IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E': NEW DELHI
BEFORE,
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

ITA No.1773/Del/2021
(ASSESSMENT YEAR 2010-11)

M/s Midway Exim Pvt. Ltd. B-4/71A, Lawrence Road New Delhi-110 035 PAN-AAECM 3980A	Vs.	Income Tax Officer Ward-16(4) New Delhi
(Appellant)		**(Respondent)**

Appellant by	Sh. Suresh Gupta, CA
Respondent by	Ms. Smita Singh, Sr. DR

Date of Hearing	31/10/2023
Date of Pronouncement	05/12/2023

ORDER

PER YOGESH KUMAR U.S., JM:

This appeal by Assessee is filed against the order of Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi ["Ld.CIT", for short], dated 01/10/2021 for Assessment Year 2011-12. Grounds taken in this appeal are as under:

"1. The Assessing Officer has erred in law in completing the assessment u/s 147/143(3) without issuing a notice u/s 143(2) of the Act against the return of income filed on 02.11.2017 in response to notice u/s 148 of IT Act issued by the AO and such non-compliance of the above mandatory requirement of law to issue notice u/s 143(2) of IT Act against return of income filed makes the resultant assessment order in appeal null and void-ab-initio.

2. Without prejudice to Ground No. 1, the Assessing Officer has erred in law in issuing a notice u/s 143(2) of the Act on 12.09.2017 before return of

income was filed on 02.11.2017 in response to notice u/s 148 of IT Act and such issue of mandatory notice u/s 143(2) before filling of return in response to notice 148 makes the resultant assessment order in appeal null and void-ab-initio.

3. The Ld. CIT(A) has erred both in law and circumstances of the case in upholding the reassessment proceedings initiated us 147 of the IT Act ignoring the contention of appellant that the proceedings have been initiated by the AO without application of independent mind on the material, if any, provided by the Inv. Wing of the department. In view of the above defects in the compliances the resultant reassessment proceedings are required to be set aside.

4. The Ld. CIT(A) has erred both in law and in facts of the case in upholding the impugned reassessment proceedings ignoring the fact that the sanction u/s 151 of IT Act as provided with the copy of the reason recorded shows mechanical satisfaction by sanctioning authority.

5. The impugned assessment is invalid and without jurisdiction as the said assessment is completed without complying with legal requirements of the provisions of section 147/148 of the Income Tax Act therefore such assessment is void ab initio and liable to be quashed.

6. The Ld CITCA) has erred both in law and circumstances of the cases in upholding the addition of Rs 7.54.01.000-us 68 of IT Act ignoring the fact that the said provision is not applicable on the realization from sale of investments.

7. Without prejudice to above Ground No.6, the Ed. CIT(A) has erred both in law and circumstances of the cases in upholding the addition of Rs.8.18.01.000/- u/s 68 of the IT Act including share application of Rs.64,00,000/- holding the credits as unexplained cash credit ignoring the fact that the assessee has discharged its initial onus u/s 68 of the IT Act explaining nature and source of the credits by filing requisite documents during assessment proceedings.

8. The appellant craves leave to add, delete, modify amend the above grounds of appeal with the permissions of the Hon'ble appellate authority."

2. The brief facts of the case are that, the assessee filed its return of income for AY 2010-11 on 16/03/2011 declaring income at Rs.7,090/-. The return filed by the assessee was processed u/s 143(3) of the Income Tax Act, 1961

('Act' for short) Act on 10/06/2011 and the case was not selected for scrutiny assessment. Subsequently, information was received from the Investigation Wing in respect of M/s Midway Exim Pvt. Ltd. along with relevant transaction details of bank account of the assessee company, wherein the total receipt of Rs.8,18,01,000/- was deposited into bank accounts maintained with Punjab National Bank. During the year, it is found that the assessee reflected very meager amount of income i.e., Rs.7,090/- in its return of income for AY 2010-11 compared to receipt of Rs.8,18,01,000/-, the assessment order came to be passed on 28/12/2017 u/s 147/143(3) of the Act by making addition of Rs.8,18,01,000/- u/s 68 of the Act by treating the credits of share application money/premium in the bank account of the assessee company as unexplained credits in the hands of the assessee under the provisions of section 68 of the Act.

3. Aggrieved by the assessment order, the assessee preferred an appeal before the Ld. CIT(A). The Ld. CIT(A) vide order dated 01/10/2011 upheld the addition made by the AO. As against the order of the Ld. CIT(A) dated 01/10/2021, the assessee preferred the present appeal on the ground mentioned above.

4. In Ground No. 1 & 2 the assessee challenged the reopening of the case u/s 147/148 of the Act. The Ld. Counsel for the assessee submitted that, the A.O. erred in law in completing the assessment u/s 147/143(3) by issuing the notice u/s 143(2) of the Act against the return of income filed on 02/11/2017

in response to notice u/s 148 of the Act issued by the A.O. and no such compliance of the above mandatory requirement of law to issue notice u/s 143(2) of the Act against return of income filed makes the impugned Assessment Order null and void. Further submitted that the A.O. erred in issuing notice u/s 143(2) of the Act on 12/09/2017 declared return of income was filed on 02/11/2017 in response to notice u/s 148 of the Act and such issuance of mandatory notice u/s 143(2) before filing of return in response to notice 148 makes the impugned assessment order null and void.

5. Per contra, the Ld. Departmental Representative relied on the orders of the Lower Authorities and submitted that the reopening has been done in accordance with law which requires no interference at the hands of the Tribunal.

6. We have heard both the parties and perused the material available on record. In the present case, the notice u/s 148 has been issued to the assessee on 30/03/2017 which was duly served upon the assessee. As per the said notice, the assessee was required to file return of income within 30 days from the receipt of the notice for the Assessment Year 2010-11, however, the assessee had not filed return of income and asked for the 'reason recorded for reopening of the assessment' vide letter dated 05/04/2017. The reasons recorded was furnished by the A.O. vide letter dated 07/07/2017, consequent to the same, the assessee filed objection for reopening of the assessment vide

letter dated 09/10/2017, the said objection of the assessee was also disposed by the A.O. vide letter dated 10-11/10/2017. Further, the notice u/s 143(2) of the Act was given to the assessee on 12/09/2017. In the meantime, the notice u/s 142(1) of the Act has been issued on 08/09/2017. Further, the assessee vide letter dated 02/11/2017, stated that the original return filed on 16/03/2011 has to be considered as the return filed in response to notice u/s 148 of the Act dated 30/03/2017. It is to be noted that the A.O. had already issued notice u/s 143(2) of the Act to the assessee on 12/09/2017 which was issued to the assessee after the lapse of time limit given to the assessee to file the return of income in response to notice issued u/s 148 of the Act on 30/03/2017. Now, the assessee wants to do the things indirectly which cannot be done directly. In our opinion, there is no credential to the letter filed by the assessee dated 02/11/2017 requesting the A.O. to treat the original return filed on 16/03/2011 as return field in response to notice u/s 148 of the Act. The law assists the person who is vigilant and not to the person who sleep over the matter. It is a well settled principle that a person having done wrong cannot take advantage of his own wrong and plead for bar of any law to frustrate the lawful trial by a Competent Court. The principle of Latin Maxim '*Nullus Commodum Capera Potest De Injuria Sua Propria*' applies to the assessee. Thus, the notice issued u/s 143(2) of the Act issued on 12/09/2017 is a valid notice given to the assessee so as to frame the assessment u/s 143(3) read with Section 147 of the Act. Being so, the various case laws relied by the assessee are of no assistance. Therefore, we find no merit in Ground No. 1 & 2

of the assessee, accordingly, the Ground No. 1 & 2 of the assessee are dismissed.

7. In Ground No. 3 pleaded that the Ld. CIT(A) has erred both in law and circumstances of the case in upholding the reassessment proceedings initiated us 147 of the IT Act ignoring the contention of appellant that the proceedings have been initiated by the AO without application of independent mind on the material, if any, provided by the Inv. Wing of the department and in view of the above defects in the compliances the resultant reassessment proceedings are required to be set aside.

8. In our opinion, while reopening the assessment, there is no requirement of conclusive satisfaction of the escapement of income and only prima facie opinion of escapement of income is required. In the present case, the A.O, had in his possession the primary facts supported by materials and it was for the A.O. to draw proper inference, whether there was any escapement of income or not. The Section 147 of the Act authorizes the A.O. to assess or reassess the income chargeable to tax if the A.O. has reason to believe the income for the relevant assessment year as escaped assessment. In the present case, the A.O. has cause or justification to know that the income had escaped assessment. After going through the facts and circumstances of the case, and the reasons recorded by the A.O., found that the income had been escaped from the assessment and at the stage of reopening, the final outcome of the

proceedings is irrelevant. At the initiation stage, what is required is reason to believe but not the established facts of escapement of income. At the stage of issuance of notice u/s 148 of the Act, the only question is whether there was relevant materials on record on which reasonable person could frame a requisite belief whether the material conclusively proved the escapement or not is the concerned at that stage. Because at that point of time the formation of belief by the A.O. is within the realm of subjective satisfaction. Being so, we do not find merit in the Ground No. 3 of the assessee, accordingly, Ground No. 3 of the assessee is dismissed.

9. In Ground No. 4 the Assessee contented that the Ld. CIT(A) has erred both in law and facts of the case in upholding the impugned reassessment proceedings ignoring the fact that the sanction u/s 151 of IT Act as provided with the copy of the reason recorded shows mechanical satisfaction by sanctioning authority.

10. It is found that Ground No. 4 is not emanated from the impugned order of the CIT(A) even if the Ground No. 4 has to be considered as additional Ground, there is no application for admission of additional grounds. Without prejudice to the same, u/s 151(1) of the Act no notice u/s 148 of the Act shall be issued by the A.O. after expiry of four years from the end of the relevant Assessment Year unless the PCIT or Chief Commissioner or Principal Commissioner or Commissioner is satisfied on the reasons recorded by the

A.O, that it is fit case for issuance of such notice. After considering the facts and circumstances of the case and the reasons recorded by the A.O., we find no infirmity in the order of the authority prescribed u/s 151 (1) of the Act. Thus, the Ground No. 4 is dismissed.

11. The Ground No. 5 is too general and the Assessee's Representative has not able to establish how reopening of the assessment is in violation of Section 147 read with Section 148 of the Act, accordingly, Ground No. 5 of the assessee is dismissed.

12. Ground No. 6 & 7 are on the merit of the case. The Ld. Counsel for the assessee submitted that the Ld. CIT(A) erred in upholding the addition of Rs. 7,54,01,000/- u/s 68 of the Act ignoring the fact that the said provision is not applicable on the realization from sale of investments and without prejudice the same submitted that the CIT(A) has erred in law in upholding the addition of Rs. 8,18,01,000/- u/s 68 of the Act including share application of Rs.64,00,000/- holding the credits as unexplained cash credit ignoring the fact that the assessee has discharged the initial onus u/s 68 of the Act explaining the nature and source of the credits by filing requisite documents during the assessment proceedings.

13. The Ld. Departmental Representative submitted that the assessee has not proved the three conditions of Section 68 of the Act by proving the burden of identity of the creditor, capacity of such creditor to advance/investor the

amount and the genuineness of the transaction, therefore, the Ld. A.O. rightly made the addition u/s 68 of the Act which has been confirmed by the CIT(A) which requires no interference.

14. We have heard both the parties and perused the material available on record. There was a credit of Rs. 8.18 crore which has been shown by the assessee at self realization of investment by the Company on account of share application money. The A.O. called for following informations:-

> *"i) Furnish details of share application money, i.e. copy of ITR, source of investment, bank account statement for the period 01.04.2009 to 31.03.2010.*
>
> *ii) Details of share premium during the year.*
>
> *iii) Details of share premium, i.e. valuation report of shares."*

15. The assessee had not furnished any details, there was a failure on the part of the assessee with regarding to furnishing the details of identity of the parties, to prove the capacity of the investor and also to prove genuinety of the transaction. The assessee filed confirmations before the A.O however failed to furnish any creditors who had paid the share application money and also not produced any cogent evidence to prove the creditworthiness of the share holders. It was also noticed by the A.O. that the assessee had not produced the Form of share application, share certificate, valuation of the share

premium, to support the claim of the assessee. Accordingly, the Ld. A.O. made the additions.

16. Before the CIT(A), the assessee explained that, out of Rs. 8.18 crores there are two components which are as under:-

(a) Share application money Rs. 64,00,000/-

(b) Sale of investment Rs. 7.74 crores

Total: 18.18 crores

It was stated by the assessee that, the assessee received the share application money in following parties:-

(i) M/s Devmuni Lease and Finance Ltd.

(ii) M/s Surakashi Portfolio Pvt. Ltd.

(iii) M/s Mahan Construction Pvt. Ltd.

The assessee had also filed copy of confirmation along with return of income and copy of the bank account. On examine the details filed by the assessee, the CIT(A) observed that there are a common pattern in the documents. The findings of the CIT(A) are mentioned as under:-

"All these confirmations have similar language.

2. In some cases, even date is not mentioned.

3. The returned incomes of the companies are very meagre as compared to investment made. Returned income is of the order of few thousands only, whereas investment is in Lakhs of Rupees.

4. Many of these companies has same address as that of appellant. Some other companies have some other same address.

5. The bank account also has a pattern that money does not stay for some reasonable time but usually withdrawn or transferred to another account either on the same day or with few days.

6. Most of the time, just before the issue of cheque, almost same amount is deposited by way of cash or by way of cheque (trail of which may ultimately lead to cash deposit in some account).”

The assessee had also filed copy of the confirmation before the CIT(A) and also other documents, the CIT(A) took the case of M/s Devmuni Lease and Finance Ltd. and based on the verification of the documents found as under:-

“(i) It has same address as that of appellant.
(ii) The confirmation is undated.
(iii) The return has been filed belatedly on 19.03.2011 (in the same week in which appellant filed its return on 16.03.2011)
(iv) The returned income is only Rs.10.480/- whereas investment made is Rs.6,00,000/-.
(v) Cheque of Rs 6,00,000/- was given to the appellant on 28.05.2009. On the same day, before presenting this cheque cash amount of Rs.5,00,000/- deposited in bank account.
(vi) This account was closed on 08.10.2009.”

17. The Ld. CIT(A) found that as per return and final accounts filed for the Financial Year 2009-10 (A.Y 2010-11) the last year money in share premium account was Rs. 1,90,000/- which was suddenly increased to Rs. 3,43,42,500/-. The face value of the share is Rs. 10/- whereas the premium is Rs. 190/-. The said pattern was found to be unbelievable as a company which is filing return of income of Rs. 7,090/- only, whose turnover is Rs. 8,52,419/-,commands so of premium, which defies of the logical of prudence. Thus, following the ratio laid down by the Jurisdictional High Court in the case of Pr. Commissioner of Income Tax Vs. NDR Promoters Pvt. Ltd. 410 ITR 397 (Del), wherein in the similar circumstances, the Delhi High Court has taken issue of premium of Rs. 40/- on the face value of 10 as one of key in upholding the addition made by the A.O. u/s 68. Thus, considering the fact that in the present case, having premium of Rs. 190/- and having not produced the investors for examination before the A.O., found that the transactions cannot be held as genuine. The Ld. CIT(A) while summaries the legal position as under:-

> *" (i) The burden of proof in respect of credit in books of account (with respect to Sec. 68) is on the assessee.*
>
> *(ii) Mere fact that amount has been received through banking channel is not conclusive proof*

(iii) Providing PAN, copy of return etc would not be sufficient for assessee to discharge burden of proof.

(iv) Under section 68 it is not sufficient for assessee to merely disclose address and identities of shareholders; it has to show genuineness of such individuals or entities

(v) If assessee received share capital/premium, however there was failure of assessee to establish creditworthiness of investor companies, AO can make addition in the hands of the assessee.

(vi) For making addition under section 68, AO would not be under any duty to further show or establish that monies emanated from coffers of assessee-company

(vii) It is the assessee that has to prove that an entry in the books of accounts does not bear the character of income

(viii) Loan transactions would not become genuine merely because assessee filed loan confirmations, copies of ledger account and other supporting evidence to justify transactions at fag end of assessment proceedings. The facts of the case cannot be considered in isolation with the ground realties. By analogy, this ratio would be applicable to any credit in books

(ix) PAN is not conclusive proof of identity as it is issued without de facto verification.

(x) Decision in case of Lovely Exports is not a binding precedent under Article 141.

(xi) In application of s.68 only explanation given by the assessee is not sufficient. The Assessing Officer is also required to be satisfied about the explanation offered by the assessee.

(xii) Doctrines of human probability, substance over form and colourable device as a method of tax evasion are valid principles."

18. Considering the fact that the assessee had failed to prove the three conditions wiz:- (i) The identity of the creditor, (ii) The capacity such creditor to additions the amount & (iii) The genuineness of the transaction, in our considered opinion, the CIT(A) committed no error in confirming the addition made by the A.O. u/s 68 of the Act, accordingly we find no merit in the Ground No. 6 & 7 of the Assessee's appeal, thus, Ground No. 6 & 7 of the assessee is dismissed.

19. In the result, the appeal of the assessee is dismissed.

Order Pronounced in the Open Court on 05th December, 2023.

Sd/-	Sd/-
(DR. B.R.R. KUMAR)	**(YOGESH KUMAR U.S.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 05/12/2023

Pk/R.N, Sr ps

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI