

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI **R. K. PANDA, ACCOUNTANT MEMBER**
AND
SHRI **N. K. CHOUDHRY, JUDICIAL MEMBER**
(Through Video Conferencing)

ITA No.767/Del/2019
(Assessment Year: 2013-14)

ACIT,
Circle-15(1),
CR Building, IP Estate,
New Delhi

Vs. M/s. Rathi Graphics
Technologies Ltd,
24/1A, Mohan Cooperative
Industrial Estate,
Mathura Road, New Delhi

(Appellant)

PAN: AAACR3276L
(Respondent)

CO No. 67/Del/2021
(In ITA No.767/Del/2019)
(Assessment Year: 2013-14)

ACIT,
Circle-15(1),
CR Building, IP Estate,
New Delhi

Vs. M/s. Rathi Graphics
Technologies Ltd,
24/1A, Mohan Cooperative
Industrial Estate,
Mathura Road, New Delhi

(Appellant)

(Respondent)

Revenue by :

Shri T. Kipgen, Ld. CIT DR

Assessee by:

Shri Ved Jain, Ld. Adv

Shri Ashish Goel, Ld. CA

Date of Hearing

03/02/2022

Date of pronouncement

24/02/2022

ORDER

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

1. The revenue has preferred the instant appeal whereas, the Assessee has preferred the instant Cross Objection against the order dated 27.11.2018 impugned herein passed by the Id. Commissioner of Income tax (A)-XXVI, New Delhi (in short "Ld. Commissioner") u/s 250 of the Income Tax Act, 1961 (in short "the Act").

2. Let us to first decide the issue claimed to be legal, raised first time by the Assessee before us in cross objection, but not raised before the authorities below to the effects that as per judgment of Hon'ble Delhi High Court in the case of CIT Vs Kabul Chawla 380 ITR 573, the proceedings initiated under Section 153-A of the Act are bad in law and addition is legally unsustainable in the absence of any incriminating material being found in search relating to the assessment year under consideration.

Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. Vs Commissioner Of Income Tax {229 ITR 383 SC} clearly held that the Tribunal has jurisdiction to examine a question of law which arises from relevant facts already on record and having a bearing on the tax liability of the Assessee .

In the instant case, the Assessee has raised the issue which is un-doubtly legal in nature and for adjudication of the same no new facts or materials required as the same arises from relevant facts already on record as considered by the authorities below, hence we deem it appropriate to allow the Assessee to raise the legal issue as raised in Cross Objection.

3. Since the Assessee has raised the legal issue by way of Cross Objection against the impugned order, which is not refuted by the Ld. DR, we deem it appropriate to decide the Cross Objection first, for the just decision of the case.

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4. In this case, a search and seizure operation u/s 132 of the Act was conducted on dated 20.01.2015 and on subsequent dates in different business and residential premises of Rathi Group of cases based at Delhi and National Capital Region (NCR). The case of the Assessee Company was also covered as one of the group company and accordingly, notice u/s 153 of the Act was issued on dated 21.03.2016, in response to which the Assessee filed its return of income for the Assessment Year 2013-14 on dated 18.04.2016 declaring total income of Rs. 1,67,63,231/- which was processed by the AO and by passing the Assessment order dated 30-12-2016, assessed the income of the Assessee to the tune of Rs. 9,17,13,230/- and made the addition of Rs. 7.50 crores u/s 68 of the Act.

5. Against the said addition/assessment order the Assessee preferred first appeal before the Id. Commissioner who vide order dated 27.11.2018 though affirmed the addition and while exercising the powers under section 251/250/150, directed the AO to initiate the relevant proceedings to examine the transaction, however at last deleted the addition on technical aspect. The concluding part of the impugned order, by which the Id. Commissioner upheld and deleted the additionis reproduced herein below for brevity and ready reference:-

*“iv. In view of the facts of the case, emerging from the material emerging qua the remand report seen in light of the section 68 as also the jurisprudence referred above, **the appellant has no case against the addition made by the AO u/s 68 in respect of the funds infused via share capital.** However, it was contended that the appellant is a publicly listed company and the appellant submitted as under in this that they had obtained SEBI approvals*

for the equity issue as also about share valuations as per the approval. It has been submitted by the appellant as under per submission filed on 26/11/2018-

“In continuation of the earlier submissions and as rejoinder to the remand report submitted by the Assessing Officer, we submit as under -

-Ld. AO has made the additions u/s 68 on the basis of alleged verification and observations of the source of source of the share application money received by applicant. However AO was not empowered to verify the source of source in this case because applicant is listed company and amendment u/s 68 of IT act are not applicable to them.

-During the assessment as well as remand proceedings it has been established that the share application money received by the applicant from the investment companies M/s Alpha Stocks & Fin Services Pvt. Ltd. and M/s Shark Packaging India Pvt. Ltd. are from clearly identified sources reflected in the respective bank statement. The same has been put on record by the Ld AO in the Assessment Order dated 30.12.2016 at para 6.3-page no. 26 of the said order. This fact has been verified and understood by Ld AO but overlooked by him. However this fact never been denied by him also. AO simply remained stuck with the observations of the investigation wing.

-At point no 5.5 of the remand report dated 12.11.2018, AO has recorded his findings that source of source of the share application money was not the shareholders of the investment companies M/s Alpha Stocks & Finservices Pvt. Ltd. and M/s Shark Packaging India Pvt. Ltd., rather, the source was other entities.

.....Ld AO neither conducted any enquiry about this nor mentioned any adverse observation in the assessment order but added the above amount also in sec 68 of the Income Tax Act. ”

vii. Besides, a reference is also called for in respect of section 68. Sections 68 proviso reads as to exclude the entities which are listed as public companies from the onus of explaining the source of source.

Hence the addition as envisaged in the scheme of section 68 on the specific facts of the case is not sustainable.

viii. However, this doesn't preclude the AO to examine the source of capital of the intermediary entity that is a company falling within mischief of the section 68 proviso 1. Hence the AO is directed to initiate the relevant proceedings to examine the transaction and in case the jurisdiction rests with other officer, the same may be conveyed for examination there. This direction is issued per the power conferred under section 251/250/150.

ix. **Accordingly, the addition made by A.O. u/s 68 of the Act is directed to be deleted.**

6. Aggrieved against the deletion of addition by the Ld. Commissioner, the revenue/ department has preferred the appeal under consideration on following grounds of appeal:-

"1. *That the Ld.CIT(A) has erred in law and facts and in deleting the addition made u/s 68 of the I.T. Act by first holding that the creditworthiness / capacity of the investing entities is doubtful and also stating that the genuineness of the transactions is doubtful but at the same time deleting the addition by relying on the proviso 1 of section 68.*

2. *That the Ld.CIT(A) has erred in law and facts in wrongly interpreting the proviso 1 of section 68 and by holding that the listed public companies are excluded from the onus of explaining the source of source without appreciating the law that the such exemption is provided only for seeking share capital from the public at large.*

3. *That the Ld.CIT(A) has erred in law and facts and relying on proviso 1 of sec 68 of the I.T. Act without appreciating the explanatory notes of the above noted proviso which only provides that the onus is different in the case of companies seeking share capital from the public at large and which is not the case in the instant appeal.*

4. *That the Ld.CIT(A) has erred in law and facts in giving the contradictory order i.e. on one hand holding that the creditworthiness and the genuineness of the transactions is doubtful but at the same time allowing the appeal of the assessee by incorrectly referring to proviso 1 of sec. 68.*

5. *Whether the Ld. CIT(A) is justified in deleting the addition of Rs.7,50,00,000/- made u/s 68 of the I.T. Act, 1961 on account of share capital / share application money.”*

7. The Assessee being aggrieved against the action of Id. Commissioner in affirmation of the addition, has challenged the impugned order on following grounds in cross objection:-

“1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals)[CIT(A)] is bad both in the eye of law and on facts.

2. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the addition despite the fact that the proceedings initiated under Section 153A are bad in law in the absence of any incriminating material belonging to the assessee being found during the search.

3. On the facts and circumstances of the case, the learned CIT (A) has erred both on facts and in law in confirming the addition despite the fact that addition made by AO are legally unsustainable in the absence of any incriminating material being found in search relating to the assessment year under consideration.”

8. The Assessee has claimed that the return of income u/s 139 of the Act for the Assessment Year 2013-14 under consideration was filed on dated 09.12.2013 by the Assessee, against which no notice u/s 143(2) was issued to the Assessee, for which the time limit for issuance of notice u/s 143(2) of the Act got expired on 30.03.2014.

8.1 Later on a search and seizure operation was carried out, which resulted into issuance of Notice u/s 153A of the Act and making of the addition of Rs. 7.50 crores by the AO, on the basis of the balance sheet of the Assessee company, which was filed along with original return of Income and already available before the Revenue

authorities while processing the Original Return of Income and passing the Assessment Order U/s 153A/143(3) of the Act and therefore in the absence of any incriminating material belonging to the Assessee being found during the search, the addition made by the AO and confirmed by the Ld. Commissioner is unsustainable. In support of its contention the Id. AR also relied upon various judgments rendered by the jurisdictional High Court in various cases such as CIT Vs. Kabul Chawla 380 ITR 573 and Pr. Commissioner of Income Tax vs. ShriRathi Steel (Dakhin) (ITA No. 74/2020) dated 20.01.2022, as well.

9. On the contrary, the Ld. DR by filling Synopsis refuted the said claim of the Assessee and while relying upon the judgment passed by the Hon'ble Kerala high Court in the case of 'E.N. Gopal Kumar vs. CIT(Central) {reported 390 ITR 131 } submitted that as per this judgment assessment proceedings generated by issuance of a notice under section 153A(1)(a) can be concluded against the interest of Assessee including making additions even without any incriminating material being available against the Assessee, in search under section 132 on the basis of which notice was issued under section 153(1)(a). The Ld. DR on the aforesaid context also relied upon many judgments, which we are not referring to for the sake of brevity.

10. Heard the parties and perused the material available on record. No doubt there are various judgments of different Hon'ble High Courts on both sides to the issue under consideration and the Hon'ble Jurisdictional High Court in the case of **CIT vs. Kabul Chawla** (supra) also dealt with the same and laid down the dictum *'that if on the date of search, the assessment proceedings already stood*

completed and no incriminating material unearthed during the search, then no addition can be made to the income already assessed.' The said dictum of the Hon'ble High Court was confirmed by the Hon'ble Apex Court in the case of Pr. Joint CIT vs. MeetaGutgutia {(2017) 395 ITR 526 (Del)} by dismissing the SLP filed against the judgment of Hon'ble Jurisdictional High Court, wherein the same dictum was laid down by the Hon'ble Court as in CIT vs. Kabul Chawla (supra), hence we are inclined to follow the decisions of Jurisdictional High Court, referred above.

In the instant case, admittedly no assessment was pending as on the date of search. The addition was made by the AO, only on the basis of balance sheet, which was filed by the Assessee along-with original Return and even otherwise already available in the record with Revenue authorities and the addition under consideration is not based on any seized material found during the course of search and seizure operation as it clearly reflects from the order of the AO at page No. 2 para No. 6.1, therefore, the said addition in any sense is un-sustainable and cannot stand in the eyes of law on legal ground as well, as per judgment in Kabul Chawla (supra) and hence, we are inclined to set aside part of the impugned order to the extent of upholding the addition u/s 68 of the act, hence ordered accordingly. Resultantly the Cross Objection filed by the Assessee is allowed.

11. **ITA No.767/Del/2019**. Coming to the appeal filed by the Revenue Department, as we have held that addition in any sense is un-sustainable and cannot stand in the eyes of law on legal ground as well, hence there is no need to decide the appeal filed by the Revenue Department, which in fact becomes infructuous, consequently the same is dismissed.

12. In the Result, Cross Objection filed by the Assessee stands allowed and appeal filed by the Revenue Stands dismissed.

Order pronounced in the open court on 24/02/2022.

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

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

Dated: 24/02/2022
A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi