

**INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "B": NEW DELHI**

**BEFORE N.K. BILLAIYA, ACCOUNTANT MEMBER  
AND  
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

**ITA No. 3886/Del/2019  
Asstt. Year: 2015-16**

ITO, Ward-22(2) Room No. 249, C.R. Building, I.P. Estate, New Delhi PAN AAACS1226P	Vs.	Saivi Finance Pvt. Ltd. 10-B, 1st Floor, DDA SFS Pocket-A, Mayur Vihar, Phase-III, Delhi – 110 096
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by:	Shri Kapil Goel, Advocate
Department by :	Shri Vivek Kumar Upadhyay, Sr. DR
Date of Hearing	07/12/2023
Date of pronouncement	26/02/2024

**O R D E R**

**PER ASTHA CHANDRA, JM**

The appeal filed by the Revenue is directed against the order dated 27.02.2019 of the Ld. Commissioner of Income Tax (Appeals)-8, New Delhi (**"CIT(A)"**) pertaining to Assessment Year (**"AY"**) 2015-16.

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

*"1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition made by the AO of Rs. 4,00,00.000/- u/s 68 of the Income Tax Act.*

*2. Ld. CIT(A) was justified in deleting the additions made by AO ignoring the fact that statement of Sh. Nemchand Gupta as provided by the Investigation*

*Wing clearly shown that amount taken as share capital/ premium from M/s I-Tech Insurance Brokers Pvt Ltd is nothing but an accommodation entry."*

*3. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition made by the AO ignoring the fact that Shri Deepak Aggarwal used ID and fake signatures of Sh. Nemchand Gupta in the company i.e. M/s I-Tech Insurance Brokers Pvt Ltd."*

*4. The appellant craves leave to add, alter or amend any of the ground(s) of appeal before or during the course of hearing of the appeal."*

3. Briefly stated, the assessee company is a Non Banking Financial Company (NBFC) engaged in the business of providing loans to various clients. It filed its return for AY 2015-16 on 29.03.2017 declaring income of Rs. 22,27,390/-. The case was selected for scrutiny under CASS in the limited category. Statutory notice(s) were issued/served upon the assessee. In response, the assessee submitted details asked for by the Ld. Assessing Officer ("**AO**") who examined them.

3.1 The Ld. AO found that the assessee received Rs. 4,00,00,000/- as share capital/premium from M/s. I-Tech Insurance Brokers Pvt. Ltd. during the year. Based on information received from the Investigation Wing , the Ld. AO treated the said sum as an accommodation entry, though in reply to notice sent under section 133(6) of the Income Tax Act, 1961 (**the "Act"**) to I- Tech Insurance Brokers Pvt. Ltd. information asked for, namely ITR, bank statement etc. were received by the Ld. AO. The only requirement not met with was that the Director of the said company did not appear before the Ld. AO for recording his statement. Relying on the statement given by Shri Nem Chand Gupta, one of the Director of I-Tech Insurance Brokers Pvt. Ltd. before the Investigation wing, the Ld. AO treated the said sum as income from undisclosed sources and added the same to the income of the assessee under section 68 of the Act. An amount of Rs. 4 lakh has also been added as commission @1% on Rs. 4 crores to the income of the assessee under section 68 of the Act.

3.2 The Ld. AO thus completed the assessment on total income of Rs. 4,26,62,527/- including therein the aforesaid addition of Rs. 4 crores and Rs. 4 lakhs under section 68 of the Act on 27.12.2017 under section 143(3) of the Act.

