

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI

**BEFORE SHRIR. K. PANDA, ACCOUNTANT MEMBER
AND
SHRI N. K. CHOUDHRY, JUDICIAL MEMBER**
(Through Video Conferencing)

**ITA No. 581&582/Del/2019
(Assessment Year: 2012-13 and 2013-14)**

KuberKhanpanUdyog Pvt.
Ltd,
1/8, West Patel Nagar, New
Delhi
PAN: AABCK6245P
(Appellant)

Vs. ACIT,
Central Circle-30,
New Delhi

(Respondent)

Assessee by :

Shri P. C. Yadav, Adv

Revenue by:

ShriHemant Gupta, Sr. DR

Date of Hearing

14/02/2022

Date of pronouncement

22/02/2022

ORDER

PER N.K. CHOUDHRY, J. M.:

1. These appeals have been preferred by the Assessee against the separate orders dated 19.12.2018 impugned herein passed by the Ld. Commissioner of Income Tax(Appeals)-30, New Delhi (in short "Ld. Commissioner") for the Assessment Years 2012-13 and 2013-14 u/s 250(6) of the Income Tax Act, 1961 (in short "the Act") whereby, the Ld. Commissioner affirmed the assessment orders dated 12.05.2017, relevant to the Assessment Years 2012-13 and 2013-14 passed u/s 147 read with section 143(3) and 147 of the Act respectively.

2. As facts and the issues involved in these appeals are exactly same therefore, the facts and issues involved in ITA No. 581/Del/2019 shall be taken into consideration and result of the same shall apply mutatis mutandis to ITA No. 582/Del/2019.

3. Facts of the case are that in this case the original return of income declaring loss of Rs. 78,386/- was filed on 30.09.2012 and the same was processed u/s 143(3) of the Act on dated 14.03.2013 at the returned income. Thereafter, a search and seizure operation was conducted in the case of Kuber Group of cases as on date 09.10.2014 wherein, the statement of one person Shri Mul Chand Malu was recorded on dated 15.12.2014 by which Shri Mul Chand Malu had offered to declare undisclosed income of Rs. 100 crores of the Kuber Group of companies and their directors under specific head of share capital/ share premium / capital formation out of total undisclosed income of Rs. 150.

4. During the post search investigation, summons were issued u/s 131 of the Act to various persons allegedly providing accommodation entries. However, the AO did not receive any reply as the same were either returned un-served or no compliance was made. It was observed by the AO that during the year under consideration the Assessee company had received share capital, share premium and unsecured loan from following companies:-

S.No.	Name of the companies	Address	Share capital/share premium/unsecured loan
1.	M/s Powmex Sales Pvt Ltd	125/1, Cotton Street, Burra Bazar, Kolkata	45,55,000 (share capital/share premium)
2.	M/s Powmex Sales Pvt Ltd	125/1, Cotton Street, Burra Bazar, Koikata	5,00,000 (unsecured loan)
Total			50,55,000/-

5. Consequently, the Assessee was asked to prove the creditworthiness of the companies who provided share capital, share premium, in response to which the Assessee furnished the details in the form of copies of the share application forms, confirmation, bank statement, ITR acknowledgement and annual financial statements and data of the company downloaded from MCA Website. On perusal of the said documents, the AO observed that the bank statement filed by the Assessee Company is not sufficient to prove the creditworthiness without any explanation for the deposits in that account and their sources. It was further, observed by the AO that there must be some positive evidence to show the nature and source of the resources of the shares subscribers himself. In view of the link between the entry providers and incriminating evidence, mere filing of confirmations, acknowledgement of the ITRs of entry providers, bank account statement etc. is not sufficient to discharge the onus of the Assessee company. The AO further observed since the Assessee failed to file documents and could not prove the genuineness of the transaction and creditworthiness of the investors so the Assessee were asked to produce the persons controlling the affairs of the investor company for examination. The requirement of the

production of the persons were necessary as the evidence gathered at the time of search, post search and assessment proceedings indicated that the transactions were not genuine. No real business appears to have been done by the Assessee. No tangible assets are owned. After issuing commissions and making enquiries it has been reported by the Inspector that the addresses of the companies were found for record purpose only and no business activities were found to be conducted at the premises .Consequently the AO added the amount of Rs. 50,55,000/- on account of unexplained credit u/s 68 of the Act.

6. The Assessee being aggrieved challenged the assessment order before the Id. Commissioner by filing the first appeal and also raised the issue qua reopening u/s 147/148 of the Act and also on merit. The Id. Commissioner affirmed the assessment order on legal ground qua reopening of the case u/s 147/ 148 of the Act and on merit as well as by holding as under:-

“6.1.7 In this view of the matter, I hold that the AO had sufficient material before him, and that he had duly applied his mind thereupon, and he came to an honest and reasonable belief that income of the appellant had escaped assessment. As such, this challenge of the appellant is without any basis and is rejected. Thus, I hold that notice u/s 148 was not issued on borrowed satisfaction. I also hold that there is no change of opinion and that the action of the Assessing Officer is based upon admissible, credible and actionable information.

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 7.2

7,3 *It would also not be out of place to mention here that different courts have held that the transactions should stand the test of human probability. Transactions need to be understood in there entirety and in the context in which they take place. It would not be far fetched to conclude that it is the asses see’s own money earned through unaccounted transactions which has been routed through bogus long term capital gains, in the light of the evidence*

on record, circumstances and totality of the context. In the context, the following case laws are relevant-

(a) In the case of *Commissioner of Income Tax v Durga Prasad More* (1971) 082 ITR 0540 - SC, it has been held "It is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents".

(b) In the case of *SumatiDayal v CIT* (1995) 214 ITR 801, the court observed, "Thus, in our opinion, is a superficial approach to the problem.

The matter has to be considered in the light of human probabilities. We are, therefore, unable to agree with the view of the chairman in his dissenting opinion. In our opinion, the majority opinion after considering the surrounding circumstances and applying the test of human probabilities has rightly concluded that the appellant's claim about the amount being her winnings from races is not genuine."

7.4 The facts at hand have not been controverted by the appellant before the Investigation Authorities, before the Assessing Officer or before me. As such, the Assessing Officer's action is upheld.

8. In final analysis, the appellant fails in appeal."

7. The Assessee being aggrieved against the impugned order, preferred the instant appeal by raising following grounds of appeal:-

"1. On the facts and in the circumstances of the case Ld. CIT (A) New Delhi New Delhi has erred both on facts and in law in upholding the impugned order passed by the respondent illegally, violating the principles of natural justice, without fair and objective application of mind to the facts of the case and the law applicable and without being guided by the binding decisions of courts and tribunals and hence liable to be set aside and quashed and declared non est. in law.

2. On the facts and circumstances of the case, the learned Ld. CIT (A) New Delhi has erred, both on facts and in law, in sustaining the assessment of the appellant at income of Rs. 4,976,614/- as against the income of (Rs.78,386/-) declared by the appellant.

3. *On the facts and circumstances of the case, the learned Ld. CIT (A) New Delhi has erred, both on facts and in law, in sustaining the assessment that could not have been re-opened u/s 147/148 as no valid reasons have been recorded by the Assessing Officer to establish any satisfaction on his part that any income belonging to the appellant has escaped assessment.*

4. *On the facts and in the circumstances of the case Ld. CIT (A) New Delhi has erred both on facts and in law , in sustaining the action of AO as no incriminating material whatsoever was found/unearthed as a result of search.*

5. *On the facts and circumstances of the case, the learned Ld. CIT (A) New Delhi has erred, both on facts and in law, in sustaining the action of AO in initiation of proceedings u/s 147, of the IT Act, solely on the basis Unverified/ unratified/unsubstantiated/unconfirmed statement of ShriMul Chand Malu.*

6. *That the Ld. CIT(A) has erred, both on facts and in law, in sustaining the addition of Rs.45,55,000/- u/s 68 on account of share capital/share premium without appreciating the facts of the case.*

7. *That the Ld. CIT(A) has erred, both on facts and in law, in sustaining the addition of Rs.5,00,000/- u/s 68 on account of unsecured loan without appreciating the facts of the case.*

8. *On the facts and circumstances of the case, the learned Ld. CIT (A) New Delhi has erred, both on facts and in law, in sustaining the additions of Rs.50,55,000/- despite the fact that the assessee has discharged the onus cast upon it under section 68 of the Income-tax Act.*

9. *On the facts and circumstances of the case, Ld. CIT (A) New Delhi has erred, both on facts and in law, in sustaining the said addition arbitrarily rejecting the explanation and evidences brought on record by the appellant.*

10. *On the facts and in the circumstances of the case Ld. CIT (A) New Delhi has erred both on facts and in, law, in sustaining the action of AO violating the principle of natural justice by not providing opportunity for cross-examination of persons, whose statements have been relied upon by the AO, in spite of specific request made by the appellant in assessment proceedings as well as before CIT(A).*

11. *On the facts and circumstances of the case, the learned Ld. CIT (A) New Delhi has erred, both on facts and in law, in sustaining the action of AO.*

As the proceedings initiated u/s 147/148 are invalid, the proceedings should have been initiated u/s 153C.

12. *That the provisions of sections 234A, 234B and 234C of the Act are not at all applicable.*

13. *That the impugned appeal order is arbitrary, illegal, bad in law and in violation of rudimentary principles of contemporary jurisprudence.”*

8. Heard the parties and perused the material available on record. The Assessee emphasized that the Hon'ble Tribunal in ITA No. 580/Del/2019 decided on 22.10.2019 in the Assessee's own case for Assessment Year 2011-12, dealt with exactly the similar facts and circumstances, wherein the case of the Assessee for Assessment Year 2011-12 was reopened u/s 148 of the Act on the basis of the same statement of Mr. Mul Chand Malu as used in this case,. The Hon'ble Tribunal in the said case deleted the addition by holding as under:-

“11. Now we come to the other issues of the reopening of the assessment challenged by the assessee. The reopening has been challenged by the assessee stating that initiation of proceedings u/s 147 of the income tax act is solely on the basis of the unverified, un rectified, unsubstantiated and unconfirmed statement of MrMalu. It is further the claim of the assessee that the learned assessing officer has violated the principles of natural justice by not providing the opportunity for cross-examination of the persons whose statements have been relied upon by him in spite of specific request made by the appellant in the assessment proceedings as well as before the learned CIT – A. Admittedly in this case notice u/s 148 of the income tax act was issued on 31/3/20 17. The reasons recorded in the first paragraph clearly refer to the search and seizure operation carried out on the Kuber group of cases on 9/10/2014. During post search investigation summons were issued u/s 131 of the income tax act to comic sales private limited, which has

provided the share capital to the assessee company. The summons returned unserved. Further enquiries were made issuing commission u/s 131 (1A) of the act and information was gathered from investigation wing that the share deposit company is not physically existing at the given address 125/1, cotton Street, Kolkata – 700007 whereas the correct address of this company was 16 A, Shakespeare Sarani, New B K Market, 5th Floor, Kolkatta 71. Thus, the learned assessing officer made the inquiries at the incorrect address. Furthermore, the learned assessing officer has heavily relied upon the statement of Mr. VikasAgarwal residing at BC – 75, Akanskha apartment, 4th floor Calcutta 101 that was recorded on 9/1/2014. He is an alleged entry operator. He admitted this in answer to question number 6 of his statement. He named in answer to question number 7 - 12 companies, however, the name of the company who deposited share capital with the assessee was not appearing in the statement. Further, in none of the other statements recorded by the investigation wing Kolkata, the name of the company who deposited money with the assessee was appearing. During the course of appellate proceedings before the learned CIT – A, assessee submitted a remand report dated 25/10/2018, which is at page number 22 of 38 of the appellate order. In para number 5 the learned AO stated that the assessment order are based on the statement of ShriMoolchandMalu, post search investigation and investigation during assessment proceedings. The assessee specifically asked the AO to provide cross-examination or the information to show that the amount of share capital taken by the assessee from the above stated company is an accommodation entry. None of the statements of the investigation wing, though referred to many of the companies, however the name of this company from womb the assessee has taken share capital is appearing. In para number 8 of the remand report, the learned assessing officer has categorically stated that during the assessment proceedings commission u/s 131 (1) (D) of the income tax act, 1961 was issued to the Calcutta investigation wing. A list of 27 companies was sent for necessary enquiry. As per report of Calcutta wing, 9 companies are such companies, which are used for routing, and providing accommodation entry to the beneficiaries as per the statement of the directors/to persons of respective companies admitted during both during the previous enquiry survey/searches.

For balance 18 companies, as per inspector report, no such companies existed at the addresses mentioned. The name of the company who deposited money with the assessee appears in the list of 18 companies where the inspector has gone to the incorrect address as held above. Further, at para number 10 of the remand report, request of the assessee for cross-examination is dealt with. The learned assessing officer and stated that in the commission report received from Calcutta office, statement of MrVikas Kumar AGarwal, DeveshUpadhyay, and Praveen Kumar was mentioned. However, in none of these entry operators' statement the name of the company, which deposited money with the assessee, is mentioned. Further assessee asked the cross-examination of these persons who have mentioned the name of the above-deposited company. Statement recorded of all these persons are prior to date of search on Kuber Group. Thus, statements are recorded by the investigation wing prior to search, naturally before the reasons were recorded. Before the learned CIT – A, on the specific request of the assessee that AO has not granted an opportunity of the cross-examination of those persons, even the learned CIT – A directed the AO to grant cross-examination of those person however AO expressed his inability to do so. With respect to the identity, creditworthiness and genuineness of the transactions the assessee submitted return of income of the share applicant, it is audited balance sheet, confirmation of the transactions and bank statement of the share applicants. Therefore, the claim of assessee is that it has discharged initial onus cast upon it under section 68 of the income tax act. The learned AO merely on the basis of the statement of the entry operators, who did not name the share deposit as 1 of the companies operated by them, the inspector report saying that share deposit and did not exist by inquiring at the incorrect address and failure to give cross-examination of those entry operators, which are the only statement against the assessee, the addition made by the learned assessing officer cannot be sustained. Honourable Supreme Court in CIVIL APPEAL NO. 4228 OF 2006 M/S ANDAMAN TIMBER INDUSTRIES VERSUS COMMISSIONER OF CENTRAL EXCISE,KOLKATA-II has held that when except the statement of the 3rd party is the only evidence available with the revenue authorities, addition cannot be made on that solitary evidence without granting the cross-examination of such 3rd party to the assessee when asked

