

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

**BEFORE SHRI SAKTIJIT DEY, VICE PRESIDENT  
AND  
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

**ITA No. 1998/DEL/2023  
Assessment Year: 2018-19**

<b>DCIT, Circle-4(2), New Delhi.</b>	<u>Vs</u>	<b>CDS Infra Projects Limited, B-94, Okhla Industrial Area, Phase-II, New Delhi-110020.</b>  <b>PAN- AADCC0273D</b>
<b>APPELLANT</b>		<b>RESPONDENT</b>
<b>Assessee represented by</b>	Shri Ved Jain, Adv.; & Ms. Supriya Mehta, CA	
<b>Department represented by</b>	Shri T. James Singson, CID(DR)	
<b>Date of hearing</b>	06.02.2024	
<b>Date of pronouncement</b>	29.04.2024	

**ORDER**

**PER M. BALAGANESH, AM:**

This appeal, by the Revenue, is directed against the order of National Faceless Appeal Centre (NFAC), Delhi, dated 10.05.2023, arising out of order dated 04.09.2021, passed by the NFAC u/s 143(3) of the Income-tax Act, 1961, pertaining to the assessment year 2018-19.

2. The only issue to be decided in this appeal is a to whether the learned CIT(A) was justified in deleting the addition of Rs. 25 crores on account of mobilization advance in the facts and circumstances of the instant case.

3. We have heard rival submissions and perused the materials available on record. The assessee is a private limited company, engaged in the business of construction/development of roads, highways, bridges etc. all across India. The return of income for A.Y. 2018-19 was filed by the assessee company on 30.10.2018, declaring total income of Rs. 12,54,66,780/-. During the course of assessment proceedings, the learned AO observed that construction works are awarded to the assessee company by National Highways Authority of India (NHAI) under the Ministry of Road Transport & Highways, State PWD etc. in various states. The assessee has following sister concerns/ joint ventures.

1. M/s CDS-NKC (JV), a Joint Venture between M/s CDS Infra Projects Limited (i.e appellant company) and M/s NKC Projects Pvt. Ltd
2. M/s ZEL CDS (JV), a Joint Venture between M/s CDS Infra Projects Limited (i.e appellant company) and M/s Zanders Engineers Limited
3. M/s Chandra Global Finance Ltd., a major Shareholder of the appellant company
- 4 M/s O.P. Gupta & Sons Pvt. Ltd., a major Shareholder of the appellant company

4. During the year under consideration, the assessee received share subscription money of Rs. 45,60,00,000/- towards allotment of 4,56,00,000 equity shares at Rs. 10/- each at par from its existing shareholders mainly by way of the right issue, as under:

Date of allotment of shares	Name of the allottee	No. of Shares allotted	Total Amount (Rs.)
05/01/2018	M/s O.P. Gupta & Sons P.Ltd.	20,95,000	2,09,50,000
31/03/2018	M/s O.P. Gupta & Sons P.Ltd.	2,75,05,000	27,50,50,000
31/03/2018	M/s Chandra Global Finance Ltd.	1,60,00,000	16,00,00,000
	Total	4,56,00,000	45,60,00,000

5. The Ld. A.O. was satisfied in respect of part of the aforesaid subscription money to the extent of Rs. 20,60,00,000/- but was not satisfied with the explanation of the assessee in respect of the remaining subscription money of Rs. 25,00,00,000/- and proceeded to make an addition of Rs. 25 crore as unexplained cash credit u/s 68 read with section 115BBE of the Act, as under:

Name and address of the Share Subscribers	Total share subscription money received by the appellant (in Rs.)	Share subscription money accepted by the Ld. A.O as genuine (in Rs.)	Share subscription money not accepted by the Ld. A.O and made addition u/s 68 read with section 115BBE of the Act (in Rs)
M/s. O.P. Gupta & Sons Pvt. Ltd. 8-94, Okhla Industrial Area Phase II Delhi 110020	29,60,00,000/-	14,60,00,000/-	15,00,00,000/-
M/s Chandra Global Finance Ltd. B-94, Okhla Industrial Area Phase II. Delhi 110020	16,00,00,000/-	6,00,00,000/-	10,00,00,000/-
Total	45,60,00,000/-	20,60,00,000/-	25,00,00,000/-

6. The assessee company has formed two Special Purpose vehicle (SPV), Joint Venture, one under the name & style of M/s CDS NKC (JV) & second under the name & style of M/s ZEL CDS JV.

6.1 That the first Joint venture, namely M/s CDS-NKC (JV) is between M/s CDS Infra Projects Limited (i.e assessee company) and M/s NKC Projects Pvt. Ltd. This Joint Venture was incorporated on 5/4 / 2017 for execution of construction & development of Road contract allotted by M/s National Highway Authority India (Hereinafter referred as

NHAI) under Package no. II, Balance work for four laning of Bhopal-Biaora Section of NH-12 in the State of Madhya Pradesh on EPC mode.

6.2 That the second Joint Venture, namely M/s ZEL CDS (JV) is between M/s. CDS Infra Projects Limited (i.e assessee company) and M/s Zanders Engineers Limited. This Joint Venture was incorporated on 10.01.2014 for execution of construction & development of Road contract allotted by Public Works Department of Government of Uttarakhand (Hereinafter referred as PWD) under Package No. C1 in Udham Singh Nagar District in the state of Uttarakhand on EPC mode.

6.3 That the assessee and both of its Joint Venture are regularly maintaining books of account including, Purchase Ledger, Sales Ledger, Bank Book, Cash Book etc. and duly record all their transactions in their respective books of account.

6.4 That books of account of the assessee company and both its Joint Venture have been audited under the Companies Act and/or u/s 44AB of the income Tax Act, 1961.

7. The assessee in his reply dated 19.02.2021 has made a detailed submission regarding creditworthiness by explaining the source of "source of funds". On careful perusal of the submissions, it is seen that CDSNKC(JV) received mobilization advance of Rs. 25,49,40,000/- less 2% TDS from NHAI. The firm CDS NKC(JV) has given a total of this amount of Rs. 25 Crore to M / s OP Gupta and Sons Pvt. Ltd. and M/s Chandra Global Finance Limited. Subsequently, this amount was utilized by M/s OP Gupta and Sons Pvt. Ltd. and M/s Chandra Global Finance Limited to purchase share subscription in the assessee company.

8. The learned AO sought to examine the veracity of the mobilization advance received by the joint venture companies, which, in turn, was used to pay monies to the investors of the assessee company. The assessee even gave explanation of the mobilization advance received by the joint venture companies from NHAI after due

deduction of tax thereon. The assessee submitted that it had furnished details of even the source of source in the instant case, apart from furnishing the entire details with documentary evidences of the investors thereby proving the three ingredients of section 68 of the Act. The details of documents submitted by the assessee are as under:

**M/s CDS-NKC (JV)**

- Copy of Audited balance Sheet of CDS-NKC (JV) for the F.Y. 2017-18, 2018-19 and 2019-20 (Page No. 94-97 and 153-161)
- Copy of Notes to the Balance Sheet (Page No. 97)
- Copy of Bank Statement of M/s CDS-KC(JV) reflecting the amount paid M/s OP Gupta & sons Pvt. Ltd. and M/s Chandra Global Finance Limite (Page No. 89 & 91)
- Copy of ITR and computation of Income of M/s CDS NKC (JV) (Page No. B &91)
- Copy of assessment order u/s 143(3) read with section 1448 of 1.T. Act o M/B CDS-NKC (JV) for the A.Y. 2018-19
- Copy of Form 26AS of M/s CDS NKC [MV] for the AY 2016-19 reflecting TDS of Rs. 51,18,800/- deducted on payment made by M/s Nationa Highway Authority of India to them.
- Copy of ledger account of Mobilization advance in the books of account of M/ CDS-NIKC (JV).

**M/s OP Gupta & Sons Pvt. Ltd.**

- Copy of ITR of M/ OP Gupta & Sons P. Ltd. for the A.Y: 2018-19 (Page no. 52)
- Copy of Audited Balance Sheet of M/s O.P. Gupta & Sons Pvt. Ltd. as on 31/03/2018 (Page No. 53-66)
- Copy of bank statement of M/s O.P. Gupta & Sons Pvt. Ltd. reflecting the moncy received from M/S CDS NKCJV) (Page No. 69-731

- Copy of ledger A/e of M/s O.P. Gupta & Sons Pvt. Ltd. in the books of M/s CDS-KOJVJj duly confirmed by both of them. (Page No. 50-51)

**M/s Chandra Global Finance Limited**

- Copy of ITR of M/s OP Gupta & Sons P. Ltd. for the A.Y. 2018-19 (Page no 75)
- Copy of Audited Balance Sheet of M/s Chandra Global Finance Limited as on 31/03/2018 (Page No. 76-66 of our letter dt. 28/01/2021)
- Copy of bank statement of M/s Chandra Global Finance Limited reflecting the money received from M/S CDS-NKCIJV) (Page No. 871
- Copy of ledger A/c of M/s Chandra Global Finance Limited in the books of . account of M/s CDS NKC (JV) duly confirmed by both of them. (Page No 74)

9. It was explained by the assessee that an amount of Rs. 25 crores received by the assessee from M/s O.P. Gupta & Sons Pvt. Ltd. of Rs. 15 crores; and M/s Chandra Global Finance Limited of Rs. 10 crores towards share subscription money had ultimately emanated from the mobilization advance received by M/s CDS-NKC(JV) from NHAI. The assessee even furnished date-wise sequence of transactions completely giving the chronology of dates and events for the flow of funds from NHAI to Joint Venture Company; from Joint Venture Company to the aforesaid investors of the assessee company; and from investors to the assessee company together with corresponding documentary evidences.

10. The learned CIT(A) duly appreciated the entire contentions of the assessee with documentary evidences and deleted the addition of Rs. 25 crores by observing as under:

"7. It is seen that in the assessment order dated 15/2 / 2021 u/s 143(3) of I.T. Act for the A.Y. 2018-19 of M/s CDS - NKC(JV) , its A.O. has assessed the income as declared by the M/s CDS - NKC(JV) and has accepted the transaction of mobilization advance received from NHAI and advance made to M/s Chandra Global Finance Ltd. and M/s O.P. Gupta & Sons P.Ltd. as genuine and no adverse finding given in the said assessment order.

8. It is also observed that M/s CDS-NKC (JV) has declared the aforesaid mobilization advance of Rs. 25,00,00,000/- as its 'Revenue Receipt' in Profit & Loss a/c for the F.Y. 2018-19 and 2019-20 in accordance with the mercantile system of accounting.

9. It appears that, the Ld. A.O. has misconstrued the Term of 'Genuine Transaction' and/or 'Non-Genuine Transaction'. On the facts and circumstances of the case, the appellant has undisputedly actually received the subscription money of Rs. 25,00,00,000/- and no unaccounted cash money is involved. Therefore, even if the share subscription money received by the appellant has the genesis of the unauthorized diversion of funds by M/s CDS - NKC(JV) , still the transaction in question cannot be termed as a transaction that would attract the rigors of S. 68. The Hon'ble ITAT, Jaipur bench in the case of Singhania University Vs. CIT(Exemption) (Jaipur) as reported in 184 ITD 487 (Jaipur Tribunal) had the occasion to discuss the meaning of term 'Genuine'. In the said order dated 3/1 / 2020 the Hon'ble ITAT has discussed the term 'Genuine' at para 62 of the said order, which is being reproduced hereunder-

"...62. The legislature has thus envisaged a distinction between an activity not being genuine and an activity which is not in accordance with the stated objects. An activity therefore could be genuine even though the same may not be in accordance with the stated objects. Therefore, merely because an activity is not in accordance with the stated objects, it will not result in such activity to be classified as non- genuine. The term "genuine" has been defined to mean true, authentic, real, actual, original and in context of a person or action means sincere, honest, truthful, straightforward, direct, frank, candid, and open. The genuineness of the activity thus has to be tested on the touchstone of above parameters. Where the activities are not carried M/s Singhania University vs. CIT(E) out in accordance with the stated objects or necessary approvals/permission/clearances are not obtained before carrying out such activities, there may be violation, irregularity or even a case of illegality which is subject matter and domain of the relevant authority. However, even such activities which satisfy the test as stated above would be classified as genuine activities..."

*The Hon'ble ITAT bench has clearly made the distinction between an activity not being Genuine and an activity which is not in accordance with the stated object. The Hon'ble ITAT has defined that the term genuine to mean true, real and/or actual activity and may be irregular and/or violation of the subject but still such activity would be a genuine activity.*

*In the present case M/S CDS-NKC (JV) may have unauthorizedly diverted the mobilization advance to M/S Chandra Global Finance Ltd. and M/S O.P. Gupta and Sons Pvt. Ltd., but still, the transaction between them is real, actual, authentic and true, hence it cannot be termed as non-genuine. In the present case, the NHAI may take action against M/S CDS-NKC (JV) for violation of the terms of the business contract in terms of their agreement but the amount advanced by M / s CDS-NKC (JV) to M / S Chandra Global Finance Ltd. and M / S O.P. Gupta and Sons Pvt. Ltd. cannot be held as non-genuine or non-actual or non-real. Therefore, the Ld. A.O. has misconstrued the term 'Non-Genuine', for the purpose of Sec 68 of the IT Act. Moreover, the appellant has furnished a certificate issued by a Chartered Accountant towards utilization of Mobilization Advance by M/s CDS-NKC (JV).*

*10. In the present case, the Ld. A.O. has incorrectly applied the section 68 of the I.T. Act. On the facts and circumstances of the case, the appellant has undisputedly received the subscription money of Rs. 25,00,00,000/- and no unaccounted cash money is involved. Therefore, even if the share subscription money received by the appellant has the genesis of the unauthorized diversion of funds by M/s CDS- NKC(JV), still addition u/s 68 is uncalled for. Support is derived from the judgment of the Hon'ble Delhi High Court in the case of CIT v/s Value Capital Services (P) Ltd. reported in 307 ITR 334(Delhi).*

*The relevant extract is reproduced hereunder:*

*"In any case, what is clinching is the additional burden on the Revenue. It must show that even if the applicant does not have the means to make the investment, the investment made by the applicant actually emanated from the coffers of the Assessee so as to enable it to be treated as the undisclosed income of the Assessee. This has not been shown insofar as the present case is concerned and that has been noted by the Tribunal also.*

*On the facts of the present case, it is observed that even the Ld. A.O. has not alleged that unaccounted fund/money of the appellant is involved in procuring the share subscription money. The appellant has also furnished the confirmation of advance given by M/s CDS-NKC (JV) to /s O.P Gupta & Sons P.Ltd. and M/s Chandra Global Finance Ltd., duly signed by all the parties. The A.O. has not*

*rejected the said confirmation letter/ledger. Therefore, there is no justification for making an addition u/s 68 of the I.T. Act even if there is an unauthorized diversion of funds by M/s CDS- NKC (JV). Transaction between M/s CDS-NKC (JV) and NHAJ is a contractual business transaction, if any violation of terms & conditions of the contract is made by M/s CDS-NKC (JV), then it may attract penal provision as entailed in the contract but certainly, it would not make the transaction non-genuine and would not attract section 68 of I.T. Act to make addition of Rs. 25,00,00,000/-.*

*11. To understand the purpose of attracting section 68 of the I.T. Act, one can draw the analogy from the object to insert a new proviso to section 68 as introduced by the Finance Act, 2012. The memorandum explaining proviso to section 68 of the I.T. Act inserted by the Finance Act, 2012 is as under:*

*"Section 68 of the Act provides that if any sum is found credited in the books of an assessee and such assessee either*

- 1. does not offer any explanation about nature and source of money, or*
- 2. the explanation offered by the assessee is found to be not satisfactory by the Assessing Officer*

*then, such amount can be taxed as income of the assessee*

*The onus of satisfactorily explaining such credits remains on the person in whose books such sum is credited. If such person fails to offer an explanation or the explanation is not found to be satisfactory then the sum is added to the total income of the person. Certain judicial pronouncements have created doubts about the onus of proof and the requirements of this section, particularly, in cases where the sum which is credited as share capital, share premium etc.*

*Judicial pronouncements, while recognizing that the pernicious practice of conversion of unaccounted money through masquerade of investment in the share capital of a company needs to be prevented, have advised a balance to be maintained regarding onus of proof to be placed on the company. The Courts have drawn a distinction and emphasized that in case of private placement of shares the legal regime should be different from that which is followed in case of a company seeking share capital from the public at large.*

*In the case of closely held companies, investments are made by known persons. Therefore, a higher onus is required to be placed on such companies besides the general onus to establish identity and credit worthiness of creditor and genuineness of transaction. This additional*

*onus, needs to be placed on such companies to also prove the source of money in the hands of such shareholder or persons making payment towards issue of shares before such sum is accepted as genuine credit. If the company fails to discharge the additional onus, the sum shall be treated as income of the company and added to its income.*

*It is, therefore, proposed to amend section 68 of the Act to provide that the nature and source of any sum credited, as share capital, share premium etc., in the books of a closely held company shall be treated as explained only if the source of funds is also explained by the assessee company in the hands of the resident shareholder. However, even in the case of closely held companies, it is proposed that this additional onus of satisfactorily explaining the source in the hands of the shareholder, would not apply if the shareholder is a well-regulated entity, i.e. a Venture Capital Fund, Venture Capital Company registered with the Securities Exchange Board of India (SEBI)*

*This amendment will take effect from 1st April, 2013 and will accordingly, apply in relation to the assessment year 2013-14 and subsequent years"*

*On perusal of the aforesaid Memorandum for explaining proviso to section 68 inserted by the Finance Act, 2012, it is observed that the additional burden cast upon the appellant to establish the creditworthiness and genuineness of source of source of funds, which in the present case, admittedly has been satisfactorily discharged by the appellant. In the present case, it is, therefore, held that the appellant has duly discharged its onus u/s 68 to establish the identity of the creditor, creditworthiness of the source of fund and source of source of fund and also genuineness of the transaction in respect of share subscription money received by it. Therefore, the addition made u/s 68 is not sustainable. Hence, the same deserves to be deleted."*

11. We find that none of the factual and legal findings given by the learned CIT(A) hereinabove stood controverted by the Revenue before us. The learned DR before us had reiterated the facts of the case which have already been addressed by the learned CIT(A) considering that there is nothing illegal qua the provisions of Income-tax Act thereon, thereby giving a categorical finding that the provisions of Section 68 of the Act could not be invoked in the facts and circumstances of the instant case. We do not find

any infirmity in the said finding of the learned CIT(A). Accordingly, grounds raised by the Revenue are dismissed.

12. In the result, appeal of the Revenue is dismissed.

Order pronounced in open court on 29.04.2024.

**Sd/-**  
**(SAKTIJIT DEY)**  
**VICE PRESIDENT**

**Sd/-**  
**(M. BALAGANESH)**  
**ACCOUNTANT MEMBER**

**Dated: \_29.04.2024.**

\*MP\*

Copy forwarded to:

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

ASSISTANT REGISTRAR  
ITAT, NEW DELHI