IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B" DELHI

BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
&
SHRI YOGESH KUMAR US, JUDICIAL MEMBER

I.T.A. No.467/DEL/2016
Assessment Year 2006-07

Dy. Commissioner of Income Tax, Circle-II, Faridabad.	Vs.	VSB Investment Pvt. Ltd., B-400, 3rd Floor, Nehru Ground, NIT, Faridabad.
TAN/PAN: AABCV7492B		
(Appellant)		(Respondent)

C.O. No.138/DEL/2016
Assessment Year 2006-07

VSB Investment Pvt. Ltd., B-400, 3rd Floor, Nehru Ground, NIT, Faridabad.	Vs.	Dy. Commissioner of Income Tax, Circle-II, Faridabad.
TAN/PAN: AABCV7492B		
(Appellant)		(Respondent)

Assessee by:	Shri Amit Sharma, Adv.		
Department by:	Shri Vivek Kumar Upadhyay, Sr.DR		
Date of hearing:	14	02	2024
Date of pronouncement:	09	05	2024

O R D E R

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeal has been filed at the instance of the Revenue and the Cross Objection at the instance of the Assessee against the order of the Commissioner of Income Tax (Appeals), Faridabad ['CIT(A)' in short], dated 17.11.2015 arising from the assessment order dated 31.03.2014 passed by the Assessing Officer (AO) under Section 143(3) r.w. Section 147 of the Income Tax Act, 1961 (the Act) concerning AY 2006-07.

2. The grounds of Appeal raised by the Revenue read as under:

> *"Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in law in deleting the addition made u/s. 68 of the Income Tax Act, 1961 amounting to Rs. 2,07,85,000/- on account of accommodation entries received, disregarding the fact that the assessee-company was keeping substantial amount for the period since 2005-06 to 2011-12 without paying any interest, had shown it as share application money while the party concerned showed it as loans and advances in its books and the fact that no shares had been allotted from F.Y. 2005-06 to 2011-12 against the alleged share application money received.?"*

3. The grounds of Cross Objection raised by the assessee in the Revenue's appeal are also reproduced hereunder:

> *"1. The Ld. CIT(A) has erred in law in holding that proceedings u/s. 147/148 and the assessment proceedings are valid in law despite when notice u/s. 148 dated 26.03.2013 sent by speed post on 28.03.2013 was received back unserved on 01.04.2013 and only after a period of about more than 5 months i.e. on 19.09.2013, a copy of the notice dated 26.03.2013 was served on 21.09.2013 (wrongly mentioned as 26.03.2013 in para 19 Page 34 of his order).*
>
> *2. That whereas the Ld. CIT(A) has cancelled the impugned addition of Rs.2,07,85,000/- by passing a well reasoned and speaking order, but he has erred in holding that proceedings u/s. 147 were valid in law simply because the information was received from investigation wing but without considering that the genesis of the information was vague, far fetched unreliable, and based on a wild guess in as much as undisclosed income of Rs.2,07,85,000/- was stated to be relevant to different years including A.Y. 2006-07, meaning thereby that the AO had no worthwhile information relevant to A.Y. 2006-07 and the extent of alleged undisclosed income."*

4. The assessee-company filed return of income for Assessment Year 2006-07 in question declaring total income at Rs.2,65,92,686/-. After the conclusion of the assessment, the Assessing Officer received certain information from Commissioner of Income Tax (Central), Kolkata that assessee is beneficiary of certain accommodation entries amounting to Rs.2,07,85,000/- from M/s. Basant Marketing Pvt. Ltd. Kolkata. The case was accordingly reopened vide notice under Section 148 dated 26.03.2013. Another notice under Section 148 was issued on 19.09.2013 and assessment was carried under Section 143(3) r.w. Section 147 of the Act wherein addition of Rs. 2,07,85,000/- was carried in the hands of the assessee under Section 68 of the Act towards alleged accommodation entries received by the assessee from M/s. Basant Marketing Pvt. Ltd. The total income was accordingly re-assessed at Rs.4,73,77,690/-.

5. Aggrieved, the assessee preferred appeal before the CIT(A). The CIT(A) declined to entertain the objection of the assessee that notice issued under Section 148

dated 26.03.2013 dispatched to the assessee by speed post on 28.03.2013 was never served upon the assessee. The CIT(A) however found substance in the plea of the assessee that the amount received from M/s. Basant Marketing Pvt. Ltd. cannot be regarded as accommodation entries but has been demonstrated to be genuine transaction. The CIT(A) took note of the arguments raised and adjudicated the issue in favour of the assessee as under:

> *"25. Having reproduced the argument of the appellant made in the context of these grounds, the AO's arguments for making the additions u/s.68 have been summed up by me as follows.*
>
> *i. The assessee has not discharged his onus and failed to file evidence.*
>
> *ii. The AO has relied on the case of CIT Delhi vs N.R. Portfolio Pvt. Ltd. of the Hon'ble Delhi High Court in support of his argument.*
>
> *iii. The nature and genuineness of the transactions is not proved because the appellant has claimed that it had received share application money from M/s Basant Marketing Pvt. Ltd. and M/s Basant Marketing has confirmed that it has only given advance to the appellant. Moreover only debentures worth Rs. 80,00,000/- were issued to M/s Basant Marketing in F.Y. 2011-12 and on the rest of the amount no interest has been given by the appellant to Basant Marketing, any time between 2005-06 to 2011-12.*
>
> *In this background, and having reproduced the basic crux of the AO's, as well as the appellant's arguments, the merits of both side of the arguments are examined hereunder.*
>
> *26. The AO has made the addition u/s.68 of the Income Tax Act, and the detailed reasons for the same are dealt with by the AO in para 3.6 (page 8) of the assessment order.*
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> *27. An addition u/s. 68 is made by the AO, if the assessee is unable to establish the three key elements of a credit entry appearing in his books of accounts. The three key ingredients being, the identity of the creditor, its creditworthiness and the genuineness of the transaction. In the instant case the AO has made an addition of the share application money received by the appellant company, u/s. 68 of the Act. Perusal of the AOs order reveals that the AO has no where doubted the creditworthiness of the creditor and has based his addition on the genuineness of the transaction (point 3 on page 8) and identity of the creditor (point 1 page 8). Thus in this background the arguments of the AO are examined and adjudicated in the same sequence of the arguments as appearing on page-8 of the assessment order.*
>
> *28. The first argument advanced by the AO is that the appellant has failed to discharge his onus and to file evidence in support of his claim. In this regard, it is seen that in Para 3.3 of the assessment order, the AO has himself given the details of the documents filed by the appellant with him during the course of assessment proceedings i.e.;*
>
> *- Confirmed copy of account from M/s. Basant Marketing for the relevant assessment year.*
>
> *- Copy of Bank account of M/s. Basant Marketing*
>
> *- Income Tax Return of M/s. Basant Marketing*
>
> *- Audited balance sheet along with audit report of M/s. Basant Marketing as on 31.03.2006.*
>
> *- Confirmed copies of account from M/s. Basant Marketing for subsequent years i.e. A.Y. 2007-08 to 2013-14.*

29. Once the order of the AO itself shows that all these details were filed by the appellant before the AO during the course of assessment proceedings, I fall to appreciate the contention of the AO that the appellant has not discharged his onus in establishing the identity of the creditor. It's also pertinent to note that the AO has simply held that the onus has not been discharged by the appellant without specifying the reasons for, making this observation. The AO has also not clarified as to why the above cited evidences furnished by the appellant were not sufficient and there is no mention in the assessment order of any further evidences required to be submitted by the appellant and the failure of the appellant to do so. In my considered opinion the onus has been sufficiently discharged by the appellant and appropriate and sufficient evidence in support of his claim has been provided by the appellant Thus it is evident that this reason of the AO for making the addition is incorrect and not based on facts.

30. As per the second reason given by the AO on page 8 of the assessment order the AO has relied on the ratio of the decision of the Hon'ble Delhi High Court in the case of CIT Delhi vs N.R. Portfolio Pvt. Ltd. In the assessment order itself the AO has reproduced in bold the relevant part of the judgment as below:

"If on verification, or during proceedings, the AO cannot contact the share applicants, or that the information becomes unverifiable, or there are further doubts in the pursuit of such details, the onus shifts back to the assessee."

1. The ratio of the above judgment is that if the AO is unable to contact the share applicant and verify the transaction from the share applicant, the onus shift backs to the assessee to establish the identity and the genuineness of the transactions. However, once again perusal of the assessment order at para 3.4, shows that the AO had issued a notice u/s 133(6) to M/s Basant Marketing, an M/s Basant Marketing has replied to the AOS letter on 08.03.2014, confirming the transactions. The letter from M/s Basant Marketing is reproduced on page 5 o the assessment order. Thus again I find that the AO has erred in applying the ratio of N.R. Portfolio's, as it is contrary to his own findings in the assessment order a explained above. Thus his second reason for making this addition is also found to be incorrect.

32. Thirdly, the AO has stated that the genuineness of the transaction is no proved because the appellant has claimed that it had received share application money from M/s. Basant Marketing Pvt. Ltd. and M/s Basant Marketing has confirmed that it has only given advance to the appellant. Moreover on debentures worth Rs. 80,00,000/- were issued to M/s Basant Marketing in F.Y 2011-12 and on the rest of the amount no interest has been given by the appellant to Basant Marketing, any time between 2005-06 to 2011-12.(refer page 9 of the assessment order)

33. As far as the issue of share application money being shown by the appellant and the same being shown under the head "Loan and Advances" by M/s. Basant Marketing is concerned, the same has been dealt with by the AO in pa 3.6, page-9 of the assessment order. The main contention of the AO in doubt the genuineness of the transaction is on account of the fact that the appellant shown this money as share application money, whereas the share applicant M/s Basant Marketing has shown it as advance, under the head "Loan and Advances" This issue has been confronted to the appellant during the course of assessment proceedings, and the appellant's reply has been reproduced at para 3.8 on page 7 of the assessment order.

34. It is not the case of the AO that M/s Basant Marketing has not advanced the money to the appellant company, it is also not the case of the AO that M/s Basant Marketing does not have the requisite funds to make this investment and lastly it is also not the case of the AO that M/s Basant Marketing has not confirmed the transactionsThe sole

contention of the AO in this regard is that in its balance sheet M/s Basant Marketing has shown the share application money given to the appellant under the head "Loans and Advances"The AO in the assessment order has not elaborated on the reasons for which he has held this classification, made by M/s Basant Marketing as erroneous and more so, erroneous to the extent that the genuineness of the transaction is being questioned by the AO.

35. The correct classification for an advance given for share application money can be classified either under the head of "Loans and Advances" or under the head "Investments" However in my opinion any share application money given/advanced is not an "investment", as the allotment of shares is pending and thus contingent, and not confirmed, and cannot fall in the category of "Investment". Thus the only classification it can fall, is under the head "Loans and Advances", as has been correctly done by Basant Marketing. For the sake of argument even if it does not fall under the head "Loans and Advances" and has been wrongly classified by M/s Basant Marketing, fail to appreciate how this renders the transaction invalid, especially once the transaction has been independently confirmed by the AO u/s 133(6) from M/s Basant MarketingThus in view of these facts find no merit in this particular argument of the AO.

36. The next argument of the AO is that the appellant has utilized the amount of Rs.2 Cr. from 2005-06 to F.Y. 2011-12 without paying any interest thereon to M/s Basant Marketing. In this regard, the appellant's reply during the course of appellate proceedings is as below:

"In reply, it is submitted that it was submitted vide letter dated 28-03-2014 at PB-107 that OFCD were allotted to the said company to the tune of Rs. 80,00,000/- and balance amount was refunded. In fact the project in which the funds were to be invested could not take off and therefore, such shares could not be issued for quite sometime and ultimately convertible debentures were issued and balance amount was refunded without any interest. Such observations of Ld A.O. do not establish anything adverse against the assessee qua the impugned issue."

37. On this issue find that there is no provision under the Income Tax Act or the Companies Act under which interest has to be paid on share application money received. It is a fact, that the appellant has utilized the funds emanating from M/s Basant Marketing in shape of share application money for a period of 3-4 years without paying any interest or allotting shares. At best this is a circumstantial evidence which can arouse suspicion; however this in itself cannot be the ground for making the addition especially in view of the fact that the transaction has been confirmed independently by the AO u/s 133(6). Moreover a perusal of the assessment order shows that there is not even a whisper of any statement recorded by any of the Income Tax Authorities / or CBI, of the Directors/ employees of M/s Basant Marketing on the issue of accommodation entries. A perusal of the assessment order also shows that there is no mention of any incriminating document seized by the CBI and forwarded to the Income Tax Department which indicates that M/s Basant Marketing is engaged in the business of providing accommodation entries. There is also no mention of any independent inquiries conducted by the Investigation Wing of the Income Tax Department at Bombay or Kolkata or by the AO, on M/s Basant Marketing to establish, or even indicate that M/s Basant Marketing is engaged in the business of providing accommodation entries. Thus in this background hold that it's unjustified to hold the appellant guilty of failing to prove the genuineness of the transaction u/s 68, solely on the ground that the share application money was pending for allotment for a number of years. Thus in view of these facts this argument of the AO is also found to be erroneous.

38. To sum up all the arguments advanced by the AO for making this addition have already been examined by me in the previous pages and found to be erroneous, clearly establishing that the addition deserves to be deleted. Thus in view of these facts and reasons elaborated in detail in the previous pages. Ground Nos. 4 and 5 of the appeal are allowed and the addition made by the AO is deleted.

39. Ground Nos. 1, 7 ,8 and 10 are general in nature and do not require any adjudication."

6. Aggrieved by the relief granted by the CIT(A), the Revenue has filed the appeal before the Tribunal. The assessee has also filed Cross Objection to challenge the assumption of jurisdiction under Section 147 of the Act.

7. When the matter was called for hearing, the ld. counsel for the assessee referred to his Cross Objection and submitted that notice issued under Section 148 dated 26.03.2013 was admittedly issued by speed post on 28.03.2013 at the address bearing 'VSB Investment (P) Ltd., B-400, Nehru Ground, Faridabad which is incomplete'. The complete address of the assessee stands at VSB Investment Pvt. Ltd. B-400, 3rd Floor, Nehru Ground, NIT, Faridabad. The ld. counsel submitted that the aforesaid notice was stated to have been received back by the Assessing Officer as on 01.04.2013 with remarks 'left'. In this regard, it was contended that in order to complete re-assessment, notice under Section 148 empowering the Assessing Officer to assume jurisdiction, has to be mandatorily served upon the assessee in accordance with Section 282(1) r.w. Order V, Rule 12 CPC and order III, Rule 6 CPC. In the case of the assessee, no valid notice has been served as mandated under Section 282 of the Act. A reference was made to the judgment rendered in the case of *CIT vs. Rajesh Kumar Sharma (2007) 165 Taxman 488 (Del)* where it was held that the onus is upon revenue to prove that notice was actually served on the assessee or the envelope containing the notice was correctly addressed. The ld. counsel thus submitted that the notice could not be served under Section 148 of the Act by the Assessing Officer due to incomplete particulars of address and therefore such act of the Assessing Officer cannot be regarded as valid service of notice for assumption of jurisdiction. The ld. counsel thus submits that owing to non service of notice under Section 148 within the limitation period prescribed under Section 149 of the Act, the entire re-assessment proceedings are null and void at the threshold.

7.1 On merits, the ld. counsel relied upon the CIT(A) order and submitted that the relevant documents have been placed before the Revenue Authorities to establish the *bona fides* of the amount received. The amount so received has been also repaid and therefore, no adverse imputation can be drawn. The bank statement, audited financial statements of the proposed subscriber was also placed on record and notice issued under Section 133(6) to the subscriber /lender served by the AO was also responded where the facts of lending were admitted. The ld. counsel also pointed out that the amount received from Basant Marketing Pvt. Ltd. by the assessee in the case of *DCIT vs. Satisfaction Properties Pvt. Ltd. in ITA No.6636/Mum/2018 order dated 25.01.2023* was regarded as *bona fide* receipt in the same set of facts by the Co-ordinate Bench. The SMC Bench in *ITO vs. Harsh Dalmia, ITA No.7459/Mum/2016 order dated 17.10.2017* has also affirmed the *bona fides* of the transaction with Basant Marketing Pvt. Ltd. in similar facts and dismissed the appeal of the Revenue on merits.

8. The ld. DR, on the other hand, strongly opposed the plea raised on behalf of the assessee that 'the envelope containing notice issued under Section 148 was sent at an incomplete address'. The ld. DR pointed out that the requirement of section 149 is 'issue' of notice within the limitation period notwithstanding its service beyond limitation period. The notice was duly issued within the limitation period and also handed over to postal authorities on the address provided, within the limitation period. The Ld. DR adverted to the remark of the postal authorities stating that the assessee has 'left' the address which is not the same as 'undelivered' on the grounds of wrong address. Such remark signifies that the postal authorities has located the address but could not deliver the notice due to absence of the assessee co.

8.1 Adverting to the aspects of the incompleteness of address argued on behalf of the assessee, the ld. DR submitted that purported incompleteness alleged in the address is trivial in nature and such partial address mentioned in the envelope for service of notice is equally capable of service, some small incompleteness notwithstanding. The missing part i.e '3rd Floor' in the address is insignificant. Non-mention of floor number would not prevent postal authorities to serve the envelope at the office number mentioned in the address. The ld. DR also pointed out that inadvertent omission of 'NIT' [New Industrial Town] is again not so important for the reason that the address contained

'Nehru Ground' which itself is sufficient and 'NIT' only denotes larger area. Such reference of NIT is only an extension and adjunct to the existing address bearing 'Nehru Ground'. The DR thus submitted such trivialities must not come in the way of justice dispension on merits more so when such notice was eventually served on the assessee albeit in Sept. 2013.

8.2 On merits, the ld. DR contended that the assessee has failed to discharge onus towards capacity of lending and genuineness of transactions. While the assessee has claimed that amount was received by way of share application money, the corresponding party namely Basant Marketing has reflected the amount under the head 'Loans and advances'. Such classification in the books of Lender 'Bansant Marketing' reflects a mismatch in the position taken by the Assessee co. The share applicant would not incorrectly declare the transaction of share application money based on invitation to subscribe the shares and application made on this behalf as loans and advance. The shares would also be allotted in the reasonable time and could not be kept outstanding for many years. The subscriber has been deprived of interest as well as dividend by such inordinate delay. It is not known whether the shares were ultimately allotted or not and if allotted at what terms. The financial statement of Basant Marketing is lopsided and does not inspire any confidence. It is not understood why a party from Kolkata having a meagre financial capacity would lend such large amount to the assessee without any visible profits and without any security and *quid pro quo* by way of interest etc. All the ingredients of transaction points to accommodation entry. The Ld. DR thus contended that the view taken by the CIT(A) on merits in favour of the assessee is without appreciation of facts and attendant circumstances in true perspective. The action of the CIT(A) also does not align with his co-terminus powers in addition to appellate powers. The Ld. DR thus urged for reversal of the order of CIT(A).

9. We have carefully considered the rival submissions and perused the material available on record.

10. To begin with, we advert to the cross objections raised on behalf of the assessee. As per Ground no. 1 of the cross objections, the assessee has assailed the order of CIT(A) wherein the service of notice issued under s. 148 read with s. 149 of the Act was

found to be in order. As per Ground no. 1 of the cross objections thus, the assessee seek to put question mark on legitimacy of notice under s. 148 served outside the limitation period and conferment of jurisdiction in consequence thereto.

10.1 In the instant case, the statutory time limit available for issuance of notice under s. 148 for assumption of jurisdiction towards reassessment was 6 years from the end of assessment year 2006-07 which expired on 31.03.2013. A notice under s. 148 dated 26.03.2013 was issued by the AO and handed over to postal authorities on 28.03.2013. The notice so issued was returned back by the postal authorities to the AO on 1-04-2013 as it could not be served on the Assessee with the remarks that the Assessee had 'left' the particular address. Subsequently, on 19.09.2013, i.e. after the end of 6 years, a letter was sent to the Assessee enclosing the copy of previous notice under s. 148 dated 26.03.2013. It is the case of the assessee that earlier attempt to serve notice in March 2013 failed and the notice was returned due to incomplete and incorrect particulars of address for which the assessee could not be faulted. Another attempt to serve notice under s. 148 in Sept. 2013 succeeded due to complete address mentioned in the later communication.

10.2 In this factual back drop, the essential question that arises thus is whether the notice to the assessee under s. 148 was duly issued and served in accordance with law?

10.3 The genesis of controversy the difference between the expression 'issue' and 'service' of notice. S. 149 uses the expression 'issue' of notice. Thus the service of notice issued beyond the limitation period would not per se vitiate the issue of notice within limitation. However, the requirement of 'service' of notice under s. 148 issued in terms of s. 149 is implicit. The issue of notice must be followed with service thereof to meet the requirement of s. 149 of the Act as held in Pr. CIT vs. Atlanta Capital Pvt. Ltd. Judgment dated 21-09-2015 in ITA no. 666/2015 and CIT vs. Chetan Gupta (2015) 62 taxmann.com 249 (Delhi). The notice received with remark 'left' has no value as the basic premise of issue of notice that it has to be properly addressed i.e. complete address is paramount. If the notice has not been issued at a complete address as happened in the instant case, than it can not be inferred that the postal authority would be able to serve the notice on intended party. It is a basic rule that whenever incomplete input is given

than intended output can not be presumed. Furthermore, section 27 of the General Clauses Act also provides that service shall be deemed to be effected by properly addressing, prepaying and posting it by registered post.

10.4 It is trite that when called into question, burden to prove service of notice is on the revenue as held in *Rajesh Kumar Sharma (supra)*. The obligation is entirely upon the revenue to show that the notice was dispatched at correct address within limitation period. It is only than the burden can be said to have been discharged. On facts, it is an admitted position that the attempt to serve notice albeit issued within limitation period, failed due to incompleteness of the address of the addressee. When seen in the context, the incompleteness of address was fatal. Such inference is also fortified by the fact that the impugned notice attempted to be re-served in Sept. 2013 at a complete address fructified. Thus, the assessee had ostensibly never 'left' the premise in contrast to the endorsement of the postal authorities. The second attempt to re-serve the earlier notice after the limitation period to set right the limitation aspect is thus of no avail. It would be rather incorrect to interpret s. 149 in a manner to hold that a mere issue of notice without service thereof would meet the requirement of law. The issue of notice within limitation period would be treated as proper only upon valid service of such notice which may sometime occur beyond the limitation period.

11. In the light of delineations made, we find substantial force in the plea of the assessee that the notice under s. 148 is barred by limitation placed under s. 149 of the Act and thus vitiated in law.

12. Ground no. 1 of the cross objection thus succeeds.

13. Needless to say, the reassessment proceedings culminating in reassessment order under challenge, based on invalid and non est notice is a damp squib and without any legal edifice. The adjustments to taxable income made in such proceedings are thus without legal foundation and hence bad in law.

14. In this view of the matter, the cause of action of the revenue appeal merges in void and hence, such appeal is dismissed summarily.

15. In the result, the cross objection of the Assessee is allowed whereas the Revenue appeal is dismissed.

Order pronounced in the open Court on 09/05/2024

Sd/-	Sd/-
[YOGESH KUMAR US]	**[PRADIP KUMAR KEDIA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

DATED: **/05/2024**

Prabhat