

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No. 3444/Bang/2018
Assessment Year : 2013-14

M/s. Indiaon Time Express Pvt. Ltd., A1, Samhita Ritz, Nagavarapalya, CV Raman Nagar, Bangalore – 560 093. PAN: AACCI6196C	Vs.	The Assistant Commissioner of Income Tax, Circle – 3 [1][1], Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Suresh Muthukrishnan, CA
Revenue by	:	Shri Kannan Narayanan, JCIT (DR)

Date of Hearing	:	18-08-2021
Date of Pronouncement	:	11-10-2021

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal is filed by assessee against order dated 30/10/2018 passed by the Ld.CIT(A)-3, Bangalore for assessment year 2013-14 on following grounds of appeal:

“1. The order of the Ld. Commissioner of Income Tax (Appeals) in so far as it is against the appellant is opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.

2. The Authorities below have not justified in making an addition of Rs.41,04,847/- on an estimate basis at 5% of the total expenditure claimed under the facts and in the circumstances of the appellant's case.

3. *The Authorities below have not justified in making an addition of Rs.4,20,10,670/-being the balance in the Securities Premium reserve under the facts and in the circumstances of the appellant's case.*

4. *The Authorities below have not justified in making an addition of Rs.48,00,799/-being the amount collected as share application money under the facts and in the circumstances of the appellant's case.*

5. *The appellant craves leave of your Honour to add, alter, amend, rectify, and delete any of the grounds urged above.*

6. *For the above and other grounds that may be urged at the time of hearing of the appeal, the appellant humbly prays that the appeal may be allowed and Justice rendered.”*

Brief facts of the case are as under:

2. Assessee is engaged in the business of free service. It filed its return of income for your consideration on 26/09/2013 declaring loss of ₹ 3,89,11,362/-. This case was selected for scrutiny and notice under section 143(2) of the Act was issued. As assessee failed to respond to the notices issued. The Ld.AO after examining the returns filed Ld.AO completed assessment under section 144 of the Act, making following additions:

- addition of Rs.41,04,487/- being 5% of the total expenditure claimed;
- addition of Rs.4,20,10,670/- shown as securities premium reserve;
- addition of ₹ 48,00,799/- being share application money pending allotment;

Aggrieved by the order of the Ld.AO, assessee proffered appeal before the Ld.CIT(A).

3. Before The Ld.CIT(A), assessee filed additional evidence. These additional evidences were sent to the Ld.AO for remand report. The remand report dated 22/11/2017 was passed after considering the additional evidences filed by assessee. Ld.AO was of the opinion that 5% of the total expenditure is reasonable to be

disallowed as most of the cash vouchers were self-made and the bills were self certified without any backing, corresponding documents. Insofar as the share application money and share premium money received by assessee, the Ld.AO was of the opinion that assessee failed to discharge the creditworthiness, of the persons who invested and the addition was to be conformed.

On receipt of the remand report by assessee, it was submitted that a sumo moto disallowance of ₹ 34, 86, 684/- was made in the computation of income. Assessee thus submitted that, any disallowance from the total expenditure is therefore uncalled for.

4. In respect of the share premium and share application money received by assessee, the Ld.AR submitted that, assessee filed the shareholders and subscription agreement, bank statement showing the receipt of the funds and the communication received from RBI approving the payments. It was submitted that assessee was holding the NRE account, in which one of the director who invested money was an NRI. Assessee thus submitted that no disallowance could be made, as the money had come through proper banking channels as per the RBI guidelines.

The Ld.CIT(A) after perusing all the details filed by assessee and the remand report, held as under:

“5.3 The reply of the appellant and report of the AO have duly been considered. There is no merit in the claim of the appellant that its claim of expenditure should be accepted as such as its accounts were audited. The onus was on the appellant to produce necessary evidence before the AO to claim the expenditure. Further, a perusal of the computation of income and financials of the appellant shows that an amount of Rs.8,21,18,595/- was debited to the P &L account and of the same an amount of Rs.34,86,684/- had already been disallowed by the appellant, although depreciation as per Income Tax. Act had been reduced separately. Since the claim of depreciation is not disputed by the AO, so effectively the dispute is regarding expenditure of

Rs.7,86,31,911/-. The AO has made a disallowance of 5% of Rs.8,20,96,945/-, which works out to Rs.41,04,847/-. On the other hand the appellant has contended that 5% of Rs. 7,86,31,911/- only should be considered. Since a part of the expenditure debited to the P&L account has already been added back by the appellant in its computation of income, so this argument of the appellant is accepted and the disallowance is restricted to Rs.39,31,596/-. Considering above the ground of appeal 2 of the appellant is partly allowed.

6.0 The grounds of appeal 3 and 4 relate to addition pertaining to Rs. 4,20,10,670/- being the security premium and Rs. 48,00,799/- being the share application money, as credited in the books of the appellant during the year under consideration. The addition was made by the AO as during assessment proceedings the appellant had failed to provide the details regarding identity of the shareholders, genuineness of the transactions and creditworthiness of the persons.

6.1 During appellate proceedings the additional evidence submitted by the appellant was admitted and fresh opportunity of being heard was also given to it by the AO. However despite this the appellant has failed to prove the creditworthiness of the persons who had given share application money including share premium. The appellant failed to produce copies of bank statement, income tax return, balance sheet or statement of affairs of these persons. The report of the AO is reproduced as follows:

ii. Regarding the share application money and share premium, the assessee company has produced foreign inward remittance certificates and bank statements where the amounts were received. Brief profiles of the persons who made the payments are also submitted. However, from the details submitted by the assessee company, it is not possible to ascertain the creditworthiness of the persons who invested the money as NO bank statements, income tax returns, balance sheet or statement of affairs of these persons were produced. Hence, it is submitted that the addition made by the AO in this regard maybe sustained.

6.2 During appellate proceedings also the appellant has expressed its inability to produce these details, although in relation to Mr. E.V. Shunmugam the appellant produced copy of acknowledgement of Income Tax Return for AY 2013-14. A perusal of the same shows that the gross total income of the person was Rs.76,515/- only as against amount of Rs. 2 crores stated to be invested by him as share application money' and share premium. Considering above it cannot be said that the appellant has discharged its onus of proving creditworthiness of the persons who are claimed to have invested money with it. Although the appellant has relied upon various decisions, however the same are not relevant to the facts of the case

under consideration as the appellant has failed to prove creditworthiness of the persons. Considering above the grounds of appeal 3 and 4 of the appellant are dismissed.”

Aggrieved by the order passed by the Ld.CIT(A), the assessee is an appeal before us.

Ground No. 1,5,6 are general in nature and therefore not require any adjudication.

Ground No.2 is in respect of disallowance estimated at 5% of the total expenditure claimed by assessee.

5. The Ld.AR submitted that the disallowance of 5% may be restricted to expenditure claimed towards conveyance and travelling. He submitted that assessee had already disallowed Rs.34,86,684/- in the computation of income, which has been observed by the Ld.CIT(A) to cover the irregularities for which proper bills were not maintained.

On the contrary the Ld.Sr.DR submitted that, the disallowance computed by the Ld.AO is reasonable and the same may be upheld.

We have proposed submissions advanced by both sides in light of record space before us.

6. It is observed that total expenditure claimed by assessee in the P&L account was ₹ 8,21,18,595/- and assessee disallowed ₹ 34,86,684/- in the computation of income. It is a submission of assessee that travel expenses incurred amounting to Rs.17,83,153/- for which assessee's is unable to substantiate by way of proper bills. It is the submission of the Ld.AR that, by considering the disallowance of 5% to the extent of the travel expenses incurred, irregularities if any would be covered. In the

remand report we note that the Ld.AO is unable to identify the items against which the bills are not properly presented. However on the submissions advanced by Ld.AR now before us, it is justifiable to restrict the disallowance only to the extent of travel expenses. Whereas other expenses stands explained as most of the payments are statutory payments. Considering the fact that assessee sumo to disallowed a portion of it in the computation of income, further 5% of the travel expenses incurred would cover the leakage. We therefore direct the Ld.AO to restrict the disallowance only to the extent of 5% of the travel expenses.

Accordingly this ground raised by assessee stands partly allowed.

7. Ground No.3-4 pertains to the share application money and said share premium money invested with the assessee during the year under consideration.

7.1. The Ld.AR argued that source of the source of funds is proved by the documents on record and the mere fact that the creditor is a non resident itself cannot be held against the taxpayer. It was submitted that amended provisions of section 68 of the Act, in respect of examining the source of the source for subscription of share capital and share premium, are not applicable to non-residents. The Ld.AR thus prayed that addition made under section 68 of the Act was thus unwarranted and legally untenable, considering that the genuineness of the transaction, credit worthiness and identity of the creditor is established. Ld.AR relied on decisions of *Hon'ble Karnataka High*

Court in case of CIT vs. Arunananda Textile Pvt Ltd reported in (2011) 15 taxman.com 226 and decision of Hon'ble Bombay High Court in case Pr.CIT vs. Ami Industries (India) Ltd reported in (2020) 116 taxman.com 34

7.2. On the contrary, the Ld.Sr.DR submitted that assessee did not attempt to provide details, necessary documents, evidences to establish the creditworthiness of the subscriber of shares along with nature of the transaction. Especially, considering that the foreign entities involved are group companies with specific observations regarding the suspect nature of funds originating in a tax haven being used for making said investments. He thus submitted that failed to discharge his burden of proving the credit worthiness of the subscriber company. He placed reliance on decision of *Hon'ble Supreme Court* in case of *CIT vs. NRA Iron & Steel Pvt.Ltd* reported in *(2019) 103 taxman.com 48*.

7.3 We have heard the submissions advanced by both sides in light of records placed before us. We have also consider the decisions relied by both sides.

7.4 We refer to the share subscription and shareholders agreement dated 21/03/2013 entered into by assessee with the promoters. Clause 2.5 and 3 describes promoters obligation of funding the assessee against which shares would be allotted by assessee. Section 68 of the Act requires an assessee to explain the nature and source of credit appearing in the books. In the present facts, the nature of credit is in the form of share capital and share premium. The source of credit is money received from such creditors, and one of the creditor being a non resident. We

agree that the source of source need not be established by the assessee, however, the assessee needs to place on record details of source from where a creditor deposits monies into its books of account. The foot not relevant to section 68 refers to Circular No.5 dated 20/02/1969. This circular is in respect of monies brought into India by Non residents migrants. We reproduce the circular as under:

SECTION 68 CASH CREDITS

472. Persons migrating from West/East Pakistan, Burma, East African countries, namely, Mozambique, Zanzibar, Kenya, Tanzania and Uganda - Claims as to origin of money/assets brought into India to be freely admitted up to a limit of Rs. 50,000 subject to certain conditions

1. It has been represented to the Board that persons of Indian origin residing abroad but intending to return to India and settle here permanently, apprehend that the money brought in or remitted from abroad by such persons might be subjected to income-tax in India. The apprehension appears to be due to lack of information regarding the correct legal position about the taxability of the remittances of money from abroad. The general position, in this regard, is clarified below.

2. Money brought into India by non-residents for investment or other purposes is not liable to Indian income-tax. Therefore, there is no question of a remittance into the country being subjected to income-tax in India. The question of assessment to tax arises only when there is no evidence to show that the amount, in question, in fact represents such remittance. In other words, in the absence of proper supporting evidence, the taxpayers' story that the money has been brought into India from outside may be disbelieved by the Income-tax Officer who may then proceed to hold that the money had in fact been earned in India.

3. If the money has been brought into India through banking channels or in the form of assets like plant and machinery or stock-in-trade, for which the necessary import permits had been obtained, no questions at all are asked by the Income-tax Officers as to the origin of the money or assets brought in. It is only in case where the money is claimed to have been brought from outside otherwise than through banking channels and there is no evidence regarding the transfer of the money, that the department has to make enquiries about the source thereof. Even in these cases, having regard to the difficulties experienced by persons migrating from Pakistan, Burma and East African countries, instructions have been issued to the Income-tax Officers that such claims should be freely admitted up to the limit of Rs. 50,000 in each case provided the following conditions are satisfied :

1. The assessee migrated to India on or after the dates mentioned below from the countries shown against each and had no source of income in India :

a.	30-7-1962	Mozambique [vide Ministry of Finance Press Note, dated 22-5-1967 (Circular No. 8, dated 22-5-1967 printed as Annex I)].
b.	1-1-1963	Zanzibar, Kenya, Tanzania and Uganda [vide Ministry of Finance Press Note, dated 22-5-1967 (Circular No. 8, dated 22-5-1967 printed as Annex I)].
c.	1-1-1964	East Pakistan and Burma [vide Ministry of Finance Press Note dated 15-6-1964/22-5-1965 (Circular Nos. 16D, dated 15-6-1964 and 11, dated 22-5-1965 printed as Annex II and Annex III respectively)].
d.	1-10-1965	West Pakistan [vide Ministry of Finance Press Note, dated 3-2-1969].

2. He had sufficient resources in the foreign country.

3. He had no source of income either in India or in any foreign country, other than the country from which he migrated, prior to migration and he was not assessed as "resident" in India either for the assessment year preceding the year in which he migrated or for earlier years.

4. The amount brought in has been duly introduced in the books regularly maintained in India and an intimation of such introduction is given to the Income-tax Officer within two months of the migrant's arrival.

4. Cases not covered by preceding paragraph, namely :

a. where the money (in the case of Mozambique, Zanzibar, Kenya, Tanzania, Uganda, East Pakistan and Burma) and money and/or the personal jewellery in the case of West Pakistan claimed to have been brought exceeds Rs. 50,000; or

b. where the assessee had some sources of income either in India or in any foreign country, other than the one from which he had migrated, prior to migration; or

c. where the assessee was assessed as resident in India either for the assessment year preceding the year of his/her migration or in the earlier years, will not be entitled to any special concession. Thus, any claim by such migrants that the funds or the jewellery have been brought from the abovementioned countries, will be accepted only if the persons concerned produce adequate evidence to show that they had sufficient funds/wealth in those countries and that the transfer of the cash/jewellery to India can directly be linked with the said funds or wealth. In other words, these migrants will have to lead proper evidence like any other assessee, about the source of the cash/jewellery alleged to have been brought by them from these countries. In support of the claim that they had sufficient funds in those countries, they might produce before the income-tax authorities in India their bank accounts in those countries as also copies of the assessment orders passed in their cases by

the income-tax authorities of those countries. The migrants would also then be required to prove that the amounts brought into India can directly be linked with the funds which they had possessed in those countries.

Circular : No. 5 [F. No. 73A/2/69-IT(A-II)], dated 20-2-1969.

7.5 On perusal of all these decisions following principles emerge:

- Primary onus is upon associate to prove the genuineness, identity and creditworthiness of the transaction/investors. It is the assessee was established that these investors are financially sound and capable to make such huge investments in question.
- Then the assessing officer is duty bound to verify all the evidences filed buses see in respect of the transaction
- the assessing officer is to carry out all necessary enquiries and investigation to establish the correctness of the documents filed.

7.6. On bare reading of the above Circular, it is clear that it is applicable to such non residents who are migrating from Pakistan, Burma and East African countries. That does not imply that any investment made by a non resident goes out of the ambit of scrutiny under section 68 of the Act. The assessee has to prove identity of the share subscriber. In case of a non resident subscriber, it can be established by producing FT & TR document of the non resident share subscriber. It has been mentioned that the monies were received by assessee through RBI into the NRE account.

7.7 In the present facts of the case we note that assessee filed its own audited accounts for assessment year under consideration, the share subscription and shareholders agreement, bank statement of current account held by assessee showing the

receipt of the funds and a letter from the bank held by one of the promoter who is having the NRE account of having debited in amount of ₹ 140 lakhs in favour of assessee. As rightly observed by authorities below assessee has not discharge the primary onus of establishing the creditworthiness of all the directors. The right measure is to file the bank statements of the creditors/subscribers, copy of returns filed by them to establish that the promoters/share subscribers had sufficient funds to make such huge payments to assessee towards share capital/share premium.

7.8 In the interest of justice we deem it proper to remand this issue to the Ld.AO. Assessee is directed to file all documents/statutory forms to establish the creditworthiness of the all the promoters/share subscribers. Merely by showing that the funds have received in the hands of assessee through banking channels, would not establish the creditworthiness of such creditors. Ld.AO is directed to verify all the details filed by the assessee and consider the claim in accordance with law.

Accordingly these grounds raised by assessee stands allowed for statistical purposes.

In the result appeal filed by assessee stands partly allowed.

Order pronounced in the open court on 11th October, 2021.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 11th October, 2021.
/MS/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.