

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'B' BENCH, MUMBAI.

Before Shri B.R. Baskaran (AM) & Shri Rahul Chaudhary (JM)

I.T.A. No. 2515/Mum/2021 (A.Y. 2014-15)

Asstt. Commissioner of Income Tax, Central Circle-4(2), Mumbai.	Vs.	M/s. Morpan Merchant Pvt. Ltd. Unit No. 402, 4 th floor, 236B, A.J.C. Bose Road, Marble Arch, Kolkata 700 020.
(Appellant)		PAN : AAECM2516L (Respondent)

Assessee by	Shri Mani Jain
Department by	Shri Ashok Kumar Ambastha
Date of Hearing	28.07.2023
Date of Pronouncement	17.10.2023

O R D E R

Per BENCH :-

The revenue has filed this appeal challenging the order dated 12-03-2021 passed by Ld CIT(A)-52, Mumbai and it relates to the assessment year 2014-15. The revenue is aggrieved by the decision of Ld CIT(A) in deleting the addition of Rs.9.00 crores made by the AO u/s 68 of the Act.

2. The facts relating to the cases are stated in brief. The assessee herein is engaged in the business of trading in various products. It belongs to Gauti Group. The assessee along with other group concerns/family members was subjected to search operations under section 132 of the Act on 09-03-2015 by the Investigation wing of the Income tax department. Consequent thereto, the assessments were completed in the hands of the assessee for the above said year under section 143(3) read with section 153A of the Act.

3. The Kolkata investigation wing of the department had reported that many paper companies are indulging in providing accommodation entries in the form of share capital/share premium to various beneficiaries. It was noticed by the department that the assessee's group has received share capital/share premium from such paper companies. During the year under consideration, the assessee had received a sum of Rs.9.00 crores as share application money from a company named M/s Zenstar Marketing P Ltd. Hence the AO proposed to assess the above said amount as unexplained cash credit u/s 68 of the Act.

4. In response to the same, the assessee furnished various documents and submitted that it has proved the three ingredients, viz., Identity of the lender, Genuineness of transactions and Credit worthiness of the lender by producing documents like Incorporation certificate, PAN card, bank statements and financial statements of the creditors. It was further submitted that these companies are engaged in the business of share trading and all the transactions related to the same may be verified from the financial statements of the said companies. It was also submitted that the Share premium is a capital receipt and it has been received as per the private negotiations made between the assessee and share subscribers. It was further submitted that the Companies Act has put in restrictions with regard to the usage of share premium amount. Accordingly, it was contended that the addition u/s 68 could not be made.

5. The assessing officer did not accept the contentions of the assessee. The AO, after referring to various case laws, held that the share application money received by the assessee is unexplained. Accordingly he assessed the same as unexplained cash credit u/s 68 of the Act.

6. Before Ld CIT(A), the assessee submitted that the share applicant, viz., M/s Zenstar Marketing P Ltd is a wholly owned subsidiary of assessee group from AY 2013-14 onwards. It was submitted that the entire amount of Rs.9.00 crores have been invested by M/s Zenstar Marketing P Ltd with the assessee, out of the funds received from M/s Sumati Chand Gouti Jewellers

P Ltd, which is also one of the group concerns of the Gouti Group. It was submitted that the entire amount has been repaid by way of cheque. Convinced with the explanations of the assessee, the Ld CIT(A) deleted the addition with the following observations:-

“5.66 The submission made by the assessee has examined and the bank account extracts provided to support the above contention has been examined. While dealing with the issue of identity and credit worthiness, it has been held earlier that in case of companies owned by the group, there is no question of proving identity but the credit worthiness has to be demonstrated with respect to each and every transaction. In the present case, the assessee has provided documents to show that the funds advanced to Morpan Merchants during the year by Zenstar have been sourced from M/s Sumatichand Gauti Jewellers P Ltd. The necessary bank account details evidencing credit of this amount in the bank account of Zenstar and debit of this amount in the bank account and subsequent credit in the bank account of Morpan has been provided. The identity and creditworthiness of Sumatichand Gouti Jewellers P Ltd is well established. It is seen that the AO has merely restricted himself to the issue of identity and has not extended the investigation to source of funds in the hands of the investor company. The assessee of Sumatichand gouti Jewellers P Ltd has been carried out along with this company and no doubt has been raised about source of finance in the hands of this company. Further, there is no doubt about the creditworthiness of this company. It has been held by Hon’ble Supreme Court in the case of NRA Iron & Steel (P) Ltd (2019)(103 taxmann.com 48)(SC), has stressed upon the need to examine the creditworthiness of the investor companies in case of doubt about these companies.

5.67 In light of the various documents submitted by the appellant as discussed above and the fact that the credit arose out of the funds of Sumati Chand Gouti Jewellers P Ltd the source of credit is found to be

suitably explained. The amount credited in the books of the assessee cannot be treated as unexplained credit under such circumstances. As such, the AO is in error in making the addition under section 68 of the Act in this case.”

Accordingly, the Ld CIT(A) deleted the addition made u/s 68 of the Act. Hence, the revenue is aggrieved by the decision so rendered by Ld CIT(A).

7. We heard rival contentions and perused the record. In the instant case, the addition has been made u/s 68 of the Act, wherein cash credits, which are essentially share capital/share premium money received by the assessee, have been added. 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 sources, the assessee should discharge initial burden to prove the cash credits placed upon his shoulders of the assessee u/s 68 of the Act, 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 share capital/share premium money received by it. The assessee has furnished all the details relating to the investor in order to discharge the burden placed upon it u/s 68 of the Act. 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) Certificate of Incorporation of share subscriber.

- b) PAN number of share applicant.
- c) Balance Sheet of share subscriber.
- d) Bank Statement of Share subscriber.
- e) Acknowledgement of Return of income filed by Share subscriber.
- f) Form 2 filed before ROC for allotment of shares.
- g) Valuation report of shares.

From the details submitted it can be seen that the identity of share subscriber stand proved. Since the share applicant has made payment from its bank account through account payee cheques, these transactions cannot be treated as bogus. Since the payments have been made from of funds available with them, the credit worthiness would also stand proved. In the instant case, it is not the case of the AO that the applicant did not have funds available him for making investments in the assessee company. In fact, the said investments have been routed through the bank accounts of the assessee as well as the subscribers. Further, these investments are duly reflected in their books of account.

9. We notice that the share applicant M/s Zenstar Marketing P Ltd belong to the Gouti Group and further it has received funds from another group company named M/s Sumati Chand Gouti Jewellers P Ltd. The funds so received have been used to make investments in the assessee company. Thus, it is a case of investment made by one group company in another group company.

10. We notice that the AO has mainly relied upon the report of investigation wing to come to the conclusion that the assessee has availed only accommodation entries. But the fact would remain that the assessee has furnished the relevant details before the AO and all those details were earlier filed with either Income tax department or with Registrar of Companies, i.e., with Government authorities. Hence the authenticity of those documents could not be doubted with. When all the relevant details are available with the AO, it is the requirement that the AO should examine

those documents and could reject them, only if he finds fault with those documents. We notice that the AO did not find any deficiency or fault with the evidences produced by the assessee.

11. With furnishing of all these documents, in our view, the assessee has discharged initial burden placed upon it under section 68 of the Act by furnishing above said documents. Hence the source as well as the source of source also stands proved by the subscribers.

12. The question that arises is whether the Assessing Officer could have made addition under section 68 of the Act by relying upon report of investigation wing or the statement given by the alleged accommodation entry providers. It is apposite to refer to the decision rendered by the Coordinate Bench in the case of M/s. Moraj Realty Pvt. Ltd. (ITA No.708 & 709/Mum/2019 dated 08-12-2020), wherein the decision was rendered by following the decision rendered by Hon'ble Bombay High Court. 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 honourable 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 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 i.e. 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.”

19. Similarly honourable Bombay High Court in the case of Gagandeep Infrastructure Pvt. Ltd. (supra) has held as under :-

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.

(ii) 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 CIT v/s. Lovely Exports (P)Ltd. 317 ITR 218 in the context to the preamended 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.

20. Similarly Hon'ble Bombay High Court in the case of CIT Vs. Apeak Infotech (3971 ITR 148) has held as under :-

“Amendment to Section 68 of the Act by the addition of proviso thereto took place with effect from 1st April, 2013. Therefore, it was not applicable for the subject Assessment year 2012-13, So for as the pre-amended Section 68 of the Act was concerned, the same cannot be invoked in this case, as evidence was led by the Respondents- Assessee before the Assessing Officer with regard to identity, capacity of the investor as well as the genuineness of the investment Therefore, admittedly, the Assessing Officer did not invoke Section 68 of the Act to bring the share premium to tax. Similarly, the CIT(A), on consideration of facts, found that Section 68 of the Act cannot be invoked, in view of the above, it was likely that the Revenue may have taken an informed decision not urge the issue of Section 68 of the Act before the Tribunal. High Court may also point out that decision of High Court in Major Metals Ltd. vs. Union of India, 359 ITR 450 proceeded on its own facts to uphold the invocation of Section 68 of the Act by the Settlement Commission. In the above case, the Settlement Commission arrived at a finding of fact that the subscribers re shares of the Assessee - Company were not creditworthy in as much as they did not have financial standing which would enable them to make an investment of Rs. 6,00,00,000/- at premium of Rs. 990 per share. It was this finding of the fact arrived at by the Settlement Commission which was not disturbed by High Court in its writ-jurisdiction. In the present case the person who have subscribed to the share and paid share premium have admittedly made statement on oath before the Assessing Officer as recorded by the Tribunal. No finding in this case has been given by the Authorities that shareholder/share applicants were unidentifiable or bogus.

High Court find that the impugned order of the Tribunal upheld the view of the CIT(A) to hold that share premium is capital receipt and therefore, cannot be taxed as Income. This conclusion was reached by the impugned order following the decision of this Court in Vodafone India Services Pvt. Ltd. (supra) and of the Apex Court in M/s G.S. Homes and Hotel P. Ltd. (supra). In both the above cases the Court has held that the amount received on issue of share capital including premium are on capital account and cannot be considered to be income. It was further pertinent to note that the definition of income as provided under Section 2(24) of the Act at

the relevant time did not define as income any consideration received for issue of share in excess of its fair market value. This came into the statute only with effect from 1st April, 2013 and thus, would have, no application to the share premium received by the Respondent - Assesses in the previous year relevant to the assessment year 2012 - 2013. Similarly, the amendment to Section 68 of the Act by addition of proviso was made subsequent to previous year relevant to the subject Assessment year 2012-13 and cannot be invoked. It may be pointed out that High Court in Commissioner of Income Tax vs. M/s. Gangadeep Infrastructure (P) ltd (Income Tax Appeal No. 1613 of 2014 decided in 20 March 2017) has while refusing to entertain a question with regard to Section 68 of the Act has held that the proviso to Section 68 of the Act introduced with effect from 1 April 2013 will not have retrospective effect and would be effective only from Assessment year 2013-14. In view of the above, Question No .B as proposed also does not give rise any substantial question of law as it is an issue concluded by the decision of High Court in M/s Vodafone India Services Pvt. Ltd. (Supra) and in the Apex Court in M/s G.S. Homes & Hotels P. Ltd. (supra). Thus not entertained. ”

21. Accordingly in the background of aforesaid discussion and precedent in our considered opinion assessee has given all the necessary details required for establishment of identity creditworthiness and genuineness under extant provisions of section 68 of the IT Act. The onus cast upon the assessee stands discharged. The addition by invoking amended provisions of section 68 of the Act which are not applicable for the assessment year is not sustainable.”

13. The Hon’ble Bombay High Court has held in the case of CIT vs. Orchid Industries (P) Ltd (397 ITR 136)(Bom) that the addition u/s 68 could not be made once the assessee had produced the documents to prove the cash credits. It was further held that non-appearance of the share subscriber before the AO will not change this position. It is also apt to refer to the decision rendered by Hon’ble Bombay High Court in the case of PCIT vs. Paradise Inland Shipping (P) Ltd (2017)(84 taxmann.com 58)(Bom). In this case, it was allegation of the revenue that the assessee has received share application money from fictitious companies. The Hon’ble jurisdictional High Court held as under:-

5. We have given our thoughtful considerations to the rival contentions of the learned Counsel and we have also gone through the records. The basic contention of the

learned Counsel appearing for the Appellants revolves upon the stand taken by the Appellants whether the shareholders who have invested in the shares of the Respondents are fictitious or not. In this connection, the Respondents in support of their stand about the genuineness of the transaction entered into with such Companies has produced voluminous documents which, inter alia, have been noted at Para 3 of the Judgment of the CIT Appeals which reads thus :

"The assessment is completed without rebutting the 550 page documents which are unflinching records of the companies. The list of documents submitted on 09.03.2015 are as follows :

1. Sony Financial Services Ltd. - CIN U74899DL1995PLC068362-

Date of Registration 09/05/1995

(a)	Memorandum of Association and Article of Association
(b)	Certificate of Incorporation
(c)	Certificate of Commencement of Business
(d)	Acknowledgment of the Return of Income AY 08-09
(e)	Affidavit of the Director confirming the investment
(f)	Application for allotment of shares
(g)	Photocopy of the share certificate
(h)	Audited account and Directors report thereon including balance sheet, Profit and Loss Account and schedules for the year ended 31.03.2009.
(i)	Audited account and Directors report thereon including balance sheet, Profit and Loss Account and schedules for the year ended 31.03.2010
(j)	The Bank Statement highlighting receipt of the amount by way of RTGS.
(k)	Banks certificate certifying the receipt of the amount through Banking channels."

6. On going through the documents which have been produced which are basically from the public offices, which maintain the records of the Companies. The documents also include assessment Orders for last three preceding years of such Companies.

7. The Appellants have failed to explain as to how such Companies have been assessed though according to them such Companies are not existing and are fictitious companies. Besides the documents also included the registration of the Company which discloses the registered address of such Companies. There is no material on record produced by the Appellants which could rebut the documents produced by the Respondents herein. In such circumstances, the finding of fact arrived at by the authorities below which are based on documentary evidence on record cannot be said to be perverse. Learned Counsel appearing for the Appellants was unable to point out that any of such findings arrived at by the authorities below were on the basis of misleading of evidence or failure to examine any material documents whilst coming to such conclusions. Under the guise of the substantial question of law, this Court in an Appeal under Section 260A of the Income Tax Act cannot re-appreciate the evidence to come to any contrary evidence. Considering that the authorities have

rendered the findings of facts based on documents which have not been disputed, we find that there are no substantial question of law which arises in the present Appeal for consideration.

8. The Apex Court in the case of *Orissa Corpn. (P.) Ltd. (supra)*, has observed at Para 13 thus :

"13. In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the revenue that the said creditors were income- tax assesseees. Their index number was in the file of the revenue. The revenue, apart from issuing notices under S. 131 at the instance of the assessee, did not pursue the matter further. The revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so called alleged creditors. In those circumstances, the assessee could not do anything further. In the premises, if the Tribunal came to the conclusion that the assessee has discharged the burden that lay on him then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises."

9. This Court in the Judgments relied upon by the learned Counsel appearing for the Respondents, have come to the conclusion that once the Assessee has produced documentary evidence to establish the existence of such Companies, the burden would shift on the Revenue-Appellants herein to establish their case. In the present case, the Appellants are seeking to rely upon the statements recorded of two persons who have admittedly not been subjected to cross examination. In such circumstances, the question of remanding the matter for re-examination of such persons, would not at all be justified. The Assessing Officer, if he so desired, ought to have allowed the Assessee to cross examine such persons in case the statements were to be relied upon in such proceedings. Apart from that, the voluminous documents produced by the Respondents cannot be discarded merely on the basis of two individuals who have given their statements contrary to such public documents.

10. We find no infirmity in the findings arrived at by the ITAT as well as CIT Appeals on the contentions raised by the Appellants-Revenue in the present case and, as such, the question of interference by this Court in the present proceedings under Section 260A of the Income Tax Act would not at all be justified."

14. In our view, the above said decisions rendered by the jurisdictional Hon'ble High Court and the co-ordinate 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 uphold the decision rendered by the learned CIT(A) on this issue.

15. In the result, the appeal of the revenue is dismissed.

Pronounced in the open court on 17/10/2023.

Sd/-
(RAHUL CHAUDHARY)
Judicial Member

Sd/-
(B.R. BASKARAN)
Accountant Member

Mumbai; Dated : 17/10/2023

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Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(Judicial)
4. PCIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai