

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E' NEW DELHI**

**BEFORE MS SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SH. PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

I.T.A. No. 5803/DEL/2017 (A.Y 2012-13)

(THROUGH VIDEO CONFERENCING)

ITO Ward-17(1) Room No. 323A, C. R. Building, New Delhi (APPELLANT)	Vs	Momentum Technologies P. Ltd. B-21, Moti Nagar, New Delhi AACCM6467C (RESPONDENT)
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Appellant by	Ms. Pramita M. Biswas, CIT DR
Respondent by	Sh. Kapil Goel, Adv

Date of Hearing	30.09.2021
Date of Pronouncement	15.11.2021

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the Revenue against the order dated 31/07/2017 passed by CIT(A)-6, Delhi for assessment year 2012-13.

2. The grounds of appeal are as under:-

“1. Whether on the facts and circumstances of the case, the Ld. CIT(A) is legally justified in deleting addition of Rs. 10,39,66,491/- u/s 68 of the Income Tax Act, 1961 (the Act) on account of cash deposits in bank account even when the assessee had failed to discharge its initial onus to prove the genuineness of source of cash deposited in the bank during the course of assessment proceedings even after providing sufficient opportunities to the assessee?”

2. *Whether on the facts and circumstances of the case, the Ld. CIT(A) is legally justified in deleting addition of Rs. 10,39,66,491/- on account of cash deposits in bank account by ignoring the provisions of section 68 of the Act in this regard and by ignoring the fact that the assessee had failed to discharge its initial onus laid down u/s 68 of the Act?*

3. *Whether on the facts and circumstances of the case, the Ld. CIT(A) is legally justified in deleting addition of Rs. 10,39,66,491/- u/s 68 of the Act, 1961 on account of cash deposits in bank account made on the basis of credible information by accepting submission filed by the assessee during appellate proceedings even when the assessee had not fulfilled conditions as laid down under Rule 46-A of the Income Tax Rule, 1962(the Rule) and no opportunity was provided to the Assessing Officer of being heard ?”*

3. The assessee company was incorporated on 27/4/2000 and is in the business of trading of computers etc. Shri Sandeep Kanwar is one of the directors of the Company. The assessee has been filing the regular returns of income from A.Y. 2001-02. The assessee filed the return of income of Rs. 4,21,853/- and the turnover was declared at Rs. 3,60,56,039/- during the A.Y. 2011-12. The assessee had also filed a revised return of income of Rs. 10,14,894/- declaring the additional commission income of Rs. 5,93,039/- The assessee has also filed the return income of Rs. 5,10,548/- and the turnover was declared of Rs. 4,56,50,726/- for the A.Y. 2012-13 which was also revised with a revised return of income of Rs. 15,50,213/- declaring the additional commission income of Rs. 10,39,665. The Assessing Officer had received information and a report dated 14/03/2013 from the Investigation Wing, Delhi observed that the assessee had opened a bank account on 29/09/2010 with the ICICI Bank, 2/6, West Patel Nagar, New Delhi vide account no 03320500-3344 which was not declared by the assessee in the regular books of accounts of the assessee. The Assessing Officer further observed that there were various cash deposits in this bank account on various dates and the aggregate cash deposits during the A.Y. 2011-12 was Rs.

5,93,03,873/- and Rs. 10,39,66.491/- during the A.Y. 2012-13. Shri Sandeep Kanwar, the Director of the company was summoned and examined by the Assessing Officer and his statement u/s 131 was recorded on 08/01/2013. In his statement, he stated that the ICICI Bank account opened in the name of the company was used for the purpose of depositing cash from the sales proceeds of the computers all over the country and the money was ultimately paid in cheque to the suppliers like M/s Atul Traders and M/s Victex International but the transactions were not accounted for or reflected in the regular books of accounts of the assessee. Since the transactions of the ICICI Bank account of cash deposits and the payments to the suppliers for the trading business of computers was not reflected in the regular books of accounts and consequent upon the enquiry and investigation by the investigation Wing, the assessee had revised its income by declaring one percent as additional commission income from the cash deposits of Rs. 5,93,039/- for the A.Y. 2011-12 and Rs. 10,39,665/- for the A.Y 2012-13. Since the transactions of aggregate cash deposits in the ICICI, bank account during the A.Y. 2011-12 was Rs. 5,93,03,873/- and Rs. 10,39,66,491/- during the A.Y. 2012-13 and the same were not declared/or accounted for in the regular books of accounts the Assessing Officer has made the addition of the entire or aggregate cash deposits of Rs. 5,93.03,873/- for the A.Y 2011-12 and Rs. 10,39,66,491/- for the Assessment Year 2012-13 vide the order of the Assessing Officer.

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

5. The Ld. DR relied upon the assessment order.

6. The Ld. AR submitted that the similar issue has been allowed by the Tribunal in Assessment Year 2011-12 in favour of the assessee being ITA No. 5802/Del/2017 order dated 31/3/2021.

7. We have heard both the parties and perused the material available on record. The facts are identical in the present Assessment Year to that of Assessment Year 2011-12 which was decided by the Tribunal on 31/3/2021. The Tribunal held as under:-

“14. We have carefully considered the rival contentions and perused the facts available on record along with the orders of the lower authorities. The first contention raised by assessee invoking rule 27 of the income tax appellate tribunal rules 1963, the contention raised that when the return of income is pending before the learned assessing officer, whether the reopening can be made by issue of notice u/s 148 of the income tax act or not. For impugned AY , assessee has filed original return of income for assessment year 2011 – 12 on 27/9/2011 declaring income of ₹ 421,855/- the assessee could have revised its return of income noting any error and omission in the original return of income filed by the assessee. Such return of income could have been revised at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier. Thus, the assessee could have revised its return of income on or before 31st of March 2013 or before the completion of the assessment, whichever is earlier. The assessee revised its return of income on 12 February 2013 declaring wherein the income which was not disclosed in the original return of income. Thus the total income was revised at ₹ 1,014,894/-. Naturally, the assessment was not framed by the time assessee revised its return of income. Therefore, the revised return filed by the assessee is within the time allowed u/s 139 (5) of the act.

15. Neither the assessee nor the learned CIT – A has held that the revised return filed by the assessee is not bona fide and is not on account of any error or omission in the return of income filed originally. Therefore, the revised return filed by the assessee is necessarily to be accepted.

16. Provision of section 143 (2) of the act dealing with assessment provides as under :-

[Assessment.

³⁰143.

[(2) Where a return has been furnished under section 139, or in response to a notice under sub-section (1) of section 142, the Assessing Officer shall,—

(i) where he has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim:

³⁴[Provided that no notice under this clause shall be served on the assessee on or after the 1st day of June, 2003;]

(ii) notwithstanding anything contained in clause (i), if he considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced, any evidence on which the assessee may rely in support of the return:

³⁵[Provided that no notice under clause (ii) shall be served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished.]]

17. The above provisions does not make any distinction between return of income filed u/s 139(1) or U/s 139 (5) of the act. If the return filed u/s 139[5] is a valid return , then the notice u/s 143(2) of the act can be issued to the assessee within expiry of six months from the end of the Financial Year in which revised return of income is filed. In this case, Revised return is filed on 12/2/2013, so 143 (2) notice could have been issued to the assessee on or before 30/9/2013. Therefore, the assessment proceedings were pending before ld AO. However, ld AO issued notice u/s 148 of the act on 15/04/2013, i.e. when the original assessment proceedings were pending as time limit for issue of notice u/s 143 (2) did not expire. Section 142(1) and Section 148 of the Act cannot operate simultaneously. There is no discretion vested with the Assessing Officer to utilize any one of them. The two provisions govern different fields and can be exercised in different circumstances. If income escapes assessment, then the only way to initiate assessment proceedings is to issue notice under Section 148 of the Act. In

fact, the proceedings are pending u/s 143 of the act, it looks in appropriate to call for a return under Section 148 of the Act because income cannot be said to have escaped assessment when the assessment proceedings are pending. Such is also held by Honourable Madras High court in **COMMISSIONER OF INCOME-TAX V QATALYS SOFTWARE TECHNOLOGIES LTD. [2009] 308 ITR 249 (Madras) where in following the decision of the Honourable High court in COMMISSIONER OF INCOME-TAX v. K. M. PACHAYAPPAN in 304 ITR 264 (Madras) held that**

“7. Applying the principles enunciated in the judgments of the Supreme Court as well as the Delhi High Court, cited supra, the Tribunal is right in coming to a conclusion that no action could be initiated under section 147 of the Act, when there is a pendency of the return before the Assessing Officer. The reasons given by the Tribunal are based on valid materials and evidence and we do not find any error or illegality in the order of the Tribunal so as to warrant interference.”

18. Same is also the mandate of Honourable Delhi High court in [2007] 292 ITR 49 KLM ROYAL DUTCH AIRLINES v. ASSISTANT DIRECTOR OF INCOME-TAX where in it has been held that Where an assessment has not been framed at all, it is not possible to posit that income has escaped assessment.

19. In view of this we also held that when the revised return is pending before ld AO, Time limit for picking that return for scrutiny is pending u/s 143 (2) of the act, the ld AO could not have multiplied the proceedings and initiated proceedings u/s 148 of the act.

20. Even otherwise on the merits of the case the learned CIT – A has noted that there were 887 instances of cash deposits during the year and similarly 1135 instances of cash deposits in the next year for assessment year 2011 – 12 the maximum cash deposit was of Rs 4 lakhs. He also noted that the entire amount of cash deposits, which was made on various dates in the bank account, was in smaller amounts. The cash deposits were also made from different parts of the country. He also noted that there are subsequent check payments from the same and bank account in which the cash has been deposited. He further held that the income tax is a tax on real income and not on the turnover. Further, the DDIT (investigation) has also conducted certain inquiries wherein it was noted that Assessee Company is doing business in computer assessee reason and computer peripherals. The director of the company was also examined and his statement was recorded by the investigation wing on 8 January 2013. The various questions referred

to Indo statement the director has clearly referred to the name of Assessee Company stating that it is carrying on business in computer accessories and peripherals. The address of the Godown of the company was also mentioned. The company maintains eight bank accounts as per question number seven out of which one was found to be out of books. The director of the company has also given reference to the turnover of this company and mentioned the names of the suppliers. It was also stated that assessee has not dealt with the above concerns for the last one and half years. On reading of question number 11 it is apparent that the amount of cheques issued to Messer's Atul traders and Vicetex International and Shri Dev Narain Shukla's transactions were asked for by the investigation wing. Assessee submitted their mobile number as well as the addresses. The source of cash deposit was also stated by the assessee. The assessee in fact gave details with respect to four different other suppliers in response to question number 13 and mentioned the major brands dealt with by it. All the four parties mentioned in question number 13 remains unquestioned; the turnover of the assessee other than the undisclosed bank account also remained undisturbed. Furthermore, the learned CIT – A has upheld the addition u/s 68 of the act itself on the peak balance in the bank account of the assessee. In view of the above facts we do not find any infirmity in the order of the learned and CIT – A. In the result ground number 1, 2 of the appeal are dismissed. Further the learned senior departmental representative could not show us what are the additional evidences admitted by the learned CIT – A, we also did not find any additional evidence discussed by the learned CIT – A, in view of this ground number 3 of the appeal of the AO is also dismissed.

21. In view of above facts and circumstances, for the reasons stated above, appeal of the learned assessing officer is dismissed.”

In the present Assessment Year i.e. 2012-13, the Original return of income filed u/s 139(1) on 30.09.2012 declaring income of Rs. 5,10,548/-. The revised return was filed u/s 139(5) on 10.02.2013. The notice u/s 143(2)/148(1) was issued on 30.03.2013. Thus, the assessee filed its revised return of income prior to issuance of notice u/s 143(2) of the Act which is within the prescribed time limit as per Section 139(5) of the Income Tax Act, 1961. The assessee revised its return of income on 12 February 2013 declaring wherein the income

which was not disclosed in the original return of income. Thus the total income was revised at ₹ 15,50,213/- declaring the additional commission income of Rs. 10,39,665. The assessment was not framed by the time assessee revised its return of income. Therefore, the revised return filed by the assessee is within the time allowed u/s 139 (5) of the Act. Neither the assessee nor the CIT (A) has held that the revised return filed by the assessee is not bona fide and is not on account of any error or omission in the return of income filed originally. Therefore, the revised return filed by the assessee has to be accepted which was done in earlier year i.e. A.Y. 2011-12. The Ld. DR could not point out any distinguishing facts. Therefore, the appeal of the Revenue is dismissed.

8. In result, appeal of the Revenue is dismissed.

Order pronounced in the Open Court in presence of both the parties on this 15th Day of November, 2021.

sd/-

**(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated: 15/11/2021

*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