4. Aggrieved, the assessee challenged the above addition before the Ld. CIT(A) who deleted them by observing and recording the following findings:-

**“4. Decision:** *The contention of the Appellant has been considered and the order of AO has also been perused.*

**4.1** *As noted in this case, the Appellant is in the business of Non-Banking Financial Company (NBFC) from last about a decade. Regarding the addition u/s 68 made by the AO, as per the details arguments made at the assessment proceedings as well as during appellate proceedings, It emerges that the appellant has provided ITR, Balance Sheet with all annexure Complete names and addresses of the Stakeholders and PAN/GIR details, Copies of Bank statements, Copies of bank a/c of the appellant, Certificate of Incorporation of the share applicants, Memorandum of Association of the share applicants, Share Transfer Details, entire set of Income tax and ROC related documents and other details to prove the identity, creditworthiness and genuineness with respect to the said share subscription. This is also acknowledged by the AO in the assessment order. Further, notice under section 133(6) of the Act were issued and duly served, which were duly complied by all the investors of appellant. On further Issuance of summons u/s 131 of the Act, it was duly served upon the investors or their principal officers and except one M/s I-Tech Insurance Brokers Pvt. Ltd., desired investors attended and given statement including statement of Director of Appellant Company also.*

*There was also an Information received from Investigation Wing, which along with some other documents, had been carrying a statement of one Sh. Nem Chand Gupta recorded on oath by Investigation Wing in the case of Sh. Deepak Agarwal & Sh. Mukesh Kumar being accommodation entry providers. Therefore, as per paragraph 6 of the order of AO, he has proceeded to make addition mainly on the reason that Rs.4,00,00,000/- received from M/s. I-tech Insurance Brokers Pvt Ltd which also corroborates with the documents furnished by the assessee and also by I-Tech Insurances Brokers Pvt Ltd u/s 133(6) visa-vis the report of the Investigation Wing and also taking into consideration the statement and bank accounts of Shri Nem Chand Gupta given/furnished before the Investigation Wing and also available on record, the amount received from I-Tech Insurance Brokers is being treated as income from undisclosed sources and added to the total income of the assessee u/s 68 of the IT Act, 1961. Although the AO has relied upon the statement of Sh. Nem Chand Gupta (recorded by the Investigation Wing), but he has neither discussed the contents of the statement in his assessment order, as to how the statement contains evidences against the appellant, nor supplied a copy of it to the appellant for filing his response. In this respect, it is also seen that AO has not controverted the factual material and documentary evidences placed by the appellant during the assessment proceeding and he could not bring anything contrary on record to negate the documentary*

*evidences furnished by the appellant except discussing about statement recorded by the Investigation Wing.*

*It is further seen and also found affirmed vide note sheet entry dated 23-12-2017, by the AO that the aforesaid statement of Sh. Nem Chand Gupta was confronted to the AR of the Appellant on that date, but according to AR, the copies thereof were not provided and the case was finally treated as discussed on 25-12-2017 in denial to opportunity of being heard.*

**4.2** *According to Section 68 of Income Tax Act 1961, 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 of the same or the explanation offered by him is not satisfactory in the opinion of A.O., the sum so credited may be charged to income tax as the income of the assessee of that previous year.*

*The basic precondition for the Section 68 is that the assessee should file a valid confirmation. Valid confirmation has no specific format but it must contain name, complete address of the lender and PAN of the lender. The confirmation so filed must indicate complete details of transactions (like mode- cash or cheque, with number date of cheque with bank details). The AO have right to demand the copy of bank account of the lender evidencing such transactions and the same needs to be filed. As far as the creditworthiness or financial strength of the creditor/subscriber is concerned, that can be proved by producing the bank statement of the creditors/subscribers showing that it had sufficient balance in its accounts to enable it to subscribe to the share capital. Once these documents are produced, the assessee would have satisfactorily discharged the onus cast upon him. Thereafter, it is for the Assessing Officer to scrutinize the same and in case he nurtures any doubt about the veracity of these documents, to probe the matter further. However, to discredit the documents produced by the assessee on the aforesaid aspects, there has to be some cogent reasons and materials for the Assessing Officer and he cannot go into the realm of suspicion. Thus element of credit worthiness and satisfaction of AO thereafter is subjective and requires more efforts/inquiry on the part of the AO to give a finding in the order that lender is not genuine or is not credit worthy.*

*Under the provisions of S. 68, no doubt, the initial onus is on the assessee that needs to be shifted to the satisfaction of the Assessing Officer by establishing the Identity, genuineness and creditworthiness of the above companies. However, it appears that the addition has been made on mere assumptions, surmises and perceptions of the AO, wrongly exercising discretion, ignoring established legal position on dynamic shifting of onus 68. AO has completely failed to bring any material on record, for discharging onus that shifted upon him when inspite of all the necessary supporting documents, confirmations, the addition has been made by AO on the basis of mere assumptions that these lenders are non-existent and bogus, even though notice was duly served on the company M/s. I-Tech Insurance Brokers Pvt. Ltd. The other necessary documents in support of its claim were also submitted to the AO, therefore, undoubtedly establishing that this company is existent, operational and working as on the current address also.*

**4.3** *As held in the case of **R. B. Mittal v. CAT 246 ITR 283 (AP)** In an enquiry u/s 68, the rule of audi alteram partem has to be observed and the assessee must be given a fair and reasonable hearing to discharge the burden cast on him u/s 68 of the Act. Further, it is settled law that in the matter of cash credit, the Initial onus lies on the assessee to prove the genuineness of the transaction along with the identity of*

*the lender/Investor and his creditworthiness. Having done so, the appellant in the Instant case has discharged the onus cast upon it. Beyond this, for the charge of unexplained cash credit to stick, the onus lies on the AO to disprove the claim of the assessee by establishing that the evidence filed by the assessee was false and by bringing new material on record and failure to do so Would vitiate the addition made on this count. Reference in this regard can be made the decisions in the case of **CIT v. Orissa Corporation Pvt. Ltd. 158 ITR 78 ITA NO.1722/Del/2011 (SC) and CIT v. Rohini Builders 256 ITR 360 (Guj.)**. It was also held in the case of **CIT v. Bedi & Co. P. Ltd. (1998) 230 ITR 580 (SC)** that where prima facie the inference on facts is that the assessee's explanation is probable, the onus will shift to the revenue to disprove it and the assessee's explanation in such case cannot be rejected on mere surmises. Further, it was held in **Khandelwal Constructions v. CIT (1997) 227 ITR 900 (Gau.)** that since the satisfaction of the AO is the basis for invocation of the powers u/S 68, such satisfaction must be derived from relevant factors on the basis of proper Inquiry by the AO and such Inquiry must be reasonable and Just.*

*It is also settled law that it is mandatory for the AO to confront the assessee with any material collected by the AO at the back of the assessee, and in case of statement of third party recorded at the back of the assessee, opportunity of cross examination has to be offered to the assessee, failing which the said material/statement etc. will be rendered on unreliable and additions made on the basis of such material/statement etc. shall be rendered illegal. Reference in this regard can be made to the decisions in the case of R. B. Shreeram Durga Prasad 176 ITR 169 (SC), 125 ITR 713 (SC), Jindal Vegetable (order of Hon'ble Delhi High Court in ITA no. 428 of 2007, 174 Taxman 440 (Raj.) and Laxman Bhal Patel (order of Hon'ble Gujarat High Court dated 22.07.2008 in ITR no. 41/1997). 4.3.5. Further, in the case of N.P. Garodia (order dated 13.01.2009 of Hon'ble P & H High Court in ITA no. 808 of 2008).*

*In the case of Brij Pal Sharma (order dated 17.02.2009 in ITA no. 685 of 2008 of Hon'ble P & H High Court) It was held that where the assessee provides identity and details pertaining to the lenders/creditors and is unable to produce them and requests the AO to issue summons u/s 131 for their attendance, it is the duty of the AO to issue such summons, failing which the addition would get deleted. It is also held in **CIT v. Orissa Corporation Pvt. Ltd. 158 ITR 78 (SC) and Anis Ahmed 297 ITR 441 (SC)** that mere non- production of the lender/shareholder cannot be a ground for making addition u/s 68.*

**4.4** *In the instant case, the AO has not dealt with any of the submissions of appellant as to why AO does not believe the confirmations and other documents filed from share holders copy of acknowledgement of ITR, Balance Sheet with all annexure and Bank Statement. AO did not make any further enquiry on these new sets of facts given by appellant. AO has failed to shift back the onus on appellant once the appellant furnished the required details. More so, now it is well settled legally that mere because lender failed to attend in response to summons issued, cannot be a ground to treat the receipt as non-genuine. In this case appellant has proved the identity of the company who are having a valid PAN, have an active Status at ROC and Acknowledgement of ITR filed and current assessments being done simultaneously when the assessment under question was being finalized. All these evidences cannot be brushed aside without any further adverse material being placed on record by AO.*

**4.5** *The burden of proof is fluid for the purposes of Section 68. Once assessee has submitted basic documents relating to identity, genuineness of transaction and creditworthiness of the creditors then AO must bring further adverse material on record by more inquiry before invoking Section 68. Further, the AO has not brought out on record any material or any such corroborative evidence to substantiate that the amount deposited as share capital is bogus or the companies subscribing for shares are conduit for providing such entries and bogus. The investors have duly confirmed to have given such amount, through banking channels alongwith the bank details. No further enquiry or investigation has been carried out during assessment proceedings through banks to find out the trace of movement of funds, which has been referred by the AO in the assessment order as general modus operandi of a accommodation transaction for providing funds. Having bank account in the same branch and common address of investors in some cases, high premium payments, substantially low net asset or worth by Investors, movement of funds from different accounts can be a good basis to have suspicion regarding bogus entry operations and cases of capital formation through routing of such entries, however to conclude the same for affecting an addition, it is necessary that it is to be substantiated beyond doubt through investigation/enquiries or material brought on record. The said pattern per se cannot be deemed and held that appellant has introduced its own funds through different bogus entities by introducing cash, when such linkages of fund movement has not been brought on record. The AO has mentioned the standard pattern pertaining to the case of entry operator but nothing in particular brought out on record to state that how it is applicable in the case of appellant to record a finding that it is an introduction of unaccounted money of the appellant, routed through such share subscribers.*

**4.6** *It is relevant to refer to a decision in the case of **Ritu Kamal Singhal, Mumbai Vs. ITO 24(3)(4), ITAT Mumbai dated 01-02-2019 in ITA No. 3017/mum/ 2018** which propounded as under;*

*6. In the present case, the assessee has brought on record, PAN of the loan creditor and evidence of filing of Income Tax return. The AO has also noted that notice u/s 133(6) was issued to the lender company and reply is also received. Hence, in my considered opinion, the assessee has established the identity of the loan creditor in question. In respect of creditworthiness of the said loan creditor, the assessee has brought on record, the audited balance Sheet of the said company, relevant bank statement and as per this balance sheet, the net worth of this company is Rs. 83.34 lacs and the loan amount in question is only Rs.20 lacs. In the light of the same, it has to be accepted that the creditworthiness of the said loan creditor is also established at least prima facie. Regarding genuineness of the transaction in question, the assessee has brought on record bank statement and loan confirmation to establish that the loan was received by account payee cheque and it was returned in the next year by account payee cheque. Hence, genuineness of the transaction in question is also established at least prima facie. The AO has come to a different conclusion mainly on the basis of the statement of Shri Bhanwarlal Jain Group without providing to the assessee an opportunity of cross examination. Hence, it is seen that except the statement of Shri Bhanwarlal Jain Group, there is no adverse material brought on record by the AD. No shortcoming is pointed out in various documents brought on record by the assessee to establish the identity and creditworthiness of the loan creditor and genuineness of the transaction as noted above. Since, the AC has not provided an opportunity of cross examination of Shri Bhanwarlal Jain Group,*

*the adverse statements of that group cannot be used against the assessee. I hold so by respectfully following this judgment of Hon'ble apex court rendered in the case of Kishan Chand Chellaram vs. CIT (Supra), Once, I exclude the same. The addition made by the AO cannot be sustained in the facts of the present case as discussed above.*

*It has been held by the Apex Court in the case of **CIT vs. Sunita Dhadha (SC) [06-06-2018]**, wherein it has been affirmed that*

*"143(3)/ 292C. if the AD wants to rely upon documents found with third parties, the presumption u/s 292C against the Assessee is not available. As per the principles of natural Justice, the AD has to provide the evidence to the Assessee & grant opportunity of cross- examination. Secondary evidences cannot be relied on as if neither the person who prepared the documents nor the witnesses are produced. The violation of natural justice renders the assessment void. The Department cannot be given a second chance (All judgements considered) leading to aforesaid conclusion and any deviation from the same be treated as contempt of court by all means.*

**4.7** *Therefore, looking to the peculiar facts and circumstances of this case and in law, It emerges from the aforesaid discussion that with respect to the documents, evidences submitted by the appellant coupled with the case laws relied upon in this respect, the appellant has duly established the identity, creditworthiness and genuineness of transaction with respect to the shareholders of Appellant company. On the other hand, the AO could not bring on record any clinching and independent evidence to show that the amount received from M/s I-Tech Insurance Brokers Pvt. Ltd., is a bogus transaction or appellant's own money Introduced in cash, through stakeholder company. Though the AO has relied upon the statement of Sh. Nem Chand Gupta (recorded by the Investigation Wing), but he has neither discussed the contents of the statement in his assessment order, as to how the statement is incriminating against the appellant, nor supplied a copy of It to the appellant for filing his response, as a principle of natural justice. Further to this, it has also been established by the Appellant Company that no opportunity of being heard and cross examination of the witness was afforded, whose statement was found to be recorded in other case at the back of the appellant and used by the AO. Therefore, based on the discussions above, it is held that addition with regard to the investor company for Rs. 4,00,00,000/- is not tenable and deserves to be deleted.*

*In light of the above peculiar facts, the addition made by the AO on this account is unsustainable. I find that the onus of the appellant stands discharged and there is no justification in making an addition in the case of the appellant. Therefore, the addition of Rs. 4,00,00,000/- made by the AO u/s 68 of the Income Tax is hereby deleted. The other addition of Rs. 4,00,000/- as commission, being consequential in nature is also deleted herewith."*

5. The Revenue is dissatisfied and is before the Tribunal. All the grounds relate thereto.

6. The Ld. Sr. DR relied on the order of the Ld. AO and drew our attention to para 4 thereof. He submitted that the content of the statement of Shri Nem Chand Gupta is not forthcoming either from the order of the Ld. AO nor that of Ld. CIT(A). Therefore, the content of Shri Nem Chand Gupta's statement remains unverified. The Ld. Sr. DR further submitted that the Ld. CIT(A) has allowed relief to the assessee on the basis of documentary evidence furnished by the assessee. The Ld. AO was also not present before the Ld. CIT(A) during the appellate proceedings.

7. The Ld. AR submitted that the share subscriber (M/s. I-Tech Insurance Brokers Pvt. Ltd.) has responded to inquiry under section 133(6) of the Act and provided all relevant documents to the Ld. AO in assessment proceedings. He further submitted that statement of Mr. Nem Chand Gupta has never been confronted to the assessee much less offered for cross examination. Moreover, no independent inquiry has been made during assessment proceedings from Mr. Nem Chand Gupta. The documentary evidences filed in support of share capital remained unblemished. For these reasons the Ld. AR supported the order of the Ld. CIT(A).

8. We have given careful thought to the rival submissions and perused the records. It is obvious from the assessment order that the impugned addition(s) under section 68 of the Act have been made solely on the basis of statement of Mr. Nem Chand Gupta recorded by the Investigation Wing of the Income Tax Department prior to assessment in the case of the assessee. Adverse inference has been drawn by the Ld. AO from the statement of Mr. Nem Chand Gupta. Before the Ld. CIT(A) in written submission dated 11.02.2019 it was stated that the Ld. AO had let AR of the assessee company to read the statement of Mr. Nem Chand Gupta once while sitting before him and no copy thereof was provided so that the assessee could revert on the same. It was the grievance of the assessee that sufficient opportunity of being heard was not provided to the assessee on the issue of information from Investigation Wing regarding statement of Mr. Nem Chand

Gupta. It was also stated that statement of Director of the assessee company was recorded by the Ld. AO but nothing adverse could be found. Still the Ld. AO made the impugned additions on the basis of statement of Mr. Nem Chand Gupta with assigning a reason that director of M/s. I-Tech Insurance Broker Pvt. Limited did not appear before him for recording his statement.

9. Before the Ld. CIT(A) in written submission dated 17.01.2019 the assessee, interalia pointed out that no report of Investigation Wing and statement of Mr. Nem Chand Gupta have been provided to the assessee to ensure authentication of documents collected in different search and seizures, at the back of the assessee company. It was further stated that as a corollary, the assessee must also be provided with an opportunity to cross-examine such deposed persons whose statements have been used against the assessee. There is denial of principle of natural justice.

10. At page 6 of the appellate order the Ld. CIT(A) has stated that although the Ld. AO has relied upon the statement of Mr. Nem Chand Gupta (recorded by the Investigation Wing), but he has neither discussed the contents of the statement in his assessment order, as to how the statement contains evidences against the assessee, nor supplied a copy of it to the assessee for filing its response. The Ld. CIT(A) went on to observe further that in this respect, it is also seen that the Ld. AO has not controverted the factual material and documentary evidences placed by the assessee during the assessment proceedings and that he could not bring anything contrary on record to negate the documentary evidences furnished by the assessee except discussing about statement recorded by the Investigation Wing.

11. Again in para 4.7 at page 11 of the appellate order the Ld. CIT(A) has recorded the finding that though the Ld. AO has relied upon the statement of Mr. Nem Chand Gupta (recorded by the Investigation Wing) but he has neither discussed the contents of the statement in his assessment order, as to how the statement is incriminating against the assessee, nor supplied a

copy of it to the assessee for filing its response, as a principle of natural justice. The Ld. CIT(A) went on to record the finding that, further to his, it has also been established by the assessee company that no opportunity of being heard and cross examination of the witness were afforded whose statement was found to be recorded in other case at the back of the assessee and used by the Ld. AO.

12. Having said all this, the Ld. CIT(A) in our view ought to have brought all these facts and his findings to the notice of the Ld. AO and obtained his response by asking for remand report which the Ld. CIT(A) did not do. If this course of action had been taken during the appellate proceedings the assessee would have been satisfied. The assessee would have got opportunity to have his full say on the issue before the Ld. AO in remand proceedings.

13. The Revenue's allegation is that the Ld. CIT(A) ignored the fact that statement of Mr. Nem Chand Gupta as provided by the Investigation Wing shows clearly that amount taken as share capital/premium from M/s. I-Tech Insurance Brokers Pvt. Ltd. is nothing but an accommodation entry. Another allegation of the Revenue is that the Ld. CIT(A) ignored the fact that Shri Deepak Aggarwal used ID and fake signatures of Mr. Nem Chand Gupta in the company M/s. I Tech Insurance Brokers Pvt. Ltd. On perusal of the appellate order we do not find any whisper, though eloquently mentioned in the assessment order.

14. In the light of the facts and circumstances set out above, we are of the view that it would be expedient if the matter is restored back to the file of the Ld. AO for decision afresh. Accordingly, we set aside the order of the Ld. CIT(A) and restore the matter back to the file of the Ld. AO with a direction to him to provide to the assessee copy of the statement of Mr. Nem Chand Gupta recorded by the Investigation Wing and any other material gathered at the back of the assessee used by him against the assessee and allow

cross examination of witnesses whose statements have been relied upon. Needless to say that adequate opportunity shall be allowed to the assessee to have its full say. We order accordingly.

15. In the result, the appeal of the Revenue is treated as allowed for statistical purposes.

**Order pronounced in the open court on 26<sup>th</sup> February, 2024.**

**sd/-**

**(N.K. BILLAIYA)  
ACCOUNTANT MEMBER**

**sd/-**

**(ASTHA CHANDRA)  
JUDICIAL MEMEBR**

Dated: 26/02/2024  
**Veena**

Copy forwarded to-  
Applicant  
Respondent  
CIT  
CIT (A)  
DR: ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	