

**IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, MUMBAI**

**BEFORE SHRI B R BASKARAN, AM
&
SHRI N. K. CHOUDHRY, JM**

आयकरअपीलसं./ I.T.A. No. 1534/Mum/2023
(निर्धारणवर्ष / Assessment Year: 2014-15)

Manoj Kumar Agrawal
604, Mangal Murli Tower, 60
Feet Road, OPP ICICI bank,
Bhayander (W),
Mumbai- 401101

Versus

ITO 18(2)(3), Mumbai.
3RD floor, R. No. 306,
earnest House, Nariman
Point Mumbai- 400021

PAN No. ADBPA7238C

(अपीलार्थी/**Appellant**)

:

(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**
प्रत्यर्थीकीओरसे/**Respondent by**

:

Shri. Ashok Bansal, Ld. CA

:

Shri. Naganath B. Pasale, Ld. DR

Date of Hearing : 17.07.2023
Date of Pronouncement : 28.07.2023

आदेश / **ORDER**

Per N K Choudhry, Judicial Member:

This has been preferred by the Assessee against the order dated 11.03.2023, impugned herein, passed by the Ld. Commissioner of Income Tax(Appeals) / National Faceless Appeal Centre(NFAC) Delhi, u/s. 250 of the Income Tax Act 1961 (in short 'the Act') for AY 2014-15.

2. In the instant case, the Assessee being partner of partnership firm M/s Bansal and Company earned income from remuneration from the said firm, capital gains of shares and from other sources and during the year under consideration, by filling its return of income, declared its total income of Rs.5,72,020/- including Rs 1,60,379 {as per AIR Rs.3,58,134/-) from long term capital gain on sale of shares, which was claimed exempt u/s 10(38) of the Act. The said return was processed u/s 143(1) of the I.T. Act, 1961, however the case was selected for scrutiny. The AO observed that during the year the Assessee had, interlia, declared following income from long term capital gain on sale of shares which was claimed exempt u/s 10 (38) of (as per AIR Rs.3,58,134):

Name of Company	Sale Price	Purchase Price	Exempt U/s 10(38)
Nouveau Multimedia Ltd	38,511	91,923	(-)53,412
Pearl Agriculture (demerged with Nouveau Multimedia Ltd)	160,632	51,293	1,09,339
Pearl Agriculture (demerged with Nouveau Multimedia Ltd)	156572	52120	1,04,451
Total long term capital gain on above			1,60,379

3. The Assessee on the basis of report of the Investigation Wing of Kolkata, wherein it was stated *"that Shri. Deepak Patwari director of one of the above three companies, has recorded his statement on 22.07.2013 on oath before the investigation authorities, and has stated in reply to Q.13 that the scrips have been purchased in abnormally higher rate, to provide capital gain benefit to the companies. Another person Shri Sailesh Kumar Patni, director of one of the above three companies also recorded his statement on oath on 16.06.2015 before the investigation authorities, and has provided a list of penny stock companies which includes M/s Pearl Agriculture"* show caused the Assessee. In response, the Assessee filed its reply.

The assessing officer by observing *"that sale consideration received by the Assessee cannot be said to be genuine sale of shares rather than it is a colorable device where the apparent is not the real and the shares were sold at high price in a short period of time. Detailed analyzations of financials of the company suggesting that the share could not have command such high price allowing with abnormal price other then the stock exchange"*, ultimately held the said transaction of Rs. 3,58,134/- as income from other sources and added the same in the income of the Assessee. The assessing officer also made the addition of Rs. 14325 as commission @ 4% of accommodation entries as explained income/sources/expenditure u/s 69C of the Act.

4. The Ld. Commissioner on the similar reasoning given by the AO, affirmed the said additions.

5. We have given thoughtful consideration to the peculiar facts and circumstances of the case and observe that the Assessee purchased the shares through one broker namely M/s Geojit BNP Paribas Financial services Ltd, which was never

proved to be settler or rig master and the shares were recorded in the Assessee as well as in the broker ledger's account etc. and received in the demat account and the financial performance available of M/s Geojit BNP Paribas Financial services Ltd is also satisfactory and the authorities below failed to note that the Assessee has purchased the shares in January 2014, whereas Shri Deepak Patwari made the statement in July 2013 which was relied upon by the authorities below for making the addition, hence his statement cannot be relied upon in this case.

5.1 It is a fact that the addition has been made merely on the basis of the statements recorded during the course of survey u/s 131/133A of the Act and without supporting evidence and material on record. It is also a fact that the statements of such persons were never provided to the Assessee nor was the Assessee given any opportunity to cross examine the said persons. Even otherwise there is no abnormal difference between the purchase and sale price of the shares. In fact the shares of Nouveau Multimedia Ltd were purchased by the Assessee on a consideration of Rs. 91923/- whereas the same were sold on consideration of Rs. 38511/- which resulted into loss of Rs. 53412/- and therefore this circumstance, also strengthen the genuineness of the case of the Assessee.

5.2 We also observe that the coordinate bench of the Tribunal in the case of **IWI Stationary Pvt Ltd. Vs ACIT ITA No. 1571 & 1572/M/2023** decided on 20.07.2023 also dealt with the identical case/situation, wherein the addition was

made on the basis of 3rd party statement. For ready reference, the relevant part of the order is reproduced below. :-

6. The first issue relates to the addition of Rs.20.00 lakhs relating to unsecured loan taken by the assessee from M/s. Shyam Alcohol & Chemicals Limited treating the same as unexplained cash credit u/s 68 of the Act.

7. We heard rival contentions on this issue and perused the record. In the instant case, the loan taken by the assessee has been added u/s 68 of the Act. Sec. 68 enables assessment of such types of cash credits, if the assessee fails to prove the nature and source of cash credits. "Nature of cash credit would mean that the assessee is required to show that it is not of revenue nature. In order to prove the source, the assessee should discharge initial burden to prove the cash credits placed upon his shoulders of the assessee u/s 68 of the Act, i.e., the assessee is required to prove three main ingredients, viz., the identity of the creditor, the genuineness of the transactions and the credit worthiness of the creditor. If the assessee discharges the initial burden, then the burden would shift to the shoulders of the assessing officer, i.e., it is the responsibility of the AO to disprove the claim of the assessee by bringing evidences on record.

8. We shall now examine the facts prevailing in the instant case. It is noticed that it is not the case of the AO that the assessee did not discharge the initial burden placed upon it with regard to the loan taken by it. We notice that the assessee has furnished all the details relating to the loan in order to discharge the burden placed upon it u/s 68 of the Act. However, the AO has refused to accept those details, only for the reason that the above said company has been categorized by the investigation wing as accommodation entry provider.

9. We noticed from the record that the assessee has filed following documents in order to discharge the burden placed upon it under section 68 of the Act :-

- a) Annual audited account of lender company.*
- b) Bank statements showing receipt of money.*
- c) Copy of income tax return filed by lender company.*
- d) Confirmation of ledger account by the lender company.*

Through these documents, the assessee has proved the identity, credit worthiness and genuineness of transactions. Thus, in our view the assessee has discharged initial burden placed upon it under section 68 of the Act by furnishing above said documents.

10. The question as to **whether the Assessing Officer could have made addition under section 68 of the Act by relying upon the statement given by an accommodation entry provider was examined by the Coordinate Bench in the case of M/s. Moraj Realty Pvt. Ltd. (ITA No.708 & 709/Mum/2019 dated 08-12-2020)**. It was held as under :-

17. Moreover, except for relying on the statement of VVB the Assessing Officer has not done any inquiry himself except for referring to a notice issued under section 133(6) in A.Y. 2009-10 only. The learned counsel of the assessee has challenged the very veracity of this observation. He has submitted that assessee has asked for the copy of the said notice issued under RTI Act. In response it was replied that copies thereof are not available. Hence, this shows that even the so called inquiry by the Assessing Officer was done in case of only one party for A.Y. 2009-10 and the veracity of which is itself in doubt.

*18. We find ourselves in agreement with the submissions of the assessee's counsel. **We note that except for the statement of the entry operator which was also retracted the addition made by the authorities below is devoid of cogent material.** In this regard we note that in similar circumstances honorable Bombay High Court in the case of CIT Vs. Orchid Industries Pvt. Ltd. (ITA No. 1433 of 2014 dated 5.7.2017) held as under :-*

The Assessing Officer added Rs.95 lakhs as income under Section 68 of the Income Tax Act only on the ground that the parties to whom the share certificates were issued and who had paid the share money had not appeared before the Assessing Officer and the summons could not be served on the addresses given as they were not traced and in respect of some of the parties I who had appeared, it was observed that just before issuance of cheques, the amount was deposited in their account.

The Tribunal has considered that the Assessee has produced on record the documents to establish the genuineness of the party such as PAN of all the creditors along with the confirmation, their bank statements showing payment of share application money. It was also observed by the Tribunal that the Assessee has also produced the entire record regarding issuance of shares ie allotment of shares to these parties, their share application forms, allotment letters and share certificates, so also the books of account. The balance sheet and profit and loss account of these persons discloses that these persons had sufficient funds in their accounts for investing in the shares of the Assessee. In view of these voluminous documentary evidence, only because those persons had not appeared before the Assessing Officer would not negate the case of the Assessee. The judgment in case of Gagandeep Infrastructure (P) Ltd. (supra) would be applicable in the facts and circumstances of the present case."

11. In our view, the above said decision rendered by the coordinate bench supports the case of the assessee. Accordingly, following the above said decision, we hold that the addition made by the Assessing Officer under section 68 of the Act, in the facts and circumstances of the case, was not justified. Accordingly we set aside the order passed by the learned CIT(A) on this issue and direct the AO to delete the addition of Rs.20.00 lakhs made under section 68 of the Act.

(Highlighted by us for clarity)

5.3 Hence, considering the peculiar facts and circumstances in totality and respectfully judgments of Hon'ble High Court and the Tribunal, we are of the considered view that the addition of Rs. 3,58,134/- is not sustainable.

6. As we have deleted the addition made on account of bogus capital gain, hence addition of Rs. 14325/- at 5% of the alleged unexplained income/expenditure is also un-sustainable and therefore same is also deleted.

7. In the result, appeal filed by the Assessee stands allowed.

Order pronounced in the open court on 28.07.2023.

Sd/-
(BR Baskaran)
Accountant Member

Sd/-
(N. K. Choudhry)
Judicial Member

Shubham P. Lohar

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त/ CIT- concerned
4. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
5. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

.उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai