IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI RAHUL CHAUDHARY (JUDICIAL MEMBER)

I.T.A No.5222/Mum/2016
(Assessment Year : 2011-12)

ACIT, Circle-123)(2), Mumbai Room No.147B, 1st Floor, Aayakar Bhavan, M.K. Road Mumbai-400 020	vs	M/s Manohar Capital Markets Ltd, 66, Room No.304, Vinod Villa, Caval Cross Lane No.3, Kalbadevi, Mumbai-400 002 **PAN : AAACM3868M**
APPELLANT		**RESPONDENT**

Present for Appellant	Shri Chetan M Kacha, Sr.DR
Present for Respondent	Shri Gautam Thacker, Adv.

Date of hearing	06/03/2023
Date of pronouncement	18/04/2023

ORDER

PER : OM PRAKASH KANT

This appeal by the Revenue is directed against the order dated 27th May, 2016 passed by the Ld.Commissioner of Income-tax (Appeals)-20, Mumbai [in short, the Ld.CIT(A)] for Assessment Year 2011-12, raising following grounds: -

"1. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs 2,08,00,000/- made by the Assessing Officer u/s 68 of the Income-tax Act, 1961"

2. On the facts and circumstances of the case and in raw, the Ld CIT(A) has erred in i restricting the disallowance of commission expenses of Rs 78,87,904/- made by the AO to Rs. 7,88,790/- without appreciating that the assessee was not able to substantiate that the services were actually rendered by the parties which received the commission payments."

2. Briefly stated, facts of the case are that assessee filed its return of income electronically on 29/09/2011 declaring total income at Rs.62,42,310/-. The return of income filed by the assessee was selected for scrutiny and statutory notices under the Income-tax Act, 1961 (in short, 'the Act') were issued and complied with. During the course of assessment proceedings, the Assessing Officer observed that the commission payment of Rs.78,87,904/- was made by the assesee. Due to failure on the part of the assessee to justify commission expenses, the Assessing officer disallowed the said expenses of commission claimed by the assessee relying on the decision of the Hon'ble Supreme Court in the case of **L.H. Sugar Factory & Oil Mills (P.) Ltd v. CIT [1980] 125 ITR 293 (SC).** The Assessing Officer also made addition for increase in share capital and share application money received during the year under consideration, in absence of documentary evidence in support of creditworthiness and genuineness of the transaction filed by the assessee except bank statement of few subscribers of the shares. The Assessing Officer, referred to the decision of the Hon'ble Supreme Court in the case of **Roshan Di Hatti v CIT [1977] 107 ITR 937 (SC)** and

Kale Khan Mohammed Hanif v CIT [1963) 50 ITR 1 (SC). On further appeal, the Ld.CIT(A) deleted the addition made under section 68 for share capital and restricted the disallowance for commission expenses to the extent of 10%, which works out to Rs.7,78,790/- and balance addition was deleted. Aggrieved, the Revenue is in appeal before the Tribunal raising the grounds as quoted above.

3. Before us, the Ld.Counsel filed paper book containing pages 1 to 281.

4. In support of ground No.1, the Ld.DR submitted that order of the Ld.CIT(A) is perverse on facts. He submitted that Assessing Officer has duly recorded in the assessment order that assessee only filed bank statement of few subscribers of the shares and no other documents in support of identity or creditworthiness and genuineness of the transaction was filed by the assessee whereas the Ld.CIT(A) has recorded that all those documents were filed before the Assessing Officer. Therefore, the Ld.CIT(A) has passed the order on wrong assumption of the facts. Further, he submitted that Ld.CIT(A) has noted that no enquiries were carried out by the Assessing Officer. He referred to the decision of the Hon'ble Delhi High Court in the case of **CIT vs Jansampark Advertising & Marketing P. Ltd in ITA No. 525/2014**and submitted that the Ld.CIT(A) having co-terminus power of the Assessing Officer, he should have either conducted enquiry himself or should have remanded the matter to the Assessing Officer calling for enquiry on the issue. According to him, therefore, on the issue of addition of share

capital, the matter may be restored back to the file of the Assessing Officer.

5. The Ld.Counsel of the assessee, on the other hand, relied on the order of the Ld.CIT(A) and submitted that all details were duly filed before the Ld.CIT(A), there for finding of the ld CIT(A) should be upheld.

6. We have heard rival submissions of the parties on the issue in dispute and perused the material on record. The relevant finding of the Ld.CIT(A) is reproduced as under: -

> *"4.7 I have gone through the order and submissions made in this regard. It is noted that the Assessing Officer doubted the increase in the share capital and premium on equity shares for Rs.2,08,00,000/- and treated the same as unexplained cash credit u/s 68 of the Income Tax Act, 1961. The appellant has stated in its submissions that the action of the AO to treat these share holder companies as non-existent is arbitrary and is based on surmises and conjectures and is contradictory to the facts on record. It is contended that the details of these shareholder companies clearly shows that all these companies are active and have maintained proper accounts which were duly audited. It is also submitted that all these shareholder companies are having Income Tax Pan Number. It is further observed from the assessment order that the appellant company had filed confirmation, copy of ITR, and copy of bank statements of the share applicant companies. The appellant in its written submission has quoted and relied on the legal proposition enunciated by Hon'ble Supreme Court in case of CIT vs Lovely Exports (P) Ltd [2008] 216 CTR (SC) 195 and other decisions of the Hon'ble Courts and ITAT on the issue as reproduced above.*
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> *4.8 It is noted that the AO has held that the appellant has introduced income from undisclosed sources brought under the garb of share capital and share premium of Rs.2,08,00,000/- and hence this amount of issue of the share capital was assessed as income of the appellant u/s 68 of the Act. In this case the appellant had received share capital from 7 companies who are regularly assessed to tax, the companies have submitted the copies of the Audited accounts, copy of PAN, copy of Bank account etc. It is noted that the AO has held that there is no documentary evidence or calculation to authenticate the premium price of the share of the company. The AO had concluded that*

based on the test of human probabilities it is clear that the entire transaction is a pre-structured transaction and a colorable device used by the assessee company to introduce undisclosed income under the garb of share application money and share capital. The AR has contended that the AO had missed the crucial fact that these companies are regularly doing the business and file their tax returns on regular basis. The taxes are paid by them on the income so earned by them. In the light of observations of the Hon'ble Supreme Court in the case of CIT vs Lovely Exports (P) Ltd reported in 216 CTR 295, the onus on the appellant has been duly discharged. The peculiar facts of the case may have caused suspicion in the mind of the A.O. but there is no evidence or other material to hold that the appellant had routed its own money.

4.9 On an analysis of the facts on records, it is seen that the share application money and share premium has come from the following parties:-

Sl no.	*Name of the parties*	*No. of shares*	*Per share*	*Share premium*	*Total*
1	*Agarwal Prints P Ltd*	*6800*	*10*	*115*	*8500000*
2	*Chiron finance P Ltd*	*6000*	*10*	*115*	*7500000*
3	*Premium Polyester P Ltd*	*16000*	*10*	*115*	*2000000*
4	*Pushpak Manufacturer*	*24800*	*10*	*115*	*3100000*
5	*Agarwal Prints P Ltd*	*26000*	*10*	*140*	*3900000*
6	*Metro Properties P Ltd*	*30000*	*10*	*140*	*4500000*
7	*Parental Consultant P Ltd*	*10000*	*10*	*140*	*1500000*
8	*Parental Creation P Ltd*	*28000*	*10*	*140*	*4200000*
	Total	***147600***			***Rs.20800000***

It is noted that these companies are existing companies and they have confirmed that they have contributed to the share capital of the assessee company. The next aspect is their creditworthiness. The assessee has filed copy of PAN cards, bank statements, balance sheet and P&L account of all the investors. It emerges out from the record that these companies have duly recorded these investments in their books of accounts which were duly audited during the relevant financial year. Thus, the companies have demonstrated these balance in their balance sheets in the shape of investment as well loan and advances. The next issue is about the genuineness of the transaction. The assessee has produced the details of bank account. All the share application money have been issued through banking channel. There is no cash transaction which could compel oneself to assume that the transactions were not genuine. The onus cast upon the assessee under section 68 of the Act is to satisfy the department about the true identity of an investor, its

creditworthiness and genuineness of a transaction was explained by the Supreme Court in CIT vs. Lovely Exports (P) Ltd, 216 CTR 295. Whilst, the AO acted legitimately in enquiring into the matter, the inferences drawn by him were not justified at all in the circumstances of the case. Whether the assessee company charged a higher premium or not, should not have been the subject matter of the enquiry in the first instance. Instead, the issue was whether the amount invested by the share applicants were from legitimate sources. The objective of Section 68 is to avoid inclusion of amount which are suspect. Therefore, the emphasis is on genuineness of all the three aspects, identity, creditworthiness and the transaction. What is peculiar in the present case is when the assessment was being completed the AO has not made any investigation which would have established that the identity of the investors, the genuineness of the transaction and the creditworthiness of the share applicants were not apparent. Even otherwise, the details of share applicants' particulars were available with the AO in the form of balance sheets income tax returns, PAN details etc . While arriving at the conclusion that he did, the AO did not consider it worthwhile to make any further enquiry but based his order on the high nature of the premium and certain features which appeared to be suspect, to determine that the amount had been routed from the assessee's account to the share applicants' account. There is no finding to the effect as to how the alleged unaccounted cash / money of the assessee company was routed through various levels and it finally reached to the assessee. There is no evidence or material on record to show that the said amount representing share capital and premium money moved from the assessee and reached to the assessee. The assessee company has received the money through banking channels and the investing companies have shown the said amount as investment in their books of account. The money routed through banking channels and through account payee cheques / bank draft, undisputed given by the parties. Even, the source of the application money was found in the bank account of the investing companies not by any cash deposit; but though account payee cheques. Therefore, when all these documentary evidence are considered there appears not much basis for any addition."

7. We find that regarding the documents filed by the assessee before the Assessing Officer for justifying share capital and premium etc , the Ld.CIT(A) has mentioned that *"It was further observed from the assessment order that appellant company had filed confirmation, copy of ITR, and copy of bank statements of the share applicant companies*", whereas we do not find any such observation in the assessment order and, therefore, this finding of the fact has been recorded incorrectly by

the Ld.CIT(A). Further in para 4.9, the Ld.CIT(A) has noted that " *the Assessing Officer did not consider it worthwhile to make any further enquiry based on the high nature of the premium and certain features which appear to suspect to determine that the amount had been routed from the assesse's account to the share applicants' account*". We find that though the Ld.CIT(A) has noted that such enquiry should have been conducted by the Assessing Officer in the facts of the case; however, he did not carry out any such enquiryhimself nor asked the Assessing Officer to carry out enquiry in the matter. We find that Hon'ble Delhi High Court in the case of **CIT vs Jansampark Advertising & Marketing P. Ltd (supra)** has held that if any such enquiries on the issue are not conducted by the Assessing Officer, then Ld.CIT(A) having co-terminus power should have carried out the enquiry himself or through the Assessing Officer. The relevant para of the order of the Hon'ble Delhi High Court is reproduced as under:-

> *"35. Assessment proceedings under the Income Tax Act are not a game of hide and seek. The inquiry in the wake of a notice under Section 148 is not an empty formality. It must be effective and with a sense of purpose. There is an elaborate procedure set out which requires scrupulous adherence and followed up on. In the hierarchy of the authorities, the AO is placed at the bottom rung. The two layers of appeals, before the matter engages the appellate jurisdiction of this court, are authorities vested with the jurisdiction, power and obligation to reach appropriate findings on facts. Noticeably, it is only the appeal to the High Court, under Section 260-A, which is restricted to consideration of "substantial question of law", if any arising. As would be seen from the discussion that follows, the obligation to make proper inquiry and reach finding on facts does not end with the AO. This obligation moves upwards to CIT (Appeals), and also ITAT, should it come to their notice that there has been default in such respect on the part of the AO. In such event, it is they who are duty bound to either themselves properly inquire or cause such inquiry to be completed. If this were not to be done, the power under Section 148 would be rendered prone to abuse.*

36. The authority to bring to tax unaccounted money by exercising the power given to the AO under Section 68 is of great importance. It is expected that the AO would resort to this provision with all requisite circumspection. Since the provision is generally invoked, as has been done in the case at hand, by recourse to the procedure of notice under Section 148 upon satisfaction under Section 147 that the income (purportedly represented by the unexplained sums found credited in the books of accounts), within the mischief of Section 68, it is inherent that the explanation of the assessee respecting such credit entries would be called for only with circumspection and solely upon some concrete material coming up to support the tentative impression about it being suspect.

37. Thus, when the AO sets about seeking explanation for the unaccounted credit entries in the books of accounts of the assessee in terms of Section 68, it is legitimately expected that the exercise would be taken to the logical end, in all fairness taking into account the material submitted by the assessee in support of his assertion that the person making the payment is real, and not non-existent, and that such other person was actually the source of the money forming the subject matter of the transaction as indeed that the transaction is real and genuine, same as it is represented to be. Having embarked upon such exercise, the AO is not expected to short-shrift the inquiry or ignore the material submitted by the assessee.

38. The provision of appeal, before the CIT (Appeals) and then before the ITAT, is made more as a check on the abuse of power and authority by the AO. Whilst it is true that it is the obligation of the AO to conduct proper scrutiny of the material, given the fact that the two appellate authorities above are also forums for fact-finding, in the event of AO failing to discharge his functions properly, the obligation to conduct proper inquiry on facts would naturally shift to the door of the said appellate authority. For such purposes, we only need to point out one step in the procedure in appeal as prescribed in Section 250 of the Income Tax Act wherein, besides it being obligatory for the right of hearing to be afforded not only to the assessee but also the AO, the first appellate authority is given the liberty to make, or cause to be made, "further inquiry", in terms of sub-section (4) which reads as under:-

> *—The Commissioner (Appeals) may, before disposing of any appeal, make such further inquiry as he thinks fit, or may direct the Assessing Officer to make further inquiry and report the result of the same to the Commissioner (Appeals).*

39. The further inquiry envisaged under Section 250(4) quoted above is generally by calling what is known as "remand report". The purpose of this enabling clause is essentially to ensure that the matter of assessment reaches finality with all the requisite facts found. The assessment proceedings re- opened on the basis of preliminary satisfaction that some part of the income has escaped assessment, particularly when some unexplained credit entries have come to the notice (as in Section 68), cannot conclude, save and except by reaching satisfaction on the touchstone of the three tests mentioned earlier; viz. the identity of the third party making the payment, its creditworthiness and genuineness of the transaction. Whilst it is true that the assessee cannot be called upon to adduce conclusive proof on all these three questions, it is nonetheless legitimate expectation of the process that he would bring in some proof so as to discharge the initial burden placed on him. Since Section 68 itself declares that the credited sum would have to b included in the income of the assessee in the absence of explanation, or in the event of explanation being not satisfactory, it naturally follows that the material submitted by the assessee with his explanation must itself be wholesome or not untrue. It is only when the explanation and the material offered by the assesse at this stage passes this muster that the initial onus placed on him would shift leaving it to the AO to start inquiring into the affairs of the third party.

40. The CIT (Appeals), as also the ITAT, in the case at hand, in our view, unjustifiably criticized the A(for not having confronted the assessee with the facts regarding return of some of the summon under Section 131 or not having given opportunity for the identity of all the share applicants to be properly established. The order sheet entries taken note of in the order of CIT (Appeals) seem to indicate otherwise The order of CIT (Appeals), which was confirmed by ITAT in the second appeal, does not demonstrate a to on the basis of which material it had been concluded that the genuineness of the transactions had bee: duly established. There is virtually no discussion in the said orders on such score, except for vague description of the material submitted by the assessee at the appellate stage. Whilst it does appear that the time given to the assessee for proving the identity of the third party was too short, and further that it i probably not always possible for the assessee placed in such situation to be able to enforce the physics attendance of such third party (who, in the case of share applicants vis-a-vis a company, would b individuals at large and may not be even in direct or personal contact), the curtains on such exercise 2 verification may not be drawn and adverse inferences reached only on the basis of returning undelivered o the summonses under Section 131. Conversely, with doubts as to the genuineness of some of the parties persisting on account of nondelivery of the processes, the initial burden on the assessee to adduce proof of identity cannot be treated as discharged.

41. We are inclined to agree with the CIT (Appeals), and consequently with ITAT, to the extent of their conclusion that the assessee herein had come up with some proof of identity of some of the entries in question. But, from this inference, or from the fact that the transactions were through banking channels, it does not necessarily follow that satisfaction as to the creditworthiness of the parties or the genuineness o the transactions in question would also have been established.

42. The AO here may have failed to discharge his obligation to conduct a proper inquiry to take the matter to logical conclusion. But CIT (Appeals), having noticed want of proper inquiry, could not have closed the chapter simply by allowing the appeal and deleting the additions made. It was also the obligation of the first appellate authority, as indeed of ITAT, to have ensured that effective inquiry was carried out particularly in the face of the allegations of the Revenue that the account statements reveal a uniform pattern of cash deposits of equal amounts in the respective accounts preceding the transactions in question This necessitated a detailed scrutiny of the material submitted by the assessee in response to the notice under Section 148 issued by the AO, as also the material submitted at the stage of appeals, if deemed proper by way of making or causing to be made a "further inquiry" in exercise of the power under Section 250(4). This approach not having been adopted, the impugned order of ITAT, and consequently that of CIT (Appeals), cannot be approved or upheld."

8. In view of the above, we feel it appropriate to set aside the finding of the Ld.CIT(A) on the issue in dispute and restore the matter back to the file of the Assessing Officer for deciding afresh. The assessee is at liberty to file all the necessary document in support of identity, creditworthiness and genuineness of the transaction and then the Assessing Officer may carry out enquiries as deemed fit in the facts and circumstances of the case. The ground No. 1 of the appeal of the Revenue is accordingly allowed for statistical purpose.

9. The ground No.2 of the appeal relates to disallowance of commission expenses of Rs.78,87,904/- by the Assessing Officer which has been restricted by the Ld.CIT(A) to Rs.7,88,790/-.

10. The brief facts qua the issue in dispute are that assessee claimed the impugned expenses for commission business of the yarn. Before the Assessing Officer, the assessee only filed name and address of the parties to whom commission was paid. But the other information for justifying the commission expenses, co-relation of the same with the purchases and the sales, etc. were not filed and, therefore, the Assessing Officer disallowed the commission expenses observing as under:-

> *"The assessee was required to furnish the above details wherein he has only the name and addresses to whom commission was paid even after sufficienttime was given to the assessee, the assessee has failedto provethe purpose i.e. whether the commission was paid for purchase or sales and the totalquantum of the transaction and the percentage of commission. Keeping in view the principles of natural justice, the hearing was adjourned for 24.03.2014. However, the assessee has preferred to not comply with the statutory proceedings even atthis juncture and no details / explanation as called for were furnished till the date of passing of assessment order. Thus, the assessee failed to discharge the basiconus cast upon it. The onus is on the assessee to prove each of the followingingredients before the expenditure can be allowed as deduction: (a) The item of expenditure not being of the nature described u/s. 30 to 36; (b) The item of expenditure must not be in the nature of capital or personal expenses of the assessee; (c) the expenditure must be laid out wholly and exclusively for the purposes of business or profession. If the assessee fails to satisfy any of these tests, the expenditure claimed is not allowable. The A.O is duty bound to consider reasonableness of the expenditure including the bona fide nature of any item of expenditure and /or its quantum to the extent it may throw light on the bona fide nature. The mere fact that the accounts of the assessee contain debit and that the debit has been duly authorized on behalf of the assessee will not make theexpenses deductible from the taxable profits. Where an assessee claims a deduction the onus is on him to bring all material facts on record to substantiate his claim as laid out in the case of L.H. Sugar Factory & Oil Mills (P.) Ltd v. CIT [1980] 125 ITR 293 (SC)."*

11. On further appeal, the Ld.CIT(A) though noted that part of the documentary evidence were not filed before the Assessing Officer;

however, restricted the disallowance to 10% of the commission expenses observing as under:-

> *5.4 I have gone through the assessment order and submissions made in this regard. It is noted that in the case of assessee, the commission payment on sales were towards services rendered by agents as per the trade practice in the Yarn trade. The assessee has been following this practice of businessover past several years and the commission expense was allowed as revenue expenditure in all these years. The Assessing Officer had doubted whether any services were rendered to establish that the payment of commission was genuine. It is noted that the assessee had filed 1. Ledger of Commission paid with TDS details 2. Details list of agents whom the commission was paid contains Name, Address, PAN and TDS details 3. Copy of Bills of Commission with Supporting 4 Form 16A issued to these parties. The details of payees of the commission and the basis for the amount of commission have also been filed. The payment of commission was all through cheques only and TDS was duly deducted on these payments. It is not unusual in yarn trade that the parties to whom the sales are made are located and arranged by commission agents who facilitate the trade by charging commission. It is seen that the payees of the commission are existing income tax assessees and have been paid commission through banking channels through cheques only. Many of these parties were paid similar commissions which were duly accepted by the department in earlier year's assessments, which suggests that they were regularly organizing business on behalf of the assessee and had their business transaction in the earlier years as well as in the next year. On the basis of details filed it is noted that the assessee has been conducting the business through commission agents to whom commission on sales was paid regularly as per the terms agreed upon between assessee and the agent. However the AO in the current year has wanted proof of rendering of serviceswhich the assessee could not file during assessment proceedings. It is seen that the claim of the assessee has not been verified by the A.O. by making any third party inquiry, at the same time the claim of the assessee for commission payment cannot be completely ignored due to the available evidences on record such as party ledgers and bank statements, ledger details, IDS certificates etc. which clearly point out that the services of commission agents were availed by the assessee for the purpose of business and on this basis the addition made by the A.O. cannot be sustained fully. Having regard to the full facts of the case it would be fair and reasonable if the addition made by the AO is restricted to 10% of the total claim of commission of Rs 78,87,904/- made in the books which comes to Rs. 7,88,790/-. The AO is therefore directed to restrict the addition on this issue to Rs. 7,88,790/- . Accordingly this ground appeal is partly allowed."*

12. We have heard rival submissions of the parties on the issue in dispute and perused the relevant material on record. Under the provisions of section 37(1) of the Act, the onus lies on the assessee to justify whether expenses have been incurred wholly and exclusively for the purpose of the business. In this case, assessee claimed payment of the commission expenses in relation to earning commission on sale of the yarn for other companies. Therefore, onus was on the assessee to justify the services rendered by the commission agent and co-relation with the sales or purchase of the goods. As no such details were filed by the assessee before the Assessing Officer, therefore, Ld.CIT(A) is not justified in deleting the addition and restricting the same arbitrarily to 10% of the commission expenses. In the facts and circumstances of the case, we feel it appropriate to restore this issue back to the file of the Assessing Officer with liberty to the assessee to file all the documentary evidence in support of the services rendered by the commission agent / parties and then Assessing Officer shall decide the issue in accordance with law. The ground No.2 of the appeal of the Revenue is accordingly allowed for statistical purpose.

13. In the result, appeal of the Revenue is allowed for statistical purpose.

Order pronounced in the open court on 18/04/2023.

Sd/-	Sd/-
(RAHUL CHAUDHARY)	(OM PRAKASH KANT)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 18/04/2023
Pavanan

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai