

आयकर अपीलीय अधिकरण, रायपुर न्यायपीठ, रायपुर

IN THE INCOME TAX APPELLATE TRIBUNAL RAIPUR BENCH, RAIPUR

श्री रविश सूद, न्यायिक सदस्य एवं श्री अरुण खोड़पिया, लेखा सदस्य के समक्ष ।

BEFORE SHRI RAVISH SOOD, JM & SHRI ARUN KHODPIA, AM

आयकर अपील सं./ITA No.88/RPR/2020

(निर्धारण वर्ष / Assessment Year: 2014-15)

Assistant Commissioner of Income Tax-1(1), Bhilai	Vs	M/s. Steelco Ispat Pvt. Ltd., 13-J, Light Industrial Area, Bhilai
PAN No. : AAICS6313D		

(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
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निर्धारिती की ओर से /Assessee by	:	Shri Ravi Agrawal, CA
राजस्व की ओर से /Revenue by	:	Shri V.K. Singh, CIT-DR
सुनवाई की तारीख / Date of Hearing	:	05.07.2023
घोषणा की तारीख/ Date of Pronouncement	:	31.07.2023

आदेश / ORDER

Per Arun Khodpia, AM :

The appeal under consideration is filed by the Revenue, directed against the order of the learned Commissioner of Income Tax (Appeals)-II, Raipur, dated 26.06.2020, pertaining to the assessment year 2014-15.

2. The Revenue has raised the following grounds of appeal:-

- 1. Whether on points of law and on facts & circumstances of the case, the Ld. CIT(A) was justified in deleting the addition of Rs. 70,68,382/- made by the AO after taking into consideration that exorbitant amounts paid by the assessee as commission payments as compared to last year, by merely stating that the jurisdictional ITAT has given relief to other assessee without discussing the merits of the case?*
- 2. Whether oh points of law and on facts & circumstances of the case, the Ld. CIT(A) was justified in deleting the addition of Rs.10,49,89,748/- (which comprise Unsecured Loan - Fresh*

Credit + Interest at Rs.9,37,70,618/-, share application money at Rs.45,45,000/- and sundry creditors at Rs.66,74,130/-) while the AO has brought on record sufficient information that the parties do not have creditworthiness to advance huge amounts as loans?

- 3. Whether on points of law and on facts & circumstances of the case, the Ld. CIT(A) was justified in deleting the addition of Rs.10,49,89,748/- by discussing about the assets and liabilities of the person advancing loans. However, the Bank account statement has not been verified to substantiate the immediate source of money?*
- 4. Whether on points of law and on facts & circumstances of the case, the Ld. CIT(A) was justified in deleting share application money Rs. 45,45,000/- during the year under consideration from 9 parties, while in all the cases, the parties did not have creditworthiness to extend huge amounts as share application money to the assessee company since they were filing meager ITRs which was not proportionate to the amount extended by them as share application money? Moreover many of the companies are Kolkata based and there is no link as to how the company based in Kolkata can advance huge sums as unsecured loans to a company based in Bhilai without any connection. Further in this context, the CIT(A) has not taken consideration the recent judgment of SC in the case of NRA Iron & Steel Pvt. Ltd., vide Civil Appeal No of 2019 (Arising out of SLP (Civil) No.29855 of 2018).*
- 5. Whether on points or law and on facts & circumstances of the case, the Ld. CIT(A) was justified in deleting the addition of Rs. Rs.4,11,981/- u/s.14A, in light of the Boards circular No. 5/2014 in which it was very categorically clarified that Rule 8D read with section 14A of the Act provides for disallowances of the expenditure even where taxpayer in a particular year has not earned any exempt income?*
- 6. The order of the Id. CIT(A) is erroneous both in law and on facts.*

3. Brief facts of the case are that the assessee is a private limited company having income from trading of iron and steel items. The assessee company has filed its return for A.Y.2014-15 on 11.11.2014 declaring total income of Rs.99,95,000/-. The case of the assessee company was selected for scrutiny under CASS. Notice u/s. 143(2) of the Act was issued and served upon the assessee. Subsequently statutory notice a/w. query letters u/s.142(1) of the Act were issued. In response, the Ld. AR of the assessee had attended the office of the A.O and filed written submissions. Soft copy of books of account was filed but it could not be opened. Later on books of account and other details produced were test checked and the case was discussed by the A.O. Replies of the assessee pertaining to certain queries could not found convincing by the A.O, therefore, certain additions were proposed and made in the hands of the assessee company, which resulted into total addition of Rs.11,29,00,052/- making total assessed income of the assessee company at Rs.12,28,95,050/-.

4. Aggrieved with the action of the A.O, the assessee preferred an appeal before the CIT(Appeals) wherein, substantial relief was allowed by the Ld. CIT(Appeals) and the appeal of the assessee was decided as partly allowed.

5. In order to challenge the findings of the CIT(Appeals), now the revenue has carried this matter before us to adjudicate the issues on which, revenue is aggrieved.

Ground of appeal No.1

6. Ground of appeal No.1 pertains to the deletion of addition of Rs.70,68,382/- on account of exorbitant amount of commission paid by the assessee.

7. On ground of appeal No.1, the Ld. CIT-DR drew our attention to the assessment order dated 31.12.2016 wherein the Ld. AO has observed that the assessee has claimed to have paid sales commission of Rs.96,87,259/- as against a payment under the same head for Rs.28,18,713/- in the immediate previous year. In terms of percentage the increase in the payment of commission on turnover was 0.63% (0.40% to 1.03%) as compared to previous year. It was observed by the A.O that looking into the nature of the business, payment of commission was enormously on higher side, and commission was claimed to have been paid to some ladies and HUF entities of some family groups at exorbitant rates i.e. at the rate of 5% of sales price whereas, as per industry average, it is found to be maximum 0.5% of the turnover. The assessee himself has paid commission @5% in several cases in regular course. Looking to the flow of transaction in the other cases, it was found by the A.O that such payments are evident to be true and correct. The payments of commission which were doubted by the A.O were made at the year end

against one bill at exorbitant rates. It was observed by the A.O that such commission payment is only accommodation entries to divert taxable profit to some other persons/groups or their family members so as to avoid taxation or to minimize tax incidence as profit taxable at higher rate in the assessee's case while the alleged beneficiaries are assessable to tax at lower tax (rate). Since the prescribed TDS was deducted from all such entries, the A.O had made a remark that procedures of TDS was being done just to comply and give colour of correctness to the sham transaction. It was observed by the A.O that actual payment of commission was not made in most of the cases. The A.O has discussed each and every payment of commission made to different parties and also allowed certain amount to the extent it was found to be reasonable by him and had disallowed the remaining amount to be added in the hands of the assessee company as bogus payment of commission by the assessee company. Accordingly, the A.O made an addition of Rs.17,68,382/- in the hands of the assessee company.

8. The Ld. CIT-DR further took us through the order of the CIT(Appeals) wherein at Para 2.3, Page 11, it was observed by the CIT(Appeals) that commission received by the various parties was at the same rate as was in the last year. The CIT(Appeals) accepted the contention of the assessee by carving out some examples of the parties through which commission was paid and agreed with the submissions of the assessee that it had no network in Bhopal, and it had to depend on

others. The assessee's submission that ladies and other relatives of the directors of the assessee company had obtained orders from parties and parties had raised the bills in the name of the ladies, the payment made by the assessee company could not be disallowed. The CIT(Appeals) with regard to the payment HUF had observed that similar issue was decided by the ITAT, Raipur wherein, commission payment to HUF in several cases were allowed.

9. The Ld. CIT-DR further submitted that the CIT(Appeals) had made general remark in favour of the assessee without making any categorical findings to dislodge the contention of the A.O's order. The order of the CIT(Appeals) was cryptic wherein nothing was discussed about the services provided by such recipients of commission. Moreover, no justification for higher rate of commission allowed to such parties which are also relating to the directors of the assessee company. The decision of the ITAT pertaining to the payment to HUF was mentioned but had not discussed by the CIT(Appeals) that under what circumstances such commission was allowed to HUF according to the order of the ITAT, Raipur. It is therefore prayer of the Ld. CIT-DR that all such payments are on account of tax planning by the assessee company wherein bogus claim of the assessee company were evident. However, the same were allowed by the CIT(Appeals) and therefore, the order of the CIT(Appeals) is subject to reversal and addition made by the A.O deserves to be upheld.

10. Contrary to the submission of the Ld. CIT-DR, the Ld. AR for the assessee has submitted that the business of the assessee i.e. trading of iron and steel is very volatile in terms of rates of iron and ore, rates of iron ore are fluctuating on rapid and rampant basis, therefore, fluctuation in the rates of commission is also justified in order to achieve business targets by the assessee company. It was submitted by the Ld. AR that the Ld. AO had called for all the details pertaining to payment of commission, but have arrived at a self-motivated conclusion that in certain cases commission paid was exorbitantly high and the same were considered as bogus. However, the A.O had not exercised any enquiry from the parties concerned to whom the commissions were paid before reaching at a erroneous conclusion. The assessee has tried to explain that all the transaction pertaining to the commission were legitimate and genuine transactions and required TDS was also deducted. It was also discussed and explained in detail that why the commission at a higher rate was paid to certain parties, but the Ld. AO had not found explanation of the assessee satisfactory, had carried away with his preconceived notion to make addition. It was submitted by the Ld. AR that the CIT(Appeals) had dealt with the issue at length, party wise submission by the appellant were carved out in his order and after thoughtful consideration of all such facts, the CIT(Appeals) has appreciated that the claim of the assessee was genuine and therefore, no such addition which is merely based on suspicion of the A.O are called for. The Ld. AR further advanced the

argument that the A.O has made an ad-hoc and lumpsum addition pertaining to the entries of commission in the hands of the assessee and such additions are not permissible according to settle principle of law as held by the Hon'ble High Court of Delhi in the case of Pr. Commissioner of Income Tax Vs. R.G Buildwell Eng. Ltd, ITA No.1187/2017 dated 22.12.2017 wherein the Hon'ble High Court has held that ad-hoc disallowance made by the A.O which was further reduced on ad-hoc basis by the CIT(Appeals) also are subject to set-aside. Therefore, it was submitted by the Ld. AR that lumpsum or ad-hoc addition made are not sustainable in the eyes of law wherein specific categorical findings pertaining to the transaction were not given by the revenue authorities. The Ld. AR further relied on the order of the Co-ordinate Bench of the Tribunal, Raipur in the case of Shri Kailas Chand Agrawal Vs. Dy. Commissioner of Income Tax, ITA No.275/RPR/2016 dated 01.04.2022 wherein at Para 7.3, it was found that neither of the lower tax authorities had pointed any such voucher, the genuineness of the expenditure therein claimed to have been incurred by the assessee wholly and exclusively for the purpose of its business did not inspire any confidence nor it was the case of the revenue that any part of the expenditure was either found to be bogus or fictitious.

11. In rebuttal to the contention of the Ld. AR that the additions were made on ad-hoc and lumpsum basis, the Ld. CIT-DR submitted that at Page 2 to 5 of the assessment order, the A.O has prepared a statement

pertaining to the commission entries for 23 parties, placing on record amount claimed, allowed, disallowed, remark and has duly explained the reasons for each and every disallowances or addition proposed by him. In such situation, the addition made could not be termed as addition on ad-hoc basis or lumpsum basis, therefore, case laws relied upon the assessee are distinguishable on facts, could not support the contention of the assessee.

12. The Ld. AR further placed his reliance on the judgement of the Hon'ble Apex Court in the case of *Hero Cycles (P) Ltd. v. CIT* [2015] 379 ITR 347 (SC) wherein it was observed by the Hon'ble Apex Court that "once it is established that there is nexus between the expenditure and the purpose of business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the Board of Directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case."

13. We have considered the rival submissions, perused the material available on record and judicial pronouncements in support of the contentions as relied upon by the Ld. AR. On a perusal of the orders of the lower authorities, it transpires that the A.O has exercised exhaustive deliberations on each and every working pertaining to the commission of transactions and has also offered his comments in the remark column of

the statement wherein he has discussed the reasons, for which, the alleged disallowance was proposed. The A.O also allowed reasonable expenditure of Rs.25,57,278/- out of Rs.96,25,660/-. It is apparent from the order of the A.O that the assessee was squarely failed in explaining about the services which were performed by the parties to whom assessee company had paid exorbitant or extraordinary amount of commission as compared to other parties wherein the rate of commission was considered as reasonable by the Ld. A.O. Before the CIT(Appeals), the assessee submitted various information pertaining to most of the persons/entities to whom commissions were paid. It was the allegation of the assessee that the Ld. A.O had made abrupt disallowance without any enquiry, also the Ld. A.O was unable to bring any material on record to disprove the claim of the assessee company. The assessee submitted before the Ld. CIT(Appeals) that since parties were related to Kejriwal family, this fact itself cannot be the ground to disallow the claim of the assessee company. It was the contention of the assessee before the CIT(Appeals) that parties to whom commission was paid are also chargeable to tax and therefore, there is no loss of revenue to the government. All such contentions and allegations of the assessee appellant before the CIT(Appeals), in our considered opinion are not tenable because it was the onus of the assessee to disprove the observation of the A.O by providing details pertaining to services by the related parties as well as other parties. It was not the onus on the A.O to

substantiate that no services were given by such parties. Since the rate of commission was unexpectedly high as compared to other parties to whom the assessee company itself has paid the commission. Entry for commission in certain cases was made at the end of the year and commission was granted by making single entry. TDS was deducted at the prescribed rate but the same could not make the transaction sacrosanct. We find that total amount of commission was also drastically increased in the year under reference as compared to the previous year by the assessee company. Such abnormal facts are sufficient for the A.O to reach a conclusion that transactions of commission were not normal and are requires to be substantiated by supporting documentary evidence so as to establish such transaction's genuineness. The assessee was unable to substantiate its claim by supporting evidence to prove that services provided by the partis including related parties and certain HUF or companies to whom extraordinary commission was paid.

14. We also find that the CIT(Appeals) discussed affairs with one or two parties as example in his observation and decided the issue on the basis of submissions of the assessee that the assessee was dependent on such service providers, such observation was without any supporting evidence, therefore, is totally based on submissions of the assessee. The Ld. AR submitted a chart showing complete details like name of parties, details of sales and commission pertains. It was submitted by the Ld. AR that since the details of the parties to whom commission was paid, was

very much available before the A.O and queries should have been made with such parties to arrive at a conclusion that the transactions were genuine or not. No such enquiries were ever conducted by the A.O, therefore, the claim of the assessee which was disproved by the A.O was totally based on surmises and assumption. In the backdrop of the aforesaid facts and circumstances, we are of the considered view that the A.O who was supposed to make certain enquiries from the parties to whom the commission was paid. Also, the assessee who was under obligation to discharge the onus to substantiate its claim by submitting requisite details before the A.O both the assessee as well as revenue were failed in performing their duties, also the information which was submitted before Ld. CIT(A) was never confronted with the Ld. AO to rebut on the same and therefore, we deem it fit to restore the issue back to the file of the A.O to re-adjudicate the same afresh. Needless to say, reasonable opportunity of being heard is to be granted to the assessee. The assessee is also directed to submit all the necessary details/ evidence so as to substantiate its claim of commission at a rate higher than industry average, failing which, the A.O is at liberty to make assessment based on available facts and according to law. Thus, **Ground of appeal No.1** raised by the revenue is partly allowed for statistical purposes in terms of our aforesaid observations.

Grounds of appeal No. 2, 3 & 4

15. Grounds of appeal Nos. 2, 3 & 4 pertaining to the deletion of addition u/s.68 of the Act for an amount of Rs.10,49,89,748/- which comprise of three counts viz. (i) unsecured loan plus interest : Rs.9,37,70,618/-; (ii) share application money : Rs.45,45,000/-; and (iii) sundry creditor : Rs.66,74,130/-. Since all the issues were discussed by the A.O as well as Ld. CIT(Appeals) commonly, therefore, we shall deal with the aforesaid issues in the same manner.

16. The addition made by the A.O u/s.68 of the Act relates to the unsecured loan of Rs.9,37,70,618/- which was deleted by the Ld. CIT(Appeals), therefore, the observation of the Ld. CIT(Appeals) was challenged by the revenue in ground of appeal No.2.

17. On these grounds of appeal Nos.2, 3 & 4, the Ld. CIT-DR reiterated the facts from the assessment order wherein the A.O has observed that during the year under consideration, the assessee company has received fresh unsecured loan credits of Rs.8,62,56,004/- and interest amount of Rs.75,14,614/- which was credited to 23 loan creditors. In aggregating the amount of Rs.9,37,70,618/- was treated by the A.O as unexplained cash credit in the hands of the assessee company and the same was added to the income of the assessee company. While making such addition, the A.O had requested the assessee to submit all the details to prove identity, creditworthiness of the parties and genuineness of the transaction. In reply, the assessee had filed confirmations of the accounts without giving

detailed address of the parties. Since the account confirmations were not found sufficient by the A.O to establish the identity and creditworthiness of the parties and genuineness of the transaction, the assessee was once again requested to furnish all the relevant documents and details pertaining to fresh credits obtained during the year to explain and fulfill all requisite ingredients of Section 68 of the Act. But the assessee skipped to reply and queries pertaining to this aspect in its subsequent replies. The A.O further carried out close study of the account confirmations and details relating to credits, keeping in mind evasive approach of the assessee and no compliance was made on the part of the assessee. It is further observed by the A.O that in certain cases requisite details i.e. copy of the ITR, acknowledgement, copy of the capital account, balance sheet and bank account statement were filed by the assessee company to establish the immediate source of credit.

18. After considering such details, the A.O concluded that despite repeated request, the assessee company had failed to discharge the burden cast on it about substantiating identity, creditworthiness of creditors and genuineness of the transaction that were discussed and remarked against each and every creditors by the A.O holding that the assessee had brought its own undisclosed income in the form of unsecured loan, share application money and sundry creditors and the same is assessable as unexplained cash credit u/s.68 of the Act.

19. The Ld. CIT-DR further submitted that since the assessee company was squarely failed in providing details to substantiate that creditors were identifiable and creditworthy and transactions were genuine, therefore, the A.O had rightly made such addition and same deserves to be upheld. The Ld. CIT-DR further drew our attention to the observation of the CIT(Appeals) wherein the CIT(Appeals) has observed that relevant documents were submitted before the A.O which shows that creditors do exist. Also, creditors were duly registered with ROC having registered offices and registration numbers. As per bank statements payments have been received by the assessee from creditors therefore, genuineness of the transaction could not be doubted. It was observed by the CIT(Appeals) that without finding any faults in the documents furnished by the assessee company, no adverse finding could be made by the A.O wherein details of the creditors a/w. account confirmation were filed. Further, it was observed by the CIT(Appeals) the A.O did not make any enquiry or no efforts was made to hold the transaction not genuine, is not sustainable in law.

20. As regards the share application money, it was observed by the CIT(Appeals) that the share application money was received from 9 persons who are individual, family members, HUF of the family of directors of the assessee company. Confirmations and ITR were submitted by the assessee. The addition was made since the assessee was unable to file capital account and bank account of the share

subscribers. On the other hand it was the allegation by the assessee that the A.O did not allow sufficient opportunity and straightway added the share application money. During the appellate proceedings, the assessee filed capital account and bank statements which were sent for the A.O's comment. The Ld. CIT(Appeals) further discussed individual facts pertaining to subscribers Smt. Asha Agrawal, CM Agrawal and Shri Om Prakash Agrawal and has mentioned that facts of other share subscribers are also similar therefore, identity, creditworthiness of these persons is established. Transactions were also genuine as these were done through banking channels. The Ld. CIT(Appeals) has placed his reliance in the judgment of the Hon'ble Apex Court in the case of CIT Vs. Lovely Exports (P) Ltd. reported in 216 CTR 195 and judgment of the Hon'ble Jurisdictional High Court i.e. High Court of Chhattisgarh in the case of ACIT Vs. Venkeshwar Ispat (P) Ltd. reported in 319 ITR 393 wherein similar issues were discussed. It was submitted by the Ld. CIT-DR that the CIT(Appeals) has decided the issue in favour of the assessee by deleting the addition made by the A.O treating the transaction as genuine and creditors as identifiable and creditworthy. The Ld. CIT-DR submitted that the observation of the CIT(Appeals) that additional evidence filed by the assessee were sent for comment of the A.O but the same has not substantiated by producing comments of the A.O on such additional evidence. It was also submitted by the Ld. CIT-DR that the CIT(Appeals) had discussed facts of certain parties i.e. creditors, lenders and share

subscribers and applied the ratio of facts in such cases to all other cases but such practice is not acceptable in law, therefore, the observation of the CIT(Appeals) was erroneous on the facts as well as on law. It, was therefore, prayer of the Ld. CIT-DR that the order of the CIT(Appeals) deserves to be quashed and addition made by the A.O needs to be sustained.

21. Contradicting the submission and contentions of the revenue, the Ld. AR submitted that the onus cast upon the assessee within the meaning of Section 68 of the Act to provide necessary documents was duly discharged by the assessee before the A.O. Certain evidence which were received by the assessee later on were submitted before the CIT(Appeals). Therefore, the observation of the A.O that transactions were bogus, was erroneous finding without appreciating facts of the case with proper perspective but was based on presumption under predetermined notion. The Ld. AR also submitted all the requisite details were furnished before the A.O and also before the CIT(Appeals). The allegation of Ld. AO that companies are the Kolkata based companies, this itself cannot be the basis, without any material so as to prove that transactions are sham transaction. With regard to the addition of Rs.66,74,130/- on account of cessation of trading liability, it was submitted by the Ld. AR that no opportunity was given to the assessee to explain the case and the A.O merely going by the accounts, had drawn adverse inferences. All such creditors were regular creditors to whom the

payments were made in the ensuing years, therefore, liabilities could not be termed as ceased liabilities and addition u/s.68 was unjustifiable. It was submitted by the Ld. AR that the Ld. CIT(Appeals) has properly appreciated all facts and duly dealt with the issues, has granted relief to the assessee. It is therefore the prayer of the Ld. AR that the additions u/s.68 of the Act on these three counts are rightly deleted by the CIT(Appeals) and the same deserves to be sustained.

22. We have considered the rival contentions, perused the material available on record and judicial pronouncements in support of the contentions as relied upon by the Ld. AR placed before us. Admittedly, the Ld. AO has found from the books of the assessee company that there was certain unsecured loans, share application money and sundry creditors, the details of which were called for from the assessee but the assessee failed to provide complete details pertaining to such transaction. The A.O had categorically offered his comment against each and every lender. However, in absence of the address of the lenders no enquiry was made with the said lenders. The Ld. CIT(Appeals) had admitted all the evidence submitted before the A.O as well as certain additional evidence so as to analyze the nature of transaction in order to substantiate the identity, creditworthiness and genuineness as required under the provisions of Section 68 of the Act and the CIT(Appeals) relied upon certain case laws and deleted the addition observing that onus cast upon the assessee was duly discharged. The CIT(Appeals) based on the

decision in the case of CIT Vs. M/s. Lovely Exports P. Ltd. (supra) has observe that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the A.O, then the department is free to proceed to reopen their individual assessment in accordance with law, but is cannot be regarded as undisclosed income of the assessee company. The Ld. CIT(Appeals) further placed his reliance in the case of ACIT Vs. Venkateshwar Ispat Pvt. Ltd. (supra) wherein the Hon'ble High Court of Chhattisgarh has followed the principle of law which was settled by the Hon'ble Apex Court in the case of CIT Vs. M/s. Lovely Exports P. Ltd. (supra).

23. At this juncture, we would like to discuss the amendment provided vide the Finance Act, 2012 w.e.f. 01.04.2013 under the provisions of Section 68 of the Act wherein the "1st proviso" to Section 68 was introduced which reads as under:

"68. 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 thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year :

Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture

capital fund or a venture capital company as referred to in clause (23FB) of section 10.”

24. As per “1st proviso” to Section 68, sub-clause (a), it was onus on the assessee rather on the source from whom such credits were received, that the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited. While discussing the applicability of the amended proviso as extracted hereinabove, we would like to take guidance from the judgment of the Hon’ble High Court of Mumbai in the case of CIT Vs. Gagandeep Infrastructure Pvt. Ltd. (2017) 394 ITR 680(Bom) (HC) wherein the Hon’ble High Court has held that :

We find that the proviso to section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso. In any view of the matter the three essential tests while confirming the pre-proviso Section 68 of the Act laid

down by the Courts namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was found satisfied. Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are bogus. The Apex Court in Lovely Exports (P.) Ltd. (supra) in the context to the pre-amended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit.

25. On a perusal of the aforesaid judgment, it is clear that proviso to section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards, also the law laid down by the Hon'ble Apex Court in the case of in Lovely Exports (P.) Ltd. (supra) was in the context to the pre-amended Section 68 of the Act, therefore in the present case before us, which pertains to the AY 2014-15 cannot be decided on the findings given in the case of Lovely Exports (supra).

26. As per the material available on record in the form of assessment order as well as order of the Ld. CIT(Appeals), it is apparent that newly inserted provision in Section 68 of the Act requiring explanation about the nature and source of credit recorded in the books of the assessee

company were not explained by the lenders regarding nature and source of the sum so credited in their respective accounts. Since these material changes in the Act which was effective from 01.04.2013 was not considered by the Ld. CIT(Appeals) which is mandatory to be observed while deciding the issues alleged and are subject to addition under the provisions of Section 68 of the Act. As per the observation of the Ld. CIT(A), it is apparent that in the present case Ld. CIT(A) has decided the issue in favour of assessee placing reliance on the judgment in the case of ACIT Vs. Venketeshwar Ispat (p) Ltd. (supra) wherein the observation of the Hon'ble Jurisdictional High Court of Chhattisgarh was guided by the verdict of Hon'ble Apex Court in the case of Lovely Export (P) Ltd. (supra), since these judgments were accorded in terms of pre-amendment provisions of Section 68 of the Act, such findings cannot be the basis for deciding the issues pertaining to the years started after 1st April, 2013 i.e. post amendment years, which was categorically explained by the Hon'ble Bombay High Court in the case of CIT Vs. Gagandeep Infrastructure (P) Ltd. (supra). In view of such observations, we are of the considered view that additions u/s.68 of the Act in the present case were deleted by the Ld. CIT(A) following the judgment in the case of ACIT Vs. Venketeshwar Ispat (p) Ltd. (supra) and Lovely Export (P) Ltd. (supra) pertaining to pre-amendment period, whereas the year under consideration falls post-amendment in section 68 of the Act, should be restored to the file of the A.O for reexamination in terms of the amendment in provisions to Section

68 of the Act which are applicable for the relevant A.Y.2014-15. We, therefore, set-aside the order of the CIT(A) and restore the issue to the file of the A.O for adjudicating the same afresh. Needless to say, the AO shall grant reasonable opportunity of being heard to the assessee in the set-aside proceedings. Thus, **Grounds of appeal Nos. 2, 3 & 4** raised by the revenue are partly allowed for statistical purposes in terms of our aforesaid observations.

Ground of appeal No.5

27. Ground of appeal No.5 pertains to the deletion of addition of Rs.4,11,981/- u/s.14A of the Act by the Ld. CIT(Appeals).

28. The Ld. CIT-DR submitted that the assessee's balance sheet shows investment of Rs.66,50,000/- in share and securities, income from which is exempt. It was submitted by the Ld. CIT-DR that as per Board's Circular 5/2014, Rule 8D r.w.s. 14A of the Act provides for disallowance of the expenditure even where taxpayer in a particular year has not earned any exempt income. It is, therefore, prayer of the Ld. CIT-DR that the order of the Ld. CIT(Appeals) on this score may be set-aside and order of the A.O be restored.

29. On the contrary, the Ld. AR submitted that the assessee company during the year under consideration had though made investment in exempt income yielding shares but had not received any exempt dividend income during the year under consideration. On the basis of the aforesaid

facts, it was submitted by the Ld. AR that now when the assessee company had not received any exempt dividend income during the year under consideration, therefore, no disallowance u/s.14A of the Act could have been validly made in its hands. Accordingly, on the basis of his aforesaid contentions, it was submitted by the Ld. AR that the Ld. CIT(Appeals) has rightly deleted the addition of Rs.4,11,981/- u/s.14A of the Act.

30. We have heard the rival contentions and perused the material available on record as well as judicial pronouncements in support of the contentions as relied upon by the Ld. AR placed before us. We are in agreement with the Ld. AR that now when the assessee company had admittedly not received any exempt income during the year under consideration, therefore, no disallowance u/s.14A of the Act was called for in its hand. Our aforesaid view is fortified by the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Chettinad Logistics Pvt. Ltd. (2018) 257 Taxmann 2 (SC) and in the case of Pr. CIT Vs. Oil Industry Dev. Board, 104 CCH 156 (SC). Backed by the aforesaid judicial pronouncements, it was submitted by the Ld. AR that as per the settled position of law no disallowance u/s.14A in absence of any exempt income could have been made in the hands of the assessee. Since the others issues raised by the revenue in appeal have been restored to the file of the A.O for fresh adjudication by us, therefore, we restore this issue also to the file of the A.O for verification of the actual investment and exempt

income. The A.O is directed to verify the aforesaid factual aspect i.e. actual investment and exempt income during the year under consideration. Respectfully following the decisions of the Hon'ble Apex Court in the cases referred to (supra), it is also clarified that if it is found that the assessee company had not received any exempt income during the year under consideration, then, no disallowance u/s.14A of the Act would be made in the hands of the assessee company by the A.O. The assessee is directed to produce necessary documents to substantiate its claim in the course of set-aside proceedings. Needless to say, the A.O shall grant reasonable opportunity of being heard to the assessee. Thus, **Ground of appeal No. 5** raised by the revenue is partly allowed for statistical purposes in terms of our aforesaid observations.

31. In the result, appeal of the revenue is partly allowed for statistical purposes in terms of our aforesaid observations.

Order pronounced in the open court on 31/07/ 2023.

Sd/-
RAVISH SOOD
(JUDICIAL MEMBER)

Sd/-
ARUN KHODPIA
(ACCOUNTANT MEMBER)

रायपुर/ RAIPUR ; दिनांक / Dated : 31st July, 2023

SB

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-II, Raipur (C.G.)
4. The Pr. CIT-II, Raipur (C.G.)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर बेंच, रायपुर / DR, ITAT, Raipur Bench, Raipur.
5. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur.

		Date	Initial	
1.	Draft dictated on			Sr.PS
2.	Draft placed before author			Sr.PS
3.	Draft proposed & placed before the second member			JM/AM
4.	Draft discussed/approved by Second Member.			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS
7.	File sent to the Bench Clerk			Sr.PS
8.	Date on which file goes to the Sr.PS			
9.	Date on which file goes to the Head Clerk.			
10.	Date of dispatch of Order.			