

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'B' BENCH, KOLKATA**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Girish Agrawal, Accountant Member**

**I.T.A. No. 386/KOL/2019
Assessment Year: 2013-2014**

***Income Tax Officer,.....Appellant
Ward-1(4), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700069***

-Vs.-

***Garima Advisory Pvt. Ltd.....Respondent
10A, Hospital Road,
Kolkata-700072
[PAN: AACCG5856H]***

Appearances by:

*Smt. Ranu Biswas, Addl. CIT (DR), appeared on behalf of the Revenue
None, appeared on behalf of the assessee*

Date of concluding the hearing : May 19, 2022
Date of pronouncing the order : May 20, 2022

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The Revenue is in appeal before the Tribunal against the order of ld. Commissioner of Income Tax (Appeals)-5, Kolkata dated 02.11.2018 passed for the assessment year 2013-14.

2. The Revenue has taken two grounds of appeal, which read as under:-

“(1) Whether on the facts and circumstances and law point of the case, the ld. CIT(A) is justified in passing the order relying on the evidences produced before him during the appellate proceedings, without giving reasonable opportunity to the AO for cross examination and verification, by remanding back the matter to the

file of AO, which is contradictory to the Rule 46A of the I.T. Rule, 1962?

(2) The appellant craves the leave to make any addition, alteration, modification etc., of the grounds either before the appellate proceedings, or in the course of appellate proceedings”.

3. The Registry has pointed out that the appeal is time-barred by 14 days. In order to explain the delay, the Revenue has filed an application pleading therein that Shri Sebabrata Banerjee was to complete the administrative formalities for preparation of this appeal but somehow he fallen ill and was admitted in B.M. Birla Heart Research Centre. A certificate from the Hospital alongwith his medical history has been placed on record. Considering the brief delay of 14 days, vis-a-vis the explanation of the Revenue, we deem it appropriate to condone the delay. We are of the view that Revenue has demonstrated sufficient reasons for not filing the appeal in time. Therefore, we condone the delay and proceed to decide the appeal on merit.

4. In response to the notice of hearing, no one has come present on behalf of the assessee. This notice has duly been served upon the assessee. Therefore, we take the proceeding *ex-parte qua* the respondent (assessee)

5. Brief facts of the case are that the assessee has filed its return of income on 20.09.2014 declaring total income at 'NIL'. The Id. Assessing Officer has passed a very brief assessment order. He has made an addition of Rs.4.75 crores with the aid of section 68 of the Income Tax Act being unexplained cash credit.

6. Dissatisfied with the addition, the assessee carried the matter in appeal and contended that no share premium has been received by it during this year, rather it was an opening balance of earlier years. Whole

break-up of the credit entries right from F.Y. 2007-08 to F.Y. 2012-13 has been filed before the Id. CIT(Appeals).

7. The Id. 1st Appellate Authority has gone through these evidences and deleted the additions. The finding recorded by the Id. CIT(Appeals) reads as under:-

"4.1 I have considered the submission of the appellant and perused the relevant assessment records. The original assessment order u/s 144 of the Act was passed on 30.12.2015 by the AO by making the addition of Rs.4,75,00,000/- u/s 68 of the Act.

On perusal of the assessment order, the facts emerged that the AO had added the share capital received by the appellant to the tune of Rs.4,75,00,000/- during the year under consideration as unexplained cash credit under provisions of section 68 of the I T Act, 1961. The A/R of the appellant in his submission had categorically stated that no share capital was received during the assessment. year 2013-14- The A/R further submitted that his submission is supported by the balance sheet and the income tax return.

There is merit in the submission made by the appellant. The AO in the assessment order had disallowed share premium receive[^] in A.Y. 2011-12 as unexplained cash credits u/s 68 of the Act in A.Y. 2012-13. On verification from the balance sheet of the appellant for F.Y. 2007-08, it is found that share premium of Rs. 1,90,00,000/- was raised in the A.Y. 2007- 08 and Rs. 2,85,00,000/- was raised in A.Y. 2008-09. It is apparent that the share premium of Rs.4,75,00,000/- has been added back in the wrong assessment year u/s 68 of the Act. The assessment order was passed u/s 144 of the I T Act, 1961 due to non-cooperation by the appellant; However, the AO should have examined the balance sheet of the appellant v\ has been clearly shown the share premium of Rs.4,74,69,081 reflected as on 31.03.2013 and Rs.4,74,77,856/- as on 31.03.2012. F above details it is clear that the no share premium was raised in A 14. As discussed above, the share premium was raised in A.Y. 2007-08 and 2008-09. Therefore, the addition is bad in law and cannot be sustained. The order passed u/s 144 of the Income-tax Act, 1961 is best judgment assessment in which the AO shall take into account all relevant material which he has gathered and after giving the appellant sufficient opportunity being heard, make assessment of, the the total income or loss to best of judgment and determined the sum payable by the appellant. This section does not give arbitrary power to the AQ to make the assessment on his whims and fancies. The assessment order should be based on material available with the AO and shall be reasonable estimate. It appears that the AO has not considered the audited accounts available with him while making the addition. There are plethora of case laws referred to below which have held that the order u/s 144 should be decided with wisdom and not based on arbitrary caprice of the AO but on settled and invariable principles of justice.

"1. In CST vs. H.M. Esufali H.M. Abdulali (1970) 90 ITR 271 (SC) it has been observed by the Supreme Court that the assessing authority while making the "best judgment" assessment, no doubt, should arrive at its conclusion without any bias and on rational basis and that the said authority should not be vindictive or capricious and that basis adopted in estimating the turnover should have a reasonable nexus with the estimate made.

2. In State of Kerala vs. C. Velukuttv (1966) 60 ITR 239 (SC), it has been observed that limits of powers are implicit in the expression "best of his judgment". Judgment is a faculty to decide Matters with wisdom truly and legally. Judgment does not depend upon arbitrary caprice of a judge, but on settled and invariable principles of justice and though there is an element of guesswork in a "best judgment" assessment, it shall not be a wild one but shall have a reasonable nexus to the available material and the circumstances of each case.

3. The decision of Privy Council in CIT vs. Laxminaravan Badridas (1937) 5 ITR 170 (PC) rendered on the provisions in the 1922 Act is a classic one in which it was observed that the officer making best judgment, assessment should not act dishonestly, vindictively or capriciously because he must exercise "judgment" in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment and for this purpose, he must take into account local knowledge and' repute in regard to the assessee's circumstances and all other matters which he thinks will assist him in arriving at a fair and proper estimate and though there must necessary be a guesswork in the matter it must be a honest guesswork."

The addition of share premium u/s 68 has been made in the wrong year and the assessment order is, therefore, bad in law. Section 68 of the Income Tax Act under which the additions have been made, reads as follows:-

"Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the, nature and source of the same or the explanation offered by him is not satisfactory in the opinion of A.O., the sum so credited may be. charged to income tax as the income of the assessee of that previous year." From the bare reading of section 68 as reproduced hereinabove, it is crystal clear that additions u/s 68 of the act would relate only to sums found credited in the books of account of an assessee for the previous year in which it was introduced. There is no dispute that share application money was received in the A.Y. 2011-12 as evident by the balance sheet of the appellant and ITR. The balance sheet of A.Y. 2012-13 clearly indicates that share application money of Rs,39 lakhs was brought forward from the previous year. Therefore, there was no basis for making addition u/s 68 of the I.T. Act. The Guwahati High Court in the case of Nemi Chand Kothari vs CIT reported in 264 ITR 254 [2003] had observed that no assessment can be made contrary to the provision of law. Under the Income Tax Act, there is no provision of taxing cash credits in any previous year except in the year in which it was introduced in the books. This view has been affirmed by the Jurisdictional ITAT in the case of ITO vs M/s Jellotic Supply Pvt Ltd reported in 2018 (7) TMI 372 where in a similar case, it had held that "the AO has also stated that the aforesaid claim of the assessee

company was also verified from the subscriber companies that the share capital along with the share premium for the total sum of Rs.54,95,00,000/- was actually received by the assessee company during the FY 1999-2000 relevant to A.Y.2000-01. We note that the assessment has to be done, oh the right person, right year and on right income as held by the Hon'ble Supreme Court in ITO vs Ch. Atchaiah 218 ITR 239 (SC). As per the constitution of India, mandate (Article 265) "No tax shall be levied or collected without authority of law". So, tax can be levied only with authority of law and it can be collected only with authority of law or tax cannot be levied or collected in the absence of the authority of law. The authority of law flows from law made by Parliament. Equally important to keep in mind the principle of "Rule of law" which is one of the basic feature of the Constitution. The Hon'ble Supreme Court in Glassrock Estate (P) Ltd vs State of TN 2010 (10) SCC 96 has explained the principle of Rule of law which is as under:

"The expression 'Rule of Law' describes a society in which Government must act in accordance with law. A society governed by law is the foundation of personal liberty. It is also the foundation of economic development. Investment will not take place where rights are not respected. It is in that sense that the expression "Rule of Law" constitutes an over arching principle embodied in Article 21, on aspect of which is equality. It is in that context the Hon'ble Supreme Court has used the phrase Article 21 read with Article 14 of the Constitution of India," Therefore, the principle of Rule of Law mandate the Government i.e. in this case the AO to act only in accordance to law. The 'Rule of law' is an over arching principle of law, which is basic feature of the Constitution. So read together with Article 265 of the Constitution, that "no tax shall be levied or collected without authority of law", means that the AO should assess the income of the assessee only in accordance to law and, therefore, the addition u/s 68 of the Act could not have been legally added in the hands of the assessee company in this assessment year, so considering the AO's remand report all the documents filed by assessee for substantiating that share subscription relates to earlier assessment years, we find no infirmity in the order of Ld CIT(A) and confirm the impugned order of Ld CIT(A)."*

A similar view was held by the Rajasthan High Court in the case of CIT vs Lakshman Swaroop Gupta & Bros, reported in [1975] 100 ITR 22 where it was of the view that for the purpose of unexplained income which is contained in books of account, it is the appellant's previous year which shall be relevant for including such unexplained credit u/s 68 of the Act. The Hon'ble High Court has held that "we feel fortified in our conclusion when we recall that under Section 68 when any sum is found credited in the books of an assessee maintained for any previous year artd hi\$ explanation is rejected, the sum so credited may be charged to Income-tax and the express words of the section are "as the income of the assessee of that previous year". These are decisive words. Can we say that when the

statute provides a precise method for the taxing of an unexplained cash credit entry in the assessee's books of account, any option is available to the department to shift the opted previous year enabling it to rope in the unexplained entry? The answer is plainly in the negative. In this context a reference to Section 69 would further illuminate the intention of the legislature. It provides that where in the financial year immediately preceding the assessment year the assessee had made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the Income-tax Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year". The distinction in the phraseology of Sections 68 and 69 indicates that for the purposes of an unexplained income which is contained in the books of account it is the assessee's previous year which shall be the relevant period for including such an unexplained credit but where the investments are not contained in any books of account and they are unexplained or the explanation is unsatisfactory the value of the investments shall be deemed, to be the income of the assessee for the financial year preceding the assessment year. This distinction is purposeful. Section 68 accepts the entry as representing the correct financial position of the assessee with regard to the quantum of money and the date of its acquisition but when its source is unexplained or not adequately explained then for the purposes of income it should be treated as the income of the assessee's previous year. Section 69, however, deals with investments which are at large and neither recorded in any account book nor is it possible to precisely locate their date of acquisition. In such a situation law permits the department to deem that it accrued in the preceding financial year for the purposes of roping in such income to tax".

In this regard, reference may be made to Standard Procedure for applying provisions u/s 68 of the Act for the guidance of AO issued by CBDT vide Circular No. 246/151/2017-A&PAC-1 dated 10.01,2018 where the AO was directed to follow the sequence as noted below for applying the provisions of section 68 of the Act: -

"Step 1: Whether there is credit of a sum during the year in the book's of accounts maintained by the taxpayer.

Step 2: If yes, the assessee should be asked to explain the nature and source of such Credit appearing in the books of accounts of the assessee.

Step 3: If the assessee offers no explanation, the sum so credited may be charged to income-tax as the income of the assessee at that previous year.

Step 4: If the assessee furnishes an explanation, the AO should examine whether the explanation so offered establishes the three ingredients i.e. identity of the creditor, creditworthiness of the creditor and genuineness of the transactions.

Step 5: Whether explanation of the assessee is reliable or acceptable? If yes, no further action is required and the sum so credited may not be charged to income tax.

Step 6: If the explanation so offered by the assessee is not acceptable or reliable, the AO should give a detailed reasoning in the assessment order for not accepting the same. • .j

Step 7: The reasons for not accepting the explanation of the assessee should be communicated to the assessee.

Step 8: The order passed by the AO should be speaking one bringing on record all the facts, explanation furnished by the assessee in respect of nature and source of the credit in its books of accounts and reasons for not accepting the explanation of the assessee. Relevant case laws should be relied upon wherever possible.

The above questions are not exhaustive but illustrative and the questions and sequence may vary depending upon facts of each case.

The above procedure be brought to the notice of all officers working under your jurisdiction for compliance."

The Standard Procedure issued by CBDT makes it clear that section 68 . would apply only to credits in the books of account of the appellant in the relevant year. Section 68 would not operate on credits found in the books of the appellant relevant to previous assessment years which have not been explained. They would have to be taxed in the appropriate assessment years. The assessment order is therefore patently bad in law as addition on account of undisclosed cash credits have been made in the wrong assessment year.

After careful consideration of the submission of the appellant, perusal of relevant assessment records and relevant judicial decisions, the addition of Rs.4,75,00,000/- as unexplained cash credit u/s 68 of the Act is deleted. This ground of appeal succeeds and is therefore allowed.

4. *In the result, the appeal is allowed".*

8. In the ground of appeal, the Revenue has pleaded that the Id. CIT(Appeals) has entertained fresh evidence and did not provide an opportunity to the Revenue for rebutting this fresh evidence and, therefore, the Id. 1st Appellate Authority has violated the conditions enumerated in Rule 46A of the Income Tax Rules, 1962. There is no doubt that if on the request of appellant, the Id. 1st Appellate Authority admits certain fresh evidence as an additional evidence, then, an opportunity is

to be granted to the Id. Assessing Officer for rebutting that evidence. This has been provided under Rule 46A sub-clause (3) of the Rules.

9. With the assistance of the Id. D.R., we have gone through the record carefully, but she was unable to pin-point, which is the additional evidence, filed before the Id. CIT(Appeals). The Id. 1st appellate authority has re-appreciated the position of accounts available in the balance-sheet right from the earlier years. The Id. 1st appellate authority has categorically recorded a finding that these amounts were not received by the assessee during the accounting year relevant to the assessment year. Therefore, no addition can be made in this assessment year. The Id. 1st appellate authority for buttressing his finding made reference to the CBDT Circular bearing No. 246/151/2017-A&PAC-1 dated 10.01.2018. After perusal of the finding of the Id. CIT(Appeals), we do not find any error in it and there is no substance in the grounds of appeal raised by the Revenue. Accordingly, this appeal is dismissed.

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

Order pronounced in the open Court on May 20th, 2022.

**Sd/-
(Girish Agrawal)
Accountant Member**

**Sd/-
(Rajpal Yadav)
Vice-President (KZ)**

Kolkata, the 20th day of May, 2022

- Copies to :*
- (1) ***Income Tax Officer,
Ward-1(4), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square, Kolkata-700069***
 - (2) ***Garima Advisory Pvt. Ltd.
10A, Hospital Road,
Kolkata-700072***
 - (3) ***Commissioner of Income Tax (Appeals)-5, Kolkata;***
 - (4) ***Commissioner of Income Tax, Kolkata,***

- (5) *The Departmental Representative*
(6) *Guard File*

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By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.