

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH KOLKATA
BEFORE SHRI SONJOY SARMA, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.1161/Kol/2023
Assessment Years: 2011-12**

Silkina Commodeal Pvt. Ltd. 6, Waterloo Street, Kolkata- 700069. (PAN: AA ECS5627C)	Vs.	Income Tax Officer, Ward- 3(3), Kolkata.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Siddarth Agarwal, Advocate
Respondent by : Shri B. K. Singh, JCIT, Sr. DR

Date of Hearing : 22.01.2024
Date of Pronouncement : 06.03.2024

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld.CIT(A), National Faceless Appeal Centre (NFAC), Delhi, vide order No. ITBA/NFAC/S/250/2023-24/1057291238(1) dated 23.10.2023 passed against the assessment order by ITO, Ward-3(3), Kolkata u/s.147/143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 04.12.2018 for AY 2011-12.

2. In this appeal the issue is relating to challenging the validity of reopening of the case u/s. 147 of the Act and confirming the addition made by the Ld. AO to the tune of Rs.50,00,000/- as unexplained cash credit u/s. 68 of the Act though the transactions are in the nature of sale of shares.

3. Brief facts of the case are that assessee filed its original return of income on 06.01.2012, reporting total income at Rs.1,33,357/-.

Notice u/s. 148 of the Act dated 07.03.2018 was issued and served on the assessee after recording the reasons to believe for the same. Copy of reasons to believe are placed at pages 21 and 22 of the paper book filed by the assessee. From the perusal of the said reasons to believe it is noted that information was received from the DIT (Inv.), Kolkata that assessee had suspicious bank transactions with Jamakharchi companies. It is noted by the Ld. AO that assessee had received Rs.50,00,000/- from one fictitious shell company namely M/s. Suniyojit Agency Pvt. Ltd. on different dates by selling the shares of the following companies:

a)	Vineet Processing Pvt. Ltd.	Rs. 30,00,000/-
b)	Skylark Marketing Pvt. Ltd.	Rs. 10,00,000/-
c)	SMS Tradways Pvt. Ltd.	<u>Rs. 10,00,000/-</u>
	Total	Rs. 50,00,000/-

3.1. According to Ld. AO, no explanation was given by directors of such fictitious company regarding cash deposit which does not commensurate with their known source of income or transaction. Accordingly the Ld. AO formed the reason to believe that undisclosed income of assessee was routed through such fictitious jamakharchi companies, to bring into books of account of the assessee an income of assessee which has escaped assessment u/s. 147 of the Act.

3.2. Assessee was asked to file its explanation who according to the Ld. AO failed to explain the nature of transaction. Ld. AO noted in the impugned assessment order that assessee failed to furnish the complete details of the aforesaid fictitious jamakharchi companies from whom Rs.50,00,000/- was received by it during the year under consideration. Hence, the identity and creditworthiness of the shareholders and genuineness of the transaction could not be verified. He thus, completed the assessment and the entire amount of money

received on account of issue of shares along with the quantum of premium paid for issue of shares was added as unexplained cash credit. The total income was assessed at Rs.51,33,260/-. Aggrieved, assessee went in appeal before the Ld. CIT(A) contesting both on the legal issues as well as on the merits of the case.

4. Assessee submitted before the Ld. CIT(A) that the amount received by the assessee is towards sale of investment which had been duly accounted and reported in its audited financial statement. Assessee very categorically pointed out that for AY 2011-12, the addition has been made by the Ld. AO in respect of amount of Rs.50,00,000/- received from M/s. Sunijyoti Agency Pvt. Ltd. towards sale of share of the following three companies :

a)	Vineet Processing Pvt. Ltd.	Rs. 30,00,000/-
b)	Skylark Marketing Pvt. Ltd.	Rs. 10,00,000/-
c)	SMS Tradways Pvt. Ltd.	<u>Rs. 10,00,000/-</u>
	Total	Rs. 50,00,000/-

4.1. Assessee very categorically submitted that assessee company is an investment company dealing in purchase and sale of shares. It had made transaction with M/s. Sunijyoti Agency Pvt. Ltd. amounting to Rs. 50,00,000/- by selling the shares of the aforesaid three companies. According to the assessee, it is a case of sale of investment in shares held by the assessee which has been reported by it in its audited financial statement of the preceding years. Thus, the investments carried in the Balance Sheet from the earlier years were sold during the year to the aforesaid company against which the amounts were received and credited into the bank account of the assessee. It is not a case of issue of shares by the assessee to this company. It is not an amount received towards subscription of share

capital and share premium from this company as stated by the AO while making the addition.

4.2. It was submitted that the reasons to believe recorded no where as to on what account assessee had received the money from the company which has been alleged to be fictitious shell company. While drawing the reasons to believe, AO has arrived at a conclusion based on explanation not given by the directors of the said alleged company over which assessee had no control. It was claimed that the reasons recorded are vague and not proper. There is no satisfaction about the creditworthiness or otherwise of the information which has not been verified as to its correctness but has been merely accepted as truth in a mechanical manner. According to the assessee reopening was initiated solely on the basis of information received from the DIT (Inv.), Kolkata without independent application of mind by the AO on the information so received.

4.3. On the merits of the case, assessee had submitted that amounts were received through proper banking channel against sale of shares hold as investment which had been duly accounted and reported in its audited financial statements coming as opening balances from the earlier years. In this respect, assessee has furnished the following documents:

- (i) ITR Acknowledgment, computation of income and final accounts,
- (ii) Sale bills,
- (iii) Ledger accounts of the companies from whom the amounts were received.

4.4. Assessee also submitted that the additions have been made on the basis of surmises and conjectures without bringing any thing positive and cogent by the AO. The additions have been made by

holding this amount received on account of issue of shares along with share premium which is totally devoid of any merit.

4.5. Assessee had placed reliance on several judicial precedents in respect of the transaction undertaken by it which has been added by applying provisions of section 68, to demonstrate that once the amount received is on account of sale of investment, provisions of section 68 would not apply and, therefore, the additions made are not justified. The judicial precedents relied upon by the assessee are listed as below:

i) In the case of Tradelink Carrying (P.) Ltd. v. I.T.O., Ward 4(1), Kolkata [2020] 113 taxmann.com 520 (Kolkata - Trib.), it laws held that:

"The phraseology of section 68 is clear. The Legislature has laid down that in the absence of a satisfactory explanation, the unexplained cash credit may be charged to income-tax as the income of the assessee of that previous year. In this case the legislative mandate is not in terms of the words 'shall' be charged to income-tax as the income of the assessee of that previous year. The Supreme Court while interpreting similar phraseology used in section 69 has held that in creating the legal fiction the phraseology employs the word "may" and not "shall". Thus the un-satisfactoriness of the explanation does not and need not automatically result in deeming the amount credited in the books as the income of the assessee as held by the. Supreme Court in the case of CIT v. Smt. P. K. Noorjahan [1999] 103 Taxman 382/237 ITR 570. We note that against the said decision of Hon'ble Gujarat High Court the special leave petition filed by the Revenue has also been dismissed by the Hon'ble Apex Court."

ii) In the case of ITO v. Goodwill Cresec Pvt. Ltd. in I.T.A. No. 4151/ Del/2010, order dated 25.01.2012, held this issue in favour of the assessee:

"12 In the present case, the amount in question was neither a loan or the deposit, it was also not on account of share application money, the said amount was on account of sale of investment therefore the provisions of Section 68 of the Act were not applicable and the AO was not justified in making the addition. In our opinion, the Ld. CIT(A) rightly deleted the addition made by the AO. "

iii). The Delhi 'G ' Bench of the Tribunal in ITA No. 2264/Del/2013 in the case of ITO vs M/s. Srishti Fincap Pvt. Ltd. Order dated 07.10.2015 held the issue in favour of the assessee as :

"9. From the facts and circumstances of the case, submissions made by the parties and case law cited in this case, we are of the considered view that no ground is made out to interfere into the order passed by Ld. CIT(A) for the following reasons:

i) that in the instant case, A.O. has merely acted upon information supplied by DIT (Inv.) and has not preferred to analyze the previous returns filed by the assessee to make out if he has already disclosed the purchase of shares in question.

ii) that from the perusal of copies of assessment proceedings initiated u/s 147 read with section 143(3) of the Act, pertaining to Assessment Year 2003-04 lying at pages 45-46 of the ledger book, in ledger account showing purchase of shares qua the Assessment Year 2003-04 lying at page 34 which have never been disputed by the A.O, it is abundantly clear that the assessee had purchased the shares in Assessment Year 2003-04.

iii) that when the assessee has sold the shares for Rs.25,10,000/- undisputedly purchased by him in Assessment Year 2003-04, no adverse inference can be drawn against him ... "

iii(a) The Coordinate Bench of ITAT Delhi also relied upon previous precedents set in regard the issue involved relating to the assessee M/s. Srishti Fincap Pvt. Ltd.

" ... vii) In I.T.O. Vs Jatin Investment Pvt. Ltd. (supra), it is held that when the assessee purchased the shares in earlier year which were shown as investment in the books of account and reflected in the balance sheet then the assessee sold certain investments and accounted for the profit or loss, the provisions of Section 68 of the Act were not applicable.

viii) Similarly, Hon'ble Jurisdictional High Court in the case cited as CIT Vs Vishal Holding and Capital Pvt. Ltd. vide order dated 9th August, 2010 upheld the order dated 30.07.2009 of the ITAT in 1. TA. No. 1788/Del/2007 for the Assessment Year 2000-2001 wherein the order of the Ld. CIT(A) making the similar deletion was upheld by observing in para 6 as under:-

"We are of the view that the assessee had produced copies of accounts, bills and contract notes issued by M/s. MKM Finsec Pvt. Ltd., and had been maintaining books of account as per Companies Act. The assessee had also demonstrated the purchase and sale of shares over a period of time as seen from the balance sheet. In our opinion, the Assessing Officer has simply acted on the information received from the Investigation Wing without verifying the details furnished by the assessee. The assessee has also produced best possible evidence to support its claim. Consequently the addition made by the Assessing Officer cannot be sustained."

iii(b) The Coordinate Delhi Bench of the ITAT in the case of ITO v. Jatin Investment Pvt. Ltd. in ITA No.4325 & 4326/Kol/(2009 order dated 27.05.2015 held as follows :-

"11. In his rival submissions, the Ld. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that the assessee was having investment in shares etc. which were duly shown on the

asset aside of the balance sheet, out of those investments some were sold and few new were purchased and if there was any gain on the sale the same was offered for taxation. It was further submitted that in earlier year 13 4325 & 4326/Del/2009 under similar circumstances, the case was reopened u/s 147 of the Act and the addition made by the AO was deleted by the I.T.A.T. It was further submitted that the assessee sold the shares which were earlier purchased in different years and duly shown in the balance sheet of the respective years and that the assessee had shown the sale proceeds in the books of accounts, the investments were reduced after making the sales. It was contended that there was no obligation under the law that the assessee was required to prove the source of payee. It was further contended that the AO had not rejected the books of accounts and the purchases were duly accepted so there was no reason to doubt the sales. It was submitted that the case of the assessee is squarely covered by the decision of this bench of the Tribunal in the case of ITO vs. M/s Vishal Holding and Capital Pvt. Ltd. in ITA no. 1788/Del/2009 order dated 17.07.2009 which has been upheld by the Hon'ble Jurisdictional High Court as reported in (2011) 200 Taxman 186 (Delhi). It was further, submitted that the issue is also covered by the order of the ITAT, Delhi Bench in the case of ITO vs. Goodwill Cresce Pvt. Ltd. in ITA No. 4151/Del./2010 order dated 25.01.2012. Reliance was also placed on the following cases laws :-

- "1. CIT vs. Sh. Udit Narain Aggarwal, ITA No. 560 of 2009, dt. 12.12.2012
2. CIT vs. Sudeep Goenka, ITA No. 468 of 2009, dt. 3.01.2013.
3. CIT vs. Anirudh Narain Aggarwal, ITA No. 195 of 2010, dt. 16.01.2013."

It was pointed out that the same issue has been decided by the ITAT in assessee's own case in I. T. A. T No. 1584/Del./2009 for the A. Y. 2002-03 vide order dated 13.11.2009, in assessee's favour (copy of the order was furnished which is placed on record)

12. We have considered the submissions of both the parties and gone through the material available on the record. In the present case, it is noticed that the assessee purchased the shares in earlier years which were shown as investment in the books of accounts and reflected in the "Asset Side" of the "Balance Sheet", out of those investments (copy which is placed at page no. 23 and 24 of the assessee's paper book), the assessee sold certain investments and accounted for the profit/loss and offered the same for taxation. In the present case, the amount in question was neither a loan or the deposit, it was also not on account of share application money, the said amount was on account of sale of investment therefore the provisions of Section 68 of the Act were not applicable and the AO was not justified in making the addition. In our opinion, the Ld. CIT(A) rightly deleted the addition made by the AO.

13. On a similar issue the Hon'ble Jurisdictional High Court in the case of CIT vs. Vishal Holding and Capital Pvt. Ltd. vide order dated 9th August, 2010 upheld the order dated 30.7.2009 of the ITAT in ITA no. 1788/De1/2007 for the assessment year 2000-2001 wherein the order of the Ld. CIT(A) making the similar deletion was upheld ... "

- iv). The Hon'ble Delhi High Court in the case of Principal C.I. T. v. Jatin Investment Pvt. Ltd. 12017] TMI 342 (Delhi) affirmed the

decision of the Delhi ITAT (supra) in favour of the assessee and held as follows :-

"4. The ITAT agreed with the conclusions of the CIT (A) upon its independent examination of the record. It also discounted the Revenue's submissions that the investment shown in the book of accounts and reflected as assets in the side of the balance sheet, should have been properly treated and that in the absence of such treatment Section 68 applies. The ITAT rejected this contention and held - based upon the principles enunciated in CIT v. Vishal Holding & Capital Pvt. Ltd. (order of this Court dated 9.8.2010) that the invocation of Section'68 in the circumstances is unwarranted.

5. Learned counsel for the Revenue reiterated the grounds cited in some of the contentions made before the ITAT. Learned counsel especially emphasized on the submission that the incorrect reflection of the receipts in the balance sheet belied the true nature of the receipts as a justification for the application of Section 68 .

6. The ITAT in our opinion quite correctly appreciated the law and its application by the first appellate authority, i.e., CIT(A). Having regard to the facts and the nature of the analysis based upon the decisions of this Court, as well as the reliance on various decisions with respect to the true nature of section 68, we are of the opinion that no question of law arises; the appeals are accordingly dismissed."

v). In the case of Nemi Chand Kothari v. CIT [2004] 136 Taxman 213 [2003] 264 ITR 254, the Hon'ble Guwahati High Court has thrown light on another aspect touching the issue of onus on assessee under section 68, by holding that the same should be decided by taking into consideration the provision of section 106 of the Evidence Act which says that a person can be required to prove only such facts which are in his knowledge. The Hon'ble Court in the said case held that, once it is found that an assessee has actually taken money from depositor/lender who has been fully identified, the assessee/borrower cannot be called upon to explain, much less prove the affairs of such third party, which he is not even supposed to know or about which he cannot be held to be accredited with any knowledge. In this view, the Hon'ble Court has laid down that section 68 of Income-tax Act, should be read along with section 106 of Evidence Act.

5. After considering the submissions made by the assessee, Ld. CIT(A) observed, *“the conclusion of Ld. AO that share subscriber company was a shell company having no business and creditworthiness for purchasing the share of the appellant company for Rs.50,00,000/-.”* Aggrieved, assessee is in appeal before the Tribunal.

6. Ld. Counsel for the assessee reiterated that the reasons to believe recorded by the Ld. AO for invoking the reopening u/s. 147 are general and vague without pointing out as to the correct nature of transaction. The real and correct nature of transaction undertaken by the assessee was sale of shares held by it as investments which were duly reported and accounted in its audited financial statement giving their opening balance from the preceding years. Thus, the reasons recorded are general and vague which tantamount to conduct fishing and roving enquiries, without verifying the records of the assessee. This demonstrates non-application of mind while recording of reasons to believe on the information received from DIT (Inv.), Kolkata.

7. On the merits of the case, ld. Counsel reiterated the facts which has already been stated above and he demonstrated from the audited financial statements that the transaction undertaken by the assessee in the year under appeal is towards sale of shares held as investment. He referred to the list of companies in which assessee held the shares as investments duly reported in its audited balance sheet. The addition made by the Ld. AO and confirmed by the Ld. CIT(A) is on the misconceived premise that the amount received by the assessee is towards issue of its share capital along with share premium and the company from whom the amount has been received is share subscriber. Thus, the addition made is not justified and ought to be deleted.

8. Per contra, Ld. Sr. DR placed reliance on the orders of the authorities below. Ld. DR submitted that assessee did not comply

with the notice issued u/s. 142(1) nor any rebuttal was furnished against the contention of the Ld. AO and, therefore, addition has been made in the hands of the assessee.

9. We have heard the rival contentions and perused the material available on record. Admittedly, it is a fact on record that the transaction undertaken by the assessee in the year under appeal before us is in respect of sale of shares held as investment which had been duly reported in the audited financial statements giving their opening balances from the preceding years. The reasons recorded by the assessee for reopening the case do not in any way point out towards this nature of transaction. They only suggest that assessee had received the amounts from the said company which has been alleged to be fictitious shell company. We have also gone through the documents placed in the paper book which evidently demonstrates that the assessee has sold its shares held as investment and the amount has been received through proper banking channel from the company against the said sale of shares. We have also taken note of the basis of addition which has been noted as amount received towards issue of share capital and share premium by the assessee to the respective company from whom the amount is received as not a correct fact.

9.1. Identical issue come up before the Tribunal in the assessee's own case for AY 2010-11 and AY 2012-13 in ITA Nos. 1437/Kol/2023 and 1439/Kol/2023 in a different constitution of the Bench. Both these appeals by the assessee have also been allowed in favour of the assessee vide order dated 05.03.2024. The observations and findings arrived at by the Coordinate Bench in these two appeals are followed in this present appeal also.

9.2. Considering all these discussions and the facts already noted above, as well as after perusing the judicial precedents extracted

above, we hold that the reassessment proceeding initiated u/s. 147 are not in accordance with law. Further, on the merits of the case, assessee has evidently demonstrated the nature and source of the amount received in its bank account which is against the investment held by it in the Balance sheet. Accordingly, grounds taken by the assessee filed on the legal and merits of the case are allowed.

10. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 06th March, 2024

Sd/-
(Sonjoy Sarma)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 06th March, 2024

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent.
 3. CIT(A), NFAC, Delhi
 4. CIT
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata