

आयकर अपीलया अधकरण, अहमदाबाद।

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'D' BENCH, AHMEDABAD  
(THROUGH VIRTUAL COURT)  
BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER  
And SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

Sl. No(s)	ITA No(s)	Asset. Year(s)	Appeal(s) by	
			Appellant vs. Respondent	
			Appellant	Respondent
1.	186/Ahd/2015	1995-96	M/s. Rich Paints Ltd. C/o Smt. Bhartiben M. Shah, 60 Sundaram Nagar, Near Jakat Naka, Vasna Road, Vadodara (Guj.)-390007 <b>PAN No. AAACR8988H</b>	ITO-4(2), Baroda
2.	187/Ahd/2015	1996-97	M/s. Rich Paints Ltd. C/o Smt. Bhartiben M. Shah, 60 Sundaram Nagar, Near Jakat Naka, Vasna Road, Vadodara (Guj.)-390007 <b>PAN No. AAACR8988H</b>	ITO-4(2), Baroda
3.	188/Ahd/2015	1997-98	M/s. Rich Paints Ltd. C/o Smt. Bhartiben M. Shah, 60 Sundaram Nagar, Near Jakat Naka, Vasna Road, Vadodara (Guj.)-390007 <b>PAN No. AAACR8988H</b>	ITO-4(2), Baroda

Assessee by :	Shri Girish Agrawal & Vijay Bansal, AR
Revenue by :	Shri Dileep Kumar, Sr. DR

सुनवाई क तारख/Date of Hearing : 10.09.2020

घोषणा क तारख /Date of Pronouncement : 29.10.2020

**आदेश/O R D E R**

**PER WASEEM AHMED, ACCOUNTANT MEMBER:**

In this bunch of appeals three appeals have been filed by the Assessee for A.Ys. 1995-96 to 1997-98 which are arising from the order of the CIT(A)-III, Baroda orders dated 28.10.2014, in the assessment proceedings under Section

143(3) r.w.s. 147 r.w.s. 254 of the Income Tax Act, 1961 (in short ðthe Actð).

ITA No. 186/Ahd/2015 (A.Y. 1995-96):-

2. The assessee has raised the following grounds of appeal:

“1. The Learned CIT(A) has erred in law in confirming the action of AO in reopening the assessment proceedings u/s 147 of the Act. The entire reassessment proceedings are bad in law and without jurisdiction and therefore invalid.

2. On the facts and in the circumstances of the case and in law, the Commissioner of Income tax (Appeals)-III (“CIT(A)”) erred in upholding the order of Assessing Officer in confirming the additions u/s 68 of the Act towards share capital made by the Learned Assessing Officer.

3. As a matter of fact there is no cash which has come to the appellant so as to invoke the provisions of sec. 68 of the act, therefore the Appellant humbly prays that the said addition be deleted.

4. Ld. CIT(A) as well as ld. AO have erred in not considering various facts, submissions, explanations and clarifications as given by the appellant. Both the lower authorities have further erred in not appreciating the facts and law in their proper perspective.”

ITA No. 187/Ahd/2015 (A.Y. 1996-97):-

3. The assessee has raised the following grounds of appeal:

“1. The Learned CIT(A) has erred in law in confirming the action of AO in reopening the assessment proceedings u/s 147 of the Act. The entire reassessment proceedings are bad in law and without jurisdiction and therefore invalid.

2. On the facts and in the circumstances of the case and in law, the Commissioner of Income tax (Appeals)-III (“CIT(A)”) erred in upholding the order of Assessing Officer in confirming the additions u/s 68 of the Act towards share capital made by the Learned Assessing Officer.

3. As a matter of fact there is no cash which has come to the appellant so as to invoke the provisions of sec. 68 of the act, therefore the Appellant humbly prays that the said addition be deleted.

4. Ld. CIT(A) as well as ld. AO have erred in not considering various facts, submissions, explanations and clarifications as given by the appellant. Both the lower authorities have further erred in not appreciating the facts and law in their proper perspective.”

ITA No. 188/Ahd/2015 (A.Y. 1997-98):-

4. The assessee has raised the following grounds of appeal:

*“1. The Learned CIT(A) has erred in law in confirming the action of AO in reopening the assessment proceedings u/s 147 of the Act. The entire reassessment proceedings are bad in law and without jurisdiction and therefore invalid.*

*2. On the facts and in the circumstances of the case and in law, the Commissioner of Income tax (Appeals)-III (“CIT(A)”) erred in upholding the order of Assessing Officer in confirming the additions u/s 68 of the Act towards share capital made by the Learned Assessing Officer.*

*3. As a matter of fact there is no cash which has come to the appellant so as to invoke the provisions of sec. 68 of the act, therefore the Appellant humbly prays that the said addition be deleted.*

*4. Ld. CIT(A) as well as ld. AO have erred in not considering various facts, submissions, explanations and clarifications as given by the appellant. Both the lower authorities have further erred in not appreciating the facts and law in their proper perspective.”*

5. At the outset, the Learned AR for the assessee submitted that he has been instructed by the assessee not to press ground No. 1 challenging the validity of the assessment framed under Section 147 of the Act. Accordingly, we dismiss the same as not pressed.

6. The issues raised by the assessee in all the appeals are common and interconnected to each other. Therefore, we have combined all the appeals filed by the assessee together for the sake of brevity and convenience.

7. The interconnected issue raised by the assessee in remaining grounds of appeal is that the Learned CIT(A) erred in confirming the addition made by the AO under Section 68 of the Act on account of unexplained cash credit amounting to Rs. 50,50,000/-, Rs.11,77,000/- and Rs.1,22,34,000/-for the Assessment Years 1995-96, 1996-97 and 1997-98 respectively.

8. The facts in brief are that the assessee in the present case is a limited company and engaged in the business of manufacturing of paints. The assessee

in the years under consideration has shown the addition in the share capital as detailed under:

S.No.	Assessment year	Amount (Rs.)
1.	1995-96	50,50,000/-
2.	1996-97	11,77,000/-
3.	1997-98	1,22,34,000/-

9. The AO during the assessment proceedings was of the view that such addition in the share capital are the unexplained cash credit in pursuance to the provisions of Section 68 of the Act. Accordingly, the AO sought an explanation from the assessee.

10. The assessee in response to show cause notice submitted that it had along with the bank officer, Shri A.K. Parikh, cashier cum clerk of AJWA Branch of Dena Bank, Baroda has manipulated its accounts by generating so-called share capital as discussed above in order to facilitate the public issue. Accordingly, the assessee contended that there is no actual cash deposits in the bank. The assessee in support of his contention has made the reference to the following documents:

- i. The personal Department of the bank has conducted a detailed enquiry on the connivance and the conspiracy adopted by the cashier cum clerk as discussed above along with the assessee. As such, the personal Department found the cashier cum clerk guilty for manipulating the account of the assessee and accordingly the penalty was imposed upon him vide order dated 26 July 2001.

- ii. Similarly, the enquiry conducted by the personal Department of the bank was also affirmed by the SEBI i.e. falsification of the accounts of the assessee company.

In view of the above, the assessee contended that the impugned amount of cash deposit in the bank does not represent the unexplained cash credit within the meaning of Section 68 of the Act and therefore no addition is warranted.

11. However, the AO referred that it is the set-aside proceedings and, therefore, he is bound to follow the directions of the ITAT provided in ITA No. 2101/AHD/2001 vide order dated 21<sup>st</sup> March 2012 for the assessment year 1995-96 which reads as under:

*“...in their considered opinion, these persons are required to be examined in order to find out as to whether three ingredients are being established by the assessee with regard to the cash credit to the extent of Rs. 50,50,000/- said to have been received from these persons in the form of share application money.”*

12. The AO also found that similar direction was also issued by the ITAT with respect to the A.Ys. 1996-97 and 1997-98. In view of the above, the AO was of the opinion that the assessee was under the obligation to provide the details of the parties who have subscribed the shares of it (the assessee company). These details include present address, confirmations, PAN and other evidences of the persons in support of the deposits/share application money/share capital received by the assessee. But the assessee failed to discharge its onus. Accordingly, the AO treated the sum of Rs. 50,50,000/-, Rs.11,77,000/- and Rs.1,22,34,000/- as unexplained cash credit in the respective years under consideration and added to the total income of the assessee.

13. Aggrieved assessee preferred an appeal to the Learned CIT (A).

14. The assessee before the Learned CIT-A submitted that it was to show promoters contribution amounting to Rs. 205.06 Lacs in order to float the public issue for Rs. 323.81 lakhs. Accordingly, it in connivance with the bank officer had shown promoters contribution in the books of accounts which is based on the manipulation of the accounts. Thus, the assessee contended that such increase in the share capital cannot be termed as unexplained cash credit under Section 68 of the Act.

15. The assessee for the Assessment Year 1995-96 submitted that it has shown in this year to have received/share capital of Rs. 50.50 lakhs from seven parties between the period from 1<sup>st</sup> March 1995 to 18<sup>th</sup> March 1995 which was repaid to the same parties with the identical amount as security deposits for taking the office premises on lease at different places like Bombay, Jaipur or Calcutta etc which was nothing but sham/bogus transaction.

16. The assessee for the Assessment Year 1996-97 submitted that out of total addition of Rs.11,77,000/- made by the AO on account of the addition in share capital, a sum of Rs.3,25,000 pertains to 13 parties. As such the sum of Rs.3.25 lakhs represents the bogus/manipulated share capital which was returned to the same parties by showing corresponding security deposits. The contention of the assessee with respect to sum of Rs.3.25 lakhs, representing addition of share capital, was the same as of the Assessment Year 1995-96.

16.1 The assessee for the balance amount of Rs. 8.52 lakhs for the Assessment Year 1996-97, contended that it represents the addition of share capital subscribed by 32 parties (3 parties paid through account payee cheques and 29 parties paid in cash towards the share capital). The assessee with respect to such

addition of Rs.8.52 lakhs claimed that there cannot be any addition with respect to the parties who are income tax assesseeø.

17. The assessee for the Assessment Year 1997-98 submitted that it has shown deposits of cash in the bank account for Rs. 122.34 lakhs in connivance with the cashier of the bank. Thus, such deposit of cash represents the sham/bogus/manipulated entries. As such the amount shown as deposit was immediately withdrawn from the bank in the name of the fictitious persons leaving a small balance of amount. In this connection there was the enquiry conducted by the bank and finally the bank cashier was penalized vide order dated 26<sup>th</sup> July 2001. This fact was also fortified by the SEBI. Accordingly, the assessee claimed that there cannot be any addition of Rs. 122.34 lacs under Section 68 of the Act.

18. However, the Learned CIT(A) rejected the contention of the assessee by observing that it is the set-aside proceedings and the scope in such proceedings was limited to the extent of the direction issued by the ITAT. As per the direction of the ITAT the assessee was to establish the identity creditworthiness and genuineness of the transactions. But the assessee failed to do so.

19. The Learned CIT (A) also observed that the contention of the assessee that the transactions for the addition of share capital represents the bogus/sham entries after manipulating the accounts has already been considered by the ITAT in the original proceedings before it. As such the ITAT in the original proceeding, after considering the contention of the assessee, directed the assessee to furnish the identity, creditworthiness of the parties and genuineness of the transactions. Accordingly, the Learned CIT(A) was of the view that such contention of the assessee cannot be entertained in the set-aside proceedings.

20. In view of the above the Learned CIT (A) confirmed the addition made by the AO with respect to all the assessment years under consideration.

21. Being aggrieved by the order of the Learned CIT(A) the assessee is in appeal before us.

22. The Learned AR before us filed a Paper Books running from pages 1 to 59 for the A.Y. 1995-96, 1 to 66 for the A.Y. 1996-97, and 1 to 90 for the A.Y. 1997-98 and reiterated the contentions as made before the authorities below.

23. On the other hand the Learned DR before us vehemently supported the order of the authorities below.

24. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the present case relates whether the share capital increased in the respective years under consideration represents the unexplained cash credit within the meaning of Section 68 of the Act. It was contended by the assessee before the authorities below that share capital increased in the year under consideration represents the book entry which was made after manipulating the accounts. Such manipulation in the account was done through the involvement of the cashier of the bank as such no actual cash comes in the books. It was also brought to our notice that such manipulation in the account was done to show the compliance of the provisions as prescribed by the SEBI in order to bring the public issue.

25. The assessee in support of his contention has drawn our attention on the report of the Personal Department of the bank placed on pages 19 to 24 of the

Paper Book for the A.Y. 1995-96. The relevant extract of the report reads as under:

*“I have carefully examined the submission made by the CSE during the Persona Hearing and find that while there was proved violation of prescribed rules/norms/procedures of the Bank on the part of the CSE no malafide is apparently involved. However, this does not dilute the gravity of the matter in as much as the fact that the acts of the CSE enabled the party M/S. Rich Paints Ltd., to commit fraud with public at large. Hence, I do not find any reason to make any changes in the Punishment proposed since the same commensurate with the gravity of the proved gross misconduct of the CSE. I, therefore, impose the following Punishment upon the CSE.”*

26. Besides the above, we also note that there was the SEBI report, supporting the contention of the assessee. The SEBI report is placed on pages 13-18 of the Paper Book for the A.Y. 1995-96 and the relevant extract is reproduced as under:

*“It was also noticed that promoters were to bring in subscription to the extent of Rs. 122.34 lakhs prior to opening of subscription to the public. The investigations further revealed that the alleged promoter’s contribution was shown to be brought in only by means of fraudulent manipulation of accounts. Although it was shown that applications were received from the friends and relatives of the promoters, in reality no such persons applied for the shares. The share application amount to the extent of Rs. 122.34 lakhs, was ostensibly received from these applicants in cash which was deposited in the company’s current account of Dena Bank, Ajwa Road Account. On the same day the company withdrew the amount (exactly what was shown to be deposited in cash) by issuing payments to some fictitious parties. The payments were made by bearer cheques which were actually encashed by its own employee M/s. Majumdar. It was gathered during the investigations that neither any person mentioned in the promoters quota existed who had applied for shares (out of the list of share applicants worth Rs. 122.34 lakhs) nor any person existed to whom alleged payments by bearer cheques (worth Rs. 122.34 lakhs) were made. The account was deliberately falsified to create illusion of receipts of so called promoters contribution. The company has thus violated the SEBI Guidelines for Disclosure & Investor Protection by not bringing in subscription of 1,22,34,000 as promoters quota. The company has contravened Regulation 3,5(1)(a) and 6 (d) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to the securities market) Regulations, 1995, by falsely submission the certificate that the promoters quota has been received and through the falsification of books of accounts showing fictitious receipts of application money and showing fictitious outgoings.”*

27. The above facts were also admitted by Shri Mahendra Shah, the MD of the company before the ADI (Inv) in the statement recorded under Section 131

(1A) of the Act dated 05-12-1997 which has not been disputed by the authorities below. The copy of the statement is placed on pages 8 to 12 of the Paper Book.

28. On conjoint reading of the above stated facts, it is inferred that there was no actual transaction cash inflow carried out by the assessee for enhancing the share capital in the years under consideration. In other words, such enhancement in the share capital represents merely a book entry which was based on the manipulation of the accounts with collaboration of bank staff. This fact has not been addressed by the authorities below despite such contention was pleaded by the assessee before them. Thus, in the absence of any doubt on the contention of the assessee which is also supported from the report of the bank and the SEBI, it is concluded that the impugned cash credit in dispute is nothing but represents the bogus/fictitious entries after manipulation in the accounts.

29. Now the question arises whether such book entry can attract the provisions of Section 68 of the Act in the given facts and circumstances. The provision of Section 68 of the Act lays-down that where sum is credited in the books of accounts and the assessee fails to offer a satisfactory explanation regarding the said entries, the sum so credited may be charged to income tax as the income of the assessee. Therefore, for applying Section 68 of the Act for treating the sum credited in the books of accounts to be income of the assessee chargeable to tax, two conditions are necessary to be satisfied;

- (i) There has to be an entry credited in the books of accounts of the assessee, and

- (ii) Secondly, either there is no explanation regarding the said entries by the assessee or the explanation, if any, is not found to be satisfactory by the Assessing Officer.

30. In the case at hand, there was no iota of doubt expressed by the authorities below on the explanation furnished by the assessee regarding the entries showing the alleged unexplained cash credit. Accordingly, we hold that there was no actual transaction of cash credit in the books of accounts which were based on fake entries having no substance. As such the assessee has used fraudulent device to show the share capital in the books of accounts in order to comply the SEBI Guidelines for bringing the public issue.

31. We also note that there is a legal fiction created under Section 68 of the Act and on the basis of such legal fiction an entry in the books of accounts is deemed to be income of the assessee chargeable to tax in the event the assessee fails to discharge the onus imposed upon it under Section 68 of the Act. However, to our understanding such legal fiction can be applied in the case of actual transactions incorporated in the books and not be applied on the transactions which are merely book entries and representing the fake transactions, having no substance.

32. Moving forward, admittedly it is the set-aside proceedings before us. The ITAT on the earlier occasion has set aside the matter to the file of the AO with the direction to verify the identity, credit worthiness and genuineness of the transactions and to adjudicate the issue afresh. Undisputedly, the scope for deciding the issue in the set-aside proceedings is very limited. As such, it is limited to the extent of the direction provided by the higher authority. At this

juncture, we are inclined to refer the direction issued by the ITAT which is reproduced as under:

*“...In our considered opinion, these persons are required to be examined in order to find out as to whether three ingredients of cash credits i.e. identity, credit worthiness and genuineness of the transaction are being established by the assessee with regard to the cash credit to the extent of Rs. 1,20,42,000/- said to have been received from these persons in the form of share application money. The assessee should provide complete details and present address of these persons along with their confirmations and PAN and other evidences in support of this claim that amount received from these persons was available as cash on 3.4.1996 and 4.4.1996 and only this cash received from these persons was deposited in the bank account. We, therefore, set aside the order of ld. CIT(A) on this issue for A.Y. 1996-97 and restore this matter back to the file of the AO for fresh decision. The AO should pass a speaking order as per the law in the light of the above discussion after providing adequate opportunity of being heard to the assessee.*

*We want to make it clear that burden is on the assessee to furnish necessary evidences to support its claim that the cash deposited in the bank on 3.4.1996 and 4.4.1996 was in fact received from these persons. In the result, the quantum appeal of the assessee for A.Y.1997-98 is partly allowed for statistical purpose.”*

33. From the above direction what is transpired is that the assessee was under the obligation to furnish the details such as identity & creditworthiness of the parties and to establish the genuineness of the transactions. However, we find that the question of identity, creditworthiness of the parties and genuineness of transaction arises where there is a real transaction, then the assessee is under the obligation to discharge the onus imposed under Section 68 of the Act. Once it has been established beyond doubt that impugned cash credit entries represents the bogus/ fake entries after manipulating the accounts, then in such a situation, in our considered opinion the question of discharging the onus as imposed under Section 68 of the Act does not arise. It is because and for the simple reason that it is beyond the capacity of the assessee to comply the direction of the ITAT as discussed above. Accordingly, a question arises, should the assessee be penalized due to the non-compliance of the conditions imposed under Section 68 of the Act in the given facts and circumstances.

34. It is well-settled that an obligation gets discharged due to impossibility of performance. The law of impossibility of performance does not necessarily require absolute impossibility, but also encompass the concept of severe impracticability. In our humble opinion, the doctrine of impossibility of performance applies in this case. Due to uncontrollable circumstances, the performance of the obligation as specified under Section 68 of the Act became impossible to perform for the assessee. The impossibility of performance releases the assessee from its obligation for the non-compliance of the conditions imposed under Section 68 of the Act. A default occurs only when an obligation is not performed. When the assessee is released from the obligation, it cannot be said that it is in default. Thus, when the transaction in dispute was not based on substance, the question of discharging the onus imposed under Section 68 of the Act does not arise and thus it cannot be held a defaulter. We also find support from the legal maxim *ōlex non cogit ad impossibilia*” meaning thereby that the law does not compel a man to do what he cannot possibly perform.

35. In holding so we find support & guidance from the judgment of Honøble Supreme Court in the case of Krishna Swamy S. PD. & ANR Vs. Union of India &ors reported in 281 ITR 305 wherein it was held that :

*“The other relevant maxim is, lex non cogitadimpossibilia—the law does not compel a man to do what he cannot possibly perform. The law itself and its administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the consideration of particular cases. [See : U.P.S.R.T.C. vs. Imtiaz Hussain 2006 (1) SCC 380, Shaikh Salim Haji Abdul Khayumsab vs. Kumar &Ors. 2006 (1) SCC 46, MohammodGazi vs. State of M.P. &Ors. 2000 (4) SCC 342 and Gursharan Singh vs. New Delhi Municipal Committee 1996 (2) SCC 459].”*

Thus, in view of above we hold that the assessee cannot be penalized if it fails to furnish the details of the parties to justify the identity, creditworthiness

and genuineness of the transaction in the given facts and circumstances. Accordingly, we set aside the finding of the Learned CIT(A) and direct the AO delete the addition made by him. Hence, the ground of appeal of the assessee is allowed.

36. In the result, all the appeals of the assessee are partly allowed.

**Order pronounced in the Court on the 29/10/2020 at Ahmedabad.**

**Sd/-  
(MAHAVIR PRASAD)  
JUDICIAL MEMBER**

**Sd/-  
(WASEEM AHMED)  
ACCOUNTANT MEMBER**

Ahmedabad; Dated 29/10/2020  
manish, PS

**TRUE COPY**

**आदेश क० प्रतिलिपि आदेशित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. व्रभागीय प्रत्यक्ष, आयकर अपीलार्थी अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad.
6. गार्डफाईल / Guard file.

आदेशानुसार / BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)  
आयकर अपीलार्थी अधिकरण, अहमदाबाद / ITAT, Ahmedabad