for. In the present case the assessee asked for cross-examination before the assessing officer and as well as before the learned CIT – A, the assessee did not give the cross-examination of those accommodation entry providers. Further, the copies of the statement given by the assessing officer during the course of remand proceedings, none of the statement of the entry provider implicated the company, which deposited the share capital with the assessee. In view of the above facts, the addition made by the learned assessing officer and sustained by the learned CIT – A cannot be upheld. Therefore we direct the learned AO to delete the addition of INR 13,500,000 in ITA number 580/del/2019 and INR 21,500,000 in ITA number 322/del/2019.”

9. We observe that the Hon’ble Coordinate Bench of the Tribunal in the case of Vijayshree Food Products P. LtdVs.ACIT, {ITA No. 587/Del/2019 decided on 06.12.2021} while relying upon the aforesaid judgment passed by the co-ordinate Bench in the case of Kuber Khanpan Pvt. Ltd (supra) , deleted the similar addition by observing as under:-

***23.**We find, identical issue had come up before the Tribunal in the case of sister concerns of the assessee, namely, Kuber Khanpan Udyog Pvt. Ltd. And Kuber Food Products India Pvt. Ltd. in ITA No.580/Del/2019 and ITANo.322/Del/2019, respectively, order dated 22 nd October, 2019 for AY 2011-12.We find, the Tribunal, in the case of Kuber Khanpan Udyog Pvt. Ltd., while deciding the issue had noted the following facts at para 4 of the order:-*

“4. Brief facts of the case is that Kuber Khanpan Udyog Pvt. Ltd filed its return of income on 29.09.2011 for Rs. 320270/-. The assessment of the company was reopened u/s 148 of the Act on 31.03.2017. The Assessee filed return in response to that notice on 13.04.2017 declaring the same income. The assessment u/s 143(3) read with section 147 of the Act was passed on 12.05.2017 at Rs. 14795510/-. The addition of Rs. 1.35 crores was made in the hands of the Assessee u/s 68 of the Act. During the search and seizure u/s 132 of the Act on 09.10.2014 on Kuber Group of Cases details relating to companies with respect to share capital and unsecured loan came to the light. The statement recorded on oath on 15.12.2014 Shri Mulchand Mallu declared undisclosed income of Rs. 100 crores of the Kuber Group of Companies and its directors out of total undisclosed income of Rs. 150 crores. During the course of assessment proceedings statement of Mr. Malu was also recorded u/s 131 of the Act. The AO noted that the Assessee issued share capital of Rs. 1.35 crores from M/s. Pawmex Sales Pvt. Ltd and same was added u/s 68 of the Act. Against the order of the Id Assessing Officer Assessee preferred appeal before the Id CIT(A), who dismissed the appeal of the Assessee.”

23.1 We find, the Tribunal, after considering the arguments advanced by both the sides, deleted the addition by observing as under:-

*“11. Now we come to the other issues of the reopening of the assessment challenged by the assessee.
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.....Therefore we direct the learned AO to delete the addition of INR 13,500,000 in ITA number 580/del/2019 and INR 21,500,000 in ITA number 322/del/2019.

12. *In the result, both these appeals are partly allowed.”*

24. *Since the assessee in the instant case also belongs to the Kuber Group of companies and the facts are identical, therefore, respectfully following the decision of the Tribunal in the case of Kuber Khanpan Udyog (P) Ltd. (supra), we hold that the addition made by the AO and sustained by the CIT(A) cannot be upheld. We, therefore, set aside the order of the Id. CIT(A) and direct the AO to delete the addition. The grounds raised by the assessee are partly allowed.”*

10. There is no denial qua factual position by the revenue department. Hence, considering the peculiar facts and circumstances as the facts of the instant case are exactly similar as dealt by the Hon’ble Tribunal in the case of Kuber Khanpan Udyog Pvt Ltd (supra) and Vijayshree Food Products P. Ltd Vs. ACIT, hence, respectfully following the decisions of the Hon’ble Tribunal, we are inclined to delete the addition made by the AO affirmed by the Id. Commissioner. Consequently, the addition stands deleted.

11. In the result, both the appeals filed by the Assessee stands allowed.

Order pronounced in the open court on 22/02/2022.

-Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER

-Sd/-
(N.K. CHOUDHRY)
JUDICIAL MEMBER

Dated:22/02/2022
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi