

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI **ANIL CHATURVEDI, ACCOUNTANT MEMBER**
AND
SHRI **N. K. CHOUDHRY, JUDICIAL MEMBER**

ITA No.766/Del/2019
(Assessment Year: 2010-11)

ACIT, Central Circle-16, Jhandewalan Ext., New Delhi (Appellant)	Vs.	M/s. Rathi Graphics Technologies Ltd, 24/1A, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi PAN: AAACR3276L (Respondent)
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CO No. 41/Del/2022
(In ITA No.766/Del/2019)
(Assessment Year: 2010-11)

M/s. Rathi Graphics Technologies Ltd, 24/1A, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi PAN: AAACR3276L (Appellant)	Vs.	ACIT, Central Circle-16, Jhandewalan Ext., New Delhi (Respondent)
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Revenue by :	Shri T. Kipgen, Ld. CIT DR
Assessee by:	ShriAshishGoel, Ld. CA

Date of Hearing	14/03/2022
Date of pronouncement	29/03/2022

O R D E R

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(6) of the Income Tax Act, 1961 (in short "the Act").
- 2.** We will first decide the appeal filed by the Revenue.
- 3.** The Assessee had filed its original return of income u/s 139(1) of the Act on 30.09.2010, which came into scrutiny and resulted into passing of assessment order u/s 143(3) of the Act on 20.03.2013.
- 4.** Subsequently a search and seizure operation u/s 132 of the Act was conducted on 20.1.2015 and on subsequent dates in different offices 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 21.3.2016, in response to which the assessee filed its return of income for the assessment year 2010-11 on 18.04.2016 by declaring total income at "Nil". The said return was processed by the Assessing Officer and resulted into making an addition of Rs. 2,04,90,000/-.
- 5.** Against the said assessment order dated 30.12.2016 passed u/s 153A/143(3) of the Act, the assessee preferred first appeal before the learned Commissioner, who vide impugned order dated 27.11.2018 though deleted the addition, however, by exercising powers u/s 251/250/150 of the Act, directed the Assessing Officer to initiate the relevant proceedings to examine the transactions. The concluding part of the impugned order is reproduced herein below for brevity and ready reference:

iv. It was, however, submitted that during the financial year 2008-09 [out of the block period] the Appellant issued 3,33,000 Equity shares to M/s Alpha Stocks And Finservices Pvt. Ltd and 3,50,000 Equity Shares issued to M/s Shark Packaging India Pvt. Ltd, Accordingly, the Appellant raised share capital of Rs. 2,04,90,000/- that included share premium of Rs. 1,36,60,000/-. However Ld. AO has added this in AY 2010-11 in spite of the fact assessee had not issued any capital during relevant FY i.e. 2009-10. It is also important to note that during AY 2010-11 assessee had neither received any share application money nor issued any share capital. On 20.01.2015, search and seizure operation under section 132 of the Income Tax Act, 1961 ('the Act') were conducted on the business and residential premises of the directors of Rathi group. Pursuant to notice under section 153A of the Act, return declaring NIL income was filed on 18.04.2016. The assessment however was made at the Rs. 2,04,90,000/-, making the addition of Rs. 2,04,90,000/- under section 68 of the Income Tax Act. The Id AO was added total amount of Rs. 2,04,90,000/- to the income of the Appellant for the reason that the investor companies were used by the Appellant as a conduit for introduction of their unaccounted money in the form of share capital and premium.

v. In view of the strict regime of section 68, the addition on account of share capital subscription does not survive for the relevant period. It was also 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 we submit as under-

Your honor during the FY 2008-09 relevant to AY 2009-10 appellant issued 3,33,000 Equity shares to M/s Alpha Stocks And

FinservicesPvtLtd and 3,50,000 Equity Shares issued to M/s Shark Packaging India Pvt Ltd, Accordingly the Appellant raised share capital of Rs. 2,04,90,000/- during AY 2009-10. However Ld. AO added that capital amounting to Rs 2,04,90,000/- in AY 2010-11. When there is no credit in the books of the assessee during the assessment year under consideration ie AY 2010-11 than how additions can be made u/s 68 of IT act. Hence Capital issued during A Y 2009-10 cannot be added in A Y 2010-11.

During the assessment proceeding assessee has filed the 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. 34 of the said order. The relevant finding of the Ld. AO has been extracted from the para 6.3 at page 34 and is put here in under:

“Moreover, even from the bank statement of the investing companies also it is found that the cheques were issued to the assessee company just after receiving funds from other concerns and daily balances in the accounts always remain at the minimum. On examination of bank accounts produced, it is noted that normally cheques are issued immediately after receipt from some other parties.”

However AO has not verified the bank statement and made the wrong additions u/s 68 of Income Tax act.

Ld AO has made the additions u/s 68 on the basis of alleged verification of genu..... .

It is also to be noted that applicant is a listed company hence amendment u/s 68 of IT act is not applicable to the applicant and AO is not empowered to verify the source of source in the case under consideration.

Your honor, it is evident that the Id. AO has framed his order/report based on certain pre conceptions and biased opinion. There is gross negligence and sloppy attitude of Id. AO towards the assessment

proceedings which has led him to conclude and frame baseless allegations against the assessee.”

vi. 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.

vii. However, this doesn't preclude the AO to examine the source of capital for the period of receipt as envisaged in section 68. 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.

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

6. Aggrieved by the deletion of addition by the learned Commissioner, the Revenue Department has preferred the instant 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.2,04,90,000/- made u/s 68 of the I.T. Act, 1961 on account of share capital / share application money.

6. The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.

6.1 Revenue Department has claimed that though the Ld. Commissioner has held that creditworthiness/capacity of the investing entities is doubtful, however, ultimately wrongly deleted the addition by relying upon the proviso 1 of Section 68. Further, the learned Commissioner wrongly held that listed public companies are excluded from the onus of explaining the source of source without appreciating the law that such exemption is provided only for seeking share capital from the public at large. The Revenue Department further claimed that the Ld. Commissioner has erred in law and facts by relying on proviso 1 of Section 68 of the Act without appreciating the explanatory notes of the above noted proviso, which only provides that the onus is different in cases of companies seeking share capital from the public at large and which is not the case in the instant appeal. Further, the learned Commissioner has erred in facts and law in passing the contradictory order on one hand holding that the creditworthiness and the genuineness of the transaction is doubtful but at the same time allowed the appeal of the assessee by incorrectly referring to proviso 1 of Section 68, therefore, on the basis of aforesaid contentions the order under challenge is liable to be set aside.

6.2 On the contrary, the assessee claimed that the Ld. Commissioner has held that the share capital was raised in F.Y. 2008-09 but not in F.Y. 2009-10 and therefore, the addition cannot be made in the year under consideration i.e. A.Y. 2010-11 and consequently the Ld. Commissioner rightly deleted the addition. The Assessee further claimed that even otherwise in this case the addition was made on the basis of balance sheet available on record with the Assessing Officer and thus not emanating from any incriminating material found during the course of search, as it clearly reflects from the assessment order and, therefore, in the absence of any incriminating material, no addition can be made by passing an assessment order u/s 153A/143(3) of the Act, in view of the decision of Delhi High Court in the case of CIT Vs. Kabul Chawla (2016) 380 ITR 573 (Del.).

6.3 Heard the parties and perused the material available on record. The addition of Rs. 2,04,90,000/- was made by the Assessing Officer on account of increase in share capital by passing an assessment order u/s 153A/143(3) of the Act. The said addition was deleted by the learned Commissioner by referring section 68 read with proviso 1 of the Act, whereby the entities which are listed as public companies, are excluded from the onus of explaining the source of source. Admittedly, in the instant case no assessment was pending as on the date of search and the addition under consideration is not emanating from any incriminating material seized during the course of search and seizure operation as it clearly reflects from the assessment order, **hence, the addition under challenge in any sense is un-sustainable and cannot stand in the eyes of law on legal aspect as well** as per judgment of the Jurisdictional High Court in the case of CIT Vs. Kabul Chawla (supra), wherein it was held that *'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. Meeta Gutgutia {(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), thus we are inclined to follow the decisions of Jurisdictional High Court, referred above. Resultantly, without going into the merits of the case, the appeal filed by the Revenue Department is dismissed.

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7. Coming to the cross-objection filed by the assessee, by way of grounds of cross-objection, the assessee claimed that the order passed by the learned CIT(Appeals) is bad in the eyes of law and on facts. Further, on the facts and in the circumstances of the case the learned CIT(Appeals) has erred both on facts and in law in confirming the addition despite the fact that the proceedings initiated u/s 153A are bad in law, in the absence of incriminating material belonging to the assessee being found during the search. Further, on the facts and circumstances of the case the learned CIT(Appeals) erred both on facts and in law in confirming the addition despite the fact that addition made by the Assessing officer are legally unsustainable in the absence of any incriminating material being found in search relating to the assessment year under consideration.

7.1 We have perused the impugned order again in order to properly adjudicate the cross-objection filed by the Assessee, however, nowhere find any finding, by which it can be said that the Ld. Commissioner has sustained the addition under challenge. In fact the learned Commissioner un-sustained and deleted the same vide paras vi and viii of its order.

Even otherwise, whatever may be, as we have already held that addition under challenge in any sense is un-sustainable and cannot stand in the eyes of law on legal aspect as well, hence, the cross-objection filed by the Assessee become infructuous. Consequently, the same is dismissed.

8. In the result, appeal filed by the Revenue Department and cross-objection by the Assessee stand dismissed.

Order pounced in open Court on 29/03/2022.

-Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER

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

Dated: 29/03/2022
A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi