

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

ITA No. 1173/PUN/2016

निर्धारण वर्ष / Assessment Year : 2001-02

VEL Software Limited, 5, Gurukrupa, Purbai Rajendra Complex, Opp. Hotel Vasco, Nashik Road, Nashik 422 101 PAN : AAACV7830N	Vs.	DCIT, Circle-1, Nashik
Appellant		Respondent

Assessee by Shri Naresh Kumar
Revenue by Shri Sardar Singh Meena

Date of hearing 17-05-2022
Date of pronouncement 18-05-2022

आदेश / ORDER

PER PARTHA SARATHI CHAUDHURY, JM :

This appeal preferred by the assessee emanates from the order of the Id.CIT(A)-1, Nashik dated 08-03-2016 for the assessment year 2001-02 as per the following grounds of appeal :

- “(1) On the facts and in the circumstance of the case and in law, the order passed by the Id. CIT(A) is bad in law and requires to be cancelled.
- (2) On the facts and in the circumstance of the case and in law, the Id. CIT(A) erred in confirming the action of the AO in taxing the amount of Rs.9,30,00,000/- received by the appellant as share capital from various shareholders.
- (3) On the facts and in the circumstance of the case and in law, the Id. CIT(A) erred in holding that the appellant failed to discharge the burden that lay upon the appellant under sec.68 to

prove the genuineness of the share capital of Rs.9,30,00,000/- received by the appellant from various shareholders.”

2. This is the second round of appeal before us. The relevant facts are that the Assessing Officer found during the year under consideration, share capital of the company was increased from Rs.3,25,80,000/- to 12,55,80,000/- showing an increase of Rs.9,30,00,000/-. On being asked to explain, it was contended that the increase in share capital was contributed by ten shareholders in amounts ranging from Rs.60,00,000/- to Rs.1,25,00,000/-. Various enquiries have been conducted by the department which have been detailed in the assessment order. One pertinent point which has been brought out is that all the ten shareholders who subscribed to the share capital of Rs.9,30,00,000/-, in turn have received respective amounts from a concern M/s. Portal India and it is further explained that the shares held by such shareholders have been pledged with M/s. Portal India against the loans raised. In the course of assessment proceedings, assessee furnished affidavits of the shareholders supporting contribution in the share capital, copies of bank accounts of the so-called shareholders to the assessee company. That in the first round, the Id. CIT(A) had observed that, the shares owned by the shareholders have been pledged by the shareholders in

favour of M/s. Portal India and the same accordingly shows that it is M/s. Portal India that has acquired shares of Rs.9,30,00,000/- of the assessee company and in turn it had sold a software portal to the assessee company for a sum of Rs.9,30,00,000/-. Be that as it may, the CIT(A) has been guided by the fact that the identity of M/s. Portal India stood established as it was found to be maintaining a bank account at the relevant time with Western Cooperative Bank Ltd. in Andheri (E). Secondly, the CIT(A) also observed that the shareholders of the assessee company did not contribute any amount which was entirely loaned to them by M/s. Portal India and the source of funds stood proved, no addition was warranted u/s.68 of the Act. In this background, when the matter travelled upto the Tribunal, it was observed and held as follows :

“9. We have examined the findings of the CIT(A) with respect to three ingredients which are required to be discharged by the assessee when faced with an inquiry u/s.68 of the Act. The said onus involves not only proving the Identity and capacity of the source creditors but also genuineness of the transaction. In the present case the Assessing Officer had noted that the assessee has claimed to have purchased a software portal for Rs.9,30,00,000/- from M/s. Portal India in terms of the Memorandum of understanding; in turn, the said sum of Rs.9,30,00,000/- was routed as share capital in the assessee company albeit not in the name of M/s. Portal India but in the names of ten share holders. Notably, the purchase of the software portal from M/s. Portal India has been found to be ingenuine by the Assessing Officer as per the discussion contained in sub-para (c) of para 12 of the assessment order. In this manner, the genuineness of the transaction which has resulted in the impugned credit in the books of account has not

been accepted by the Assessing Officer. Quite clearly, apart from not being satisfied on the other ingredients of section, the Assessing Officer has treated the share capital credited in the account books in the names of ten shareholders as unexplained for the failure of the assessee to explain the genuineness of the called share holders in Western Co-op Bank Ltd. in Andheri, (E) indicating payments by the share holders towards share capital of the assessee, etc. The Assessing Officer required the assessee to produce the shareholders, but only the directors of the assessee and one individual, Shri Yashwant Gujar were produced. A statement under section 131(1) of the Act of Shri Yashwant Gujar was recorded, who deposed that he had never signed any affidavit confirming the transaction and also submitted that the signatures in the affidavit submitted in his name by the assessee company did not match with his signatures as appearing in the return of income filed by him or on his PAN card. Inquiries were also conducted to verify the existence of M/s Portal India, and the said party was not found at the stated address and even the PAN .number was also found to be incorrect. The Assessing Officer also conducted enquiries with the bank in which the assessee company, M/s Portal India and the ten shareholders maintained the bank accounts. It was found that the bank account of the shareholders and the assessee company were opened in the said bank only for the purpose of the impugned transaction. After considering the result of the verification exercise, the Assessing Officer found it unreliable one of the shareholder Shri Yashwant Gujar had denied the transaction and there was a failure to produce other share holders except shareholders who are Directors of the assessee Company. Further, the claim of the assessee that it had remitted Rs.9.30 crores towards purchase of a portal was found to be unreliable, and in this regard, the cost of purchase of the portal was held to be a "fake one" and accordingly, the purchase was found to be ingenuine. For all the above reasons, the Assessing Officer invoked section 68 of the Act and found the credit of Rs 9.30 crores as unexplained within the meaning of section 68 of the Act.

8. The CIT(A) deleted the addition by noticing that the share capital of Rs.9.30 crores was the amount transferred from the bank account of M/s. Portal India to the share holders account and from bank account of the share transaction with M/s Portal India. On the aspect of genuineness of the transaction, there is no finding by the CIT(A), and quite clearly, the same has not been addressed by assessee also before the CIT(A). Therefore, under these circumstances, in our considered opinion the CIT(A)

erred in straightaway deleting the addition without being satisfied about genuineness of the transaction. Therefore, considering the entirety of the facts and circumstances of the case, we deem it fit and proper that order of the CIT(A) be set aside and the matter be examined afresh so as to establish that all ingredients required for the purpose of Section 68 of the Act are fulfilled or not. Accordingly, we set aside the order of the CIT(A) and restore the matter back to his file to be adjudicated afresh. Needless to say, the CIT(A) shall allow a reasonable opportunity of being heard to the assessee and thereafter adjudicate afresh as per law.”

3. Therefore, as per the aforestated findings of the Tribunal in the first round, it had directed the Id. CIT(A) to re-verify the genuineness of the transaction of share capital of Rs.9,30,00,000/- which was credited in the books of account. The Tribunal had held that on the aspect of genuineness of transaction there is no finding by the Id. CIT(A) and the CIT(A) had erred in straightaway deleting the addition without being satisfied about the genuineness of transaction. Thereafter, in the second round, the Id. CIT(A) was directed by the Tribunal to examine the three elements of section 68 of the Act, i.e.(1) Identity, (2) Credit Worthiness and (3) Genuineness of the transaction in respect to the share capital introduced in the company. The Id. CIT(A), in the second round, had issued notices to the assessee to file written submissions through speed post which were returned as ‘unclaimed’. Thereafter, the AO was directed to serve the notice. The AO, when he sent the

notice through the Ward Inspector, could not find the premises at the given address. Thereafter, the AO was directed to serve the notice through Affixture by Ward Inspector at the last known address. The notice was served through Affixture by the Ward Inspector. The proof of service is on record with the department. In response to this notice also, none appeared. However, one letter seeking adjournment was filed dated 07-01-2016 by the Managing Director stating that she was unwell. Thereafter a letter dated 15-01-2016 was issued which was once again served by Affixture through Ward Inspector requesting the assessee to produce the party for verification of genuineness of the transaction on 03-02-2016. On the appointed date, none appeared. However, a written submission was filed which only referred to the earlier submissions made before the predecessor CIT(A). The Id. CIT(A) thereafter analysed the facts which emerged from the assessment order which is extracted as follows :

“The ten share holders, who have introduced share capital in the appellant company, in aggregate have received Rs.9,30,00,000/- as unsecured loan from one concern named M/s Portal India claimed to be having address at 32/128 First Floor, Laxmi Industrial Estate, New Link Road, Andheri West, Mumbai 400053, and having PAN AAABH2925P. Further all the share capital money of Rs. 9,30,00,000/- was in turn advanced to M/s Portal India by the assessee company for the establishment of portal or website. All of these transaction have happened on a single date i.e. 19/04/2000 in the same bank i.e. western Co-op.

Bank Ltd. Ahdheri (E) Branch. In response to summons issued by AO to the ten share holders only one shareholder i.e. Yeshwant R. Gujar appeared who denied having any transaction with the company or taking any loan from Portal India as evidenced from para 2 of the assessment order. Further on verification the PAN submitted by appellant of Portal India to whom the money was advanced was found to be bogus. The AO inquired from the assessing officer of M/s. Portal India and found that no company of such name exists. The appellant did not produce Mr Dharma Singh owner of portal India either at the time of assessment proceedings nor before me so that the veracity or existence of Portal India could be ascertained. Further, the AO after detailed examination has observed that neither the creditworthiness of shareholders is present to advance the share capital nor the genuineness of transaction is there. Thus, neither the creditworthiness nor the genuineness of the transaction could be established.”

4. The Id. CIT(A) at Para 4 and 5 has given a categorical finding that in the instant case the assessee has not been able to prove the identity, credit worthiness of the shareholder nor the genuineness of the transaction. It was observed that in order to verify the transaction the AO had issued summons to the ten shareholders. Only one shareholder appeared who also denied the transaction. The source of money to all these shareholders is M/s. Portal India to whom the assessee has paid the same amount, i.e. Rs.9.30 crore towards purchase of the portal software. The date of transaction is also the same. Further, it was also found by the AO that the bank account of M/s. Portal India and the lone shareholder who appeared, i.e. Yashwant R. Gujar is the same, i.e. 1658. All the transactions

had taken place in the same bank account as per material on record.

The assessee has neither furnished any satisfactory reply to the AO nor before the CIT(A) explaining the bonafideness of the transaction. The Id. CIT(A) further held at para 5 as follows :

“5. Adverting to the fact in the instant case, it is evident that the explanation offered by appellant is not satisfactory. The appellant has not produced any substantiating documents/evidence to verify the source of receipt of share capital and therefore, it has been rightly held by the Assessing Officer that the amount received as share capital is not bonafide transactions. In the present case, the AO after considering all tangible material on record, has arrived that the share capital was sham or bogus. Further, the appellant neither before the AO nor before me could produce any substantiating document to prove the genuineness of transactions. The appellant could not produce any bonafide reason for not producing the party. I agree with the finding of the AO that the introduction of share capital is surreptitious as neither the identity nor the creditworthiness of the party nor the genuineness of the transaction is proved. A harmonious construction of section 106 of the Indian Evidence Act and 68 of the IT Act will be that though apart from establishing the identity of the creditor the assessee must establish the genuineness of the transaction as well as the creditworthiness of the creditor. In view of the fact on record in the instant case, the appellant is neither able to establish the identity of the creditor, nor the assessee was able to prove the creditworthiness of the creditor or the genuineness of transaction. Hence, the assessee has not been able to discharge the initial onus as he has not been able to establish the identity and creditworthiness of the share applicants and the genuineness of the transaction. The surrounding circumstances and inquiries made by the Assessing Officer are significant evidences to hold that the addition made is correct. Therefore, the AO had rightly added the sum of Rs. 9.03 crores to the appellant's income and held it to be subject to tax. The addition of Rs. 9.03 crores is upheld.”

5. We have heard the rival contentions, considered the facts and circumstances in this case. We find that in the first round relief was

provided to the assessee by the First Appellate Authority which was overturned by the Tribunal vide order dated 25-05-2012 in ITA No.216/PUN/2010 for the A.Y. 2001-02 and the matter was remanded back to the file of Id. CIT(A) to examine the three essential elements of section 68 of the Act, i.e. (1) Identity, (2) Credit Worthiness and (3) Genuineness of the transaction . We have observed from the findings of the Id. CIT(A) in his order in the second round that first of all there has always been an evasive attitude of the assessee to evade the process of law and not responding to the notices at once. Secondly, there is a categorical finding on facts that though the onus is on the assessee to establish identity, credit worthiness and genuineness of the transaction, it had miserably failed to do so even in the second round of appeal. It is established principle of law that the pre-requisites of section 68 of the Act, the onus is on the assessee to *prima-facie* establish the three ingredients for the purposes of the section. Before us also, the Id. AR could not prove the merits of the case. He only relied on the submissions made before the Id. CIT(A) in the first round of appeal where his case was allowed. But that becomes irrelevant now since the order of the Id. CIT(A) in the first round has already been overturned by the Tribunal in its order dated 25-05-2012 in ITA

No.216/PUN/2010 (supra). Even the case laws placed on record by the Id. AR are substantially different on facts and are not applicable to the facts and circumstances in respect of the present assessee. Admittedly, the assessee has not been able to prove the identity nor the assessee was able to prove the credit worthiness nor the genuineness of the transaction. Therefore, the *prima-facie* onus of the provisions of the Act has not been discharged by the assessee.

6. We find the Hon'ble Delhi High Court has rendered numerous judgments to the effect that the assessee has to prove the identity, credit worthiness and genuineness of the transaction. To illustrate, we would like to quote some of the judgments of the Hon'ble High Court infra. In the case of Tulip Engineering Pvt. Ltd. (2015) 92 CCH 60, the Hon'ble Delhi High Court has held as under :

“So far as the last ground, i.e. the merits as to the addition of Rs. 4,84,000/- goes, the basis for introducing Section 68 is understood in CIT v. Lovely Exports, 216 CTR 195 to say that the assessee not only has to establish the identity of the share applicant or investor, as the case may be, but also of the third party. It has to be prima facie established that such third party was credit worthy and the transaction was genuine. Whilst the acquisition of the shares of Galaxy Commercial was not doubted by the AO, what ultimately fell for his consideration was the sale consideration. The AO's discussion in paragraph 3 of his order is significant in this regard; both the purchasers did not respond to notices issued by the income authorities. Furthermore, the AO's enquiry reveal that these purchasers had insubstantial means and could not reasonably be said to possess the means to make the investments that they did, in purchasing the assessee's

shares for the amounts reported by it. Besides, as to whether the transaction was genuine or not is a pure finding of fact which has concurrently been rendered against the assessee."

7. In the case of Riddhi Promoters Pvt. Ltd 232 Taxman 430 dated 27-03-2015, the Hon'ble Delhi High Court held as under:

"It is not sufficient that the identity of the share applicant or the creditor should be established for the assessee to discharge the initial onus, which is upon the assessee. Under the requirement of Section 68, the assessee has to further satisfy the Revenue as to the genuineness of the transaction and the creditworthiness of the share applicant or the individual who is advancing amounts. The assessee's reliance upon the CIT (Appeals) order to contend that the sources of the funds were in essence as Directors, is in this context of no avail. The assessee has contended that it was incorporated just before the end of the financial year. However, the assessee had to necessarily show that the amount which it indicated as borrowed from the six applicants in fact belonged to them. It is not sufficient for the assessee to just raise such contentions on the basis of certain observations of the CIT (Appeals) in this regard. The creditworthiness of the share applicants had to be seen in the context of the assertion made by them or the materials presented before the AO at the relevant time. The materials on record disclosed that some information from at least two individuals indicated that the money had not been given by them. In view of the fact that concurrently the lower authorities held against the assessee and given the intensive factual nature of the evidence, no substantial question of law arises. The appeal is accordingly dismissed. "

8. Similar proposition has been laid down by the Hon'ble Delhi High Court in the case of Nipun Builder and developers Pvt. Ltd 214 Taxman 429 dated 07-01-2013 and also in the case of N. Tarika Properties Investment Pvt. Ltd. 221 Taxman 14 dated 28-11-2013.

9. We further find that the Hon'ble Apex Court in the case of P. Mohan Kala & Others 291 ITR 278 has held as under :

" 15 When and in what circumstances Section 68 of the Act would come into play? That a bare reading of Section 68 suggests that there has to be credit of amounts in the books maintained by an assessee; such credit has to be of a sum during the previous year; and the assessee offer no explanation about the nature and source of such credit found in the books; or the explanation offered by the assessee in the opinion of the Assessing Officer is not satisfactory. It is only then the sum so credited may be charged to income-tax as the income of the assessee of that previous year. The expression "the assessee's offer no explanation" means where the assessee's offer no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. It is true the opinion of the Assessing Officer for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the sine qua non for forming the opinion."

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The Hon'ble Court further observed as under :

"25 The doubtful nature of the transaction and the manner in which the sums were found credited in the books of accounts maintained by the assessee have been duly taken into consideration by the authorities below. The transactions though apparent were held to be not real one. May be the money came by way of bank cheques and paid through the process of banking transaction but that itself is of no consequence."

10. We find the Hon'ble Supreme Court in the case of P. R.Ganpathy 210 Taxman 572 has observed that the burden to show that the amount received by purported gifts from the donors was a "gift" in the legal sense is upon the assessee.

11. We find also the Hon'ble Supreme Court in the case of Roshan Di. Hatti Vs. CIT, 107 ITR 938 has held that the law is well settled that the onus of proving the source of a sum of money found to have been received by an assessee is on him. Where the nature and source of a receipt, whether it be of money or of other property, cannot be satisfactorily explained by the assessee, it is open to the revenue to hold that it is the income of the assessee and no further burden lies on the revenue to show that income is from any particular source.

12. Similar proposition has been laid down by the Hon'ble Supreme Court in the case of Kale Khan Mohammad Hanif Vs. CIT, 50 ITR 1, wherein it was held that "it is well established that the onus of proving the source of a sum of money found to have been received by the assessee is on him. If he disputes liability for tax, it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation under the provision of Income Tax Act. In the absence of such proof, the ITO is entitled to treat it as taxable income.

13. In view of the catena of judgments referred above on the extant issue under consideration and on examination of facts, we do

not find any reason to interfere with the findings of the Id. CIT(A) which is hereby upheld.

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

Order pronounced in the Open Court on 18th May, 2022.

Sd/-
(INTURI RAMA RAO) **(PARTHA SARATHI CHAUDHURY)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

पुणे Pune; दिनांक Dated : 18th May, 2022

Satish

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1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-1, Nashik
4. The Pr.CIT-1, Nashik
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "A" / DR 'A', ITAT, Pune
6. गार्ड फाईल / Guard file

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Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
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2.	Draft placed before author	18-05-2022	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
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