

**IN THE INCOME TAX APPELLATE TRIBUNAL “F” BENCH, MUMBAI**

**BEFORE SHRI, OM PRAKASH KANT, AM  
AND  
MS. KAVITHA RAJAGOPAL, JM**

ITA No. 1776/MUM/2022  
(Assessment Year: 2008-09)

DCIT CC- 7(2) Room No. 655, 6 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020	Vs.	M/s Megabyte Merchants Pvt. Ltd. 6 & 6/3, Shashi Shekhar Bose Road, Kolkata-700025
<b>PAN/GIR No.AAFCM2993J</b>		
<b>(Appellant)</b>	:	<b>(Respondent)</b>

<b>Assessee by</b>	:	Shri Neelkanth Khandelwal
<b>Revenue by</b>	:	Shri Ankush Kapoor

<b>Date of Hearing</b>	:	13.07.2023
<b>Date of Pronouncement</b>	:	28.08.2023

**ORDER**

**PER KAVITHA RAJAGOPAL, J M:**

1. This appeal has been filed by the revenue challenging the order of the Learned Commissioner of Income Tax (Appeals)-49 [hereinafter “the CIT(A)”] passed u/s 250 of the Income Tax Act [hereinafter “the Act”] relevant to the Assessment Year [hereinafter the A.Y.] 2008-09.

2. The revenue has challenged the order of the Ld. CIT(A) in holding that the assessment made u/s 143(3) r.w.s. 153C of the Act was merely on the basis of the statement recorded u/s 132(4) of the Act and without and any incriminating material.
3. The brief facts are that the assessee company filed its return of income dated 30.01.2009 declaring total income at Rs. Nil. Pursuant to search action u/s 132 of the Act conducted in the case of Thakkar & Aashar on 05.07.2017 notice u/s 153C of the Act dated 27.09.2019 was issued to the assessee. The assessee filed its return of income in response to the said notice on 11.12.2019 declaring total income at ₹Nil.
4. The Ld. AO issued notice u/s 143(2) dated 15.12.2019 and notice u/s 142(1) dated 15.12.2019 was issued and served upon the assessee.
5. The Ld. AO passed the assessment order dated 28.12.2019 u/s 143(3) r.w.s. 153C of the Act by determining the total income at Rs. 9,39,55,000/- after making an addition of ₹9,39,55,000/- u/s 68 of the IT Act, being the share premium received by the assessee from various entities during the impugned year.
6. The assessee was in appeal before the Ld. CIT(A) challenging the assessment order and the addition made by the Ld. AO. The Ld. CIT(A) deleted the impugned addition by holding that there was no incriminating material found

and seized during the search thereby holding that the AO had no jurisdiction to make the impugned addition.

7. The revenue is in appeal before us challenging the impugned order passed by the Ld. CIT(A).

8. The Ld. Departmental Representative for the revenue contended that the impugned addition was based on the statement of Shri Devkumar Amrutlal Thakkar and stated that the assessee company as per the Ld. AO did not exist at the given address. The Ld. DR further stated that the Share Premium received from different entities was a mere sham transaction as Shri. Devkumar Thakkar who was one of the Directors of the company has in his oath during the search proceedings stated that he was not aware of any transaction in the assessee company, further he has also stated that his chartered accountant Shree Kirit Nagda has used his documents without his knowledge and had opened these dummy companies. The Ld. DR contended that the assessee has failed to prove the source of share premium received during the impugned year.

9. The Ld. AR on the other hand controverted the said facts and stated that the assessment made u/s 143(3) r.w.s. 153C was itself invalid for the reason that the AO has not recorded satisfaction before invoking proceedings u/s 153C. The Ld. AR further stated that the assessment was earlier done u/s 143(3) r.w.s. 147 of the Act where the Ld. AO had duly verified the source of share premium received by the assessee company and that the Ld. AO had issued the notice u/s 133(6) of the

Act to the investors and the same was duly replied by them. The Ld. AR further contended that the Ld. AO had during the reassessment proceedings had not found any discrepancy in the source of said share premium. The Ld. AR also contended that there was no incriminating material seized during the search proceeding and since the impugned year falls under the unabated assessment there can be no addition made by the Ld. AO without any incriminating material. The Ld. AR relied on the various decisions of Hon'ble High Courts and the Coordinate Benches.

10. As a rejoinder to the argument of the Ld AR, the Ld. DR had replied to the bench that whether the satisfaction note was recorded while issuing notice u/s 153C was not found from the records and that the Ld. AO had given written submission that same was not traceable from the record of assessment proceedings.

11. We have read the rival submission and perused the materials on record. It is observed that the Ld. AO had made addition of ₹9,39,55,000/- as unexplained cash credit u/s 68 of the Act towards the share premium received from around 17 entities which according to the Ld. AO was not substantiated by the assessee with satisfactory explanation before the Ld. AO. The Ld. AO further held that the adverse inference has been drawn as per section 114 of Indian Evidence Act where the assessee has failed to furnish explanation or documentary evidences in support of its claim. The Ld. AO has also stated that Shri. Devkumar Thakkar has retracted

his statement only after two and a half months just before the conclusion of assessment proceedings which according to the Ld. AO was an afterthought.

12. The Ld. CIT(A) on the other hand has held that the Ld. AO has merely relied on the submission of Shri. Devkumar Thakkar who is one of the Directors of the assessee company. Ld. CIT(A) has also given a finding that the assessee has denied that Shri Devkumar Thakkar was not the director of the assessee company and has specified that vide an affidavit dated 26.07.2017 that Shri. Devkumar Thakkar has stated on oath that he was not the director and only his son Shri Mihir Devkumar Thakkar was the director of the company. The Ld. CIT(A) further held that the relevant year under consideration was unabated assessment year for which the assessment has already been completed and that the Ld. AO could not have made addition in the absence of any incriminating material found and seized during the course of search. It is also pertinent to point out that the Ld. CIT(A) has held that placing reliance only on the statement cannot be a corroborative evidence in the absence of any incriminating materials found during the course of search. The Ld. CIT(A) has deleted the impugned addition made u/s 68 of the Act on the ground that no addition can be made in the absence of any incriminating material found during the course of search in the case of unabated assessment. We find no infirmity in the finding of the Ld. CIT(A) in this context. It is also evident that as per the provisions of section 153C it is mandatory that the Ld. AO of the searched person should have recorded satisfaction. In the present case in hand it is evident that the Ld. AO was unable to conclusively state that satisfaction note was

duly recorded. In the case of failure to prove that the Ld. AO has recorded satisfaction, we do not find any justification in upholding the addition made by the Ld. AO and hence the assessment order is in itself void abintio. Therefore, the order of Ld. CIT(A) in deleting the impugned addition is upheld.

13. In the result appeal filed by the revenue is dismissed.

*Order pronounced in the open court on 28.08.2023*

Sd/-  
(OM PRAKASH KANT)  
ACCOUNTANT MEMBER

Sd/-  
(KAVITHA RAJAGOPAL)  
JUDICIAL MEMBER

Mumbai;

Dated : 28.08.2023

*Aniket Singh Rajput,*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent
3. CIT- concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt.Registrar)  
ITAT, Mumbai