

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'SMC', NEW DELHI

BEFORE SHRI R.K.PANDA, ACCOUNTANT MEMBER

ITA No. 7456/Del/17

AY: 2008-09

Namah Shivaya Marketing (P) Ltd. 206, Hans Bhawan 1, Bahadur Shah Zafar Marg New Delhi 110 002 PAN: AABCN7435Q	vs.	ITO, Ward 17(3) New Delhi
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(Appellant)

(Respondent)

Assessee by : Sh. Mukul Gupta, C.A.
Department by : Sh. Amit Jain, Sr.D.R.

Date of Hearing : 13/03/2019
Date of Pronouncement: 07/06/2019

ORDER

This appeal filed by assessee is directed against the order dated 04th October, 2017 of Ld.CIT(A)-28, New Delhi pertaining to Assessment Year (A.Y.) 2008-09.

2. Facts of the case in brief, are that the assessee is a Private Limited Company and filed its return of income on 09th April, 2008 declaring total income of Rs.7,070/-. The return was processed u/s 143(1) of the Income Tax Act, 1961 (the Act) on 05th June, 2009. Subsequently the Assessing Officer (AO) received information from the Investigation Wing of the Department that the assessee has

received accommodation entry of Rs.30 lakhs in the garb of Share Application Money through the following companies, the details of which are as under.

Bank Book Date	From	To	Bank	Cheque/RTGS	Cheque Date	Amount-Rs.
24.12.2007	Finage Lease & Finance India Ltd.	Namah Shivaya Marketing P.Ltd.	Axis	098461	24.12.2007	500000
24.12.2007	Shalini Holding Ltd.	Namah Shivaya Marketing P.Ltd.	Axis	081400	24.12.2007	500000
26.12.2007	Lotus Realcon P. Ltd.	Namah Shivaya Marketing P.Ltd.	Axis	094139	26.12.2007	500000
26.12.2007	Mega Top Promoters P Ltd.	Namah Shivaya Marketing P.Ltd.	Axis	094319	26.12.2007	500000
14.01.8	Hum Tum Marketing P.Ltd.	Namah Shivaya Marketing P.Ltd.	Axis	094526	14.01.2007	1000000
	Total:					30,00,000

He noted that the above Companies are floated by Shri Surendra Kumar Jain/Virendra Kumar Jain, who have admitted during the course of search that they are mere entry operators and the various companies floated by them are used for providing accommodation entries only. Accordingly, the AO reopened the assessment u/s 147 of the Act and notice u/s 148 dated 17th March, 2015 was issued after obtaining approval from the Competent Authority. The assessee objected to such notice by filing Objections which were disposed of by the A.O. by passing a speaking order. Subsequently during the course of assessment proceedings the AO asked the assessee to substantiate the Share Application money so received

from various companies floated by Shri Surendra Kumar Jain. Rejecting the explanation given by the assessee and relying on various decisions, the AO made addition of Rs.30 lakhs to the total income of the assessee u/s 68 of the Act. The AO further made addition of Rs.60,000/- being commission paid for obtaining the accommodation entries by following the provisions of S.68C of the Act.

2.1. Before Ld.CIT(A) apart from challenging the addition on merits, the assessee also challenged the validity of the reassessment proceedings.

2.2. However, Ld.CIT(A) was not satisfied with the arguments advanced by the assessee and upheld the reassessment proceedings initiated by the A.O. So far as merits of the case is concerned, he also upheld the action of the A.O.

3. Aggrieved with such order of Ld.CIT(A) assessee is in appeal before the Tribunal by raising the following grounds.

1. *The learned CIT(A) has erred on facts and in law in upholding the impugned order of the learned assessing officer which is contrary to law, devoid of jurisdiction, passed without application of mind and without complying with the procedure and rules, is against equity and justice and facts of the assessee and material on record.*

2. *The appellant denies his liability to tax as upheld by the learned CIT(A) and determined and computed by the learned assessing officer and the manner in which it has been so determined or computed.*

3. The learned CIT(A) has erred on facts and in law in upholding the validity of reassessment proceedings ignoring the fact that initiation of the proceedings u/s 148 and the consequent order u/s 147 are bad in law as:

a) The initiation of proceedings u/s 148 are contrary to provisions of law.

b) The mandatory procedure laid down in the Act has not been followed.

c) The information has been collected behind the back of the assessee and the assessee was never confronted with the same nor an opportunity provided for cross-examination of Jain brothers, copies of the orders of Jain Brothers and the relevant seized material relied upon has not been provided to the assessee.

d) The assessment has been made on the basis of conjecture & surmises without any cogent evidence.

4. The learned CIT(A) has erred on facts and in law in upholding the addition of Rs.30,00,000/- u/s.68 on account of share capital, treating the same as an accommodation entry.

5. The learned CIT(A) has erred on facts and in law in upholding the addition of Rs.60,000/- u/s 69 as alleged commission paid for obtaining accommodation entries.

6. The learned CIT(A) has erred on facts and in law by not adjudicating ground of initiation of penalty proceedings u/s 271(l)(c) without any material on record.

PRAYER

6. The appellant craves leave and sanction of the Hon'ble ITAT to file additional evidence, if so required for proper prosecution of the case, based on facts and circumstances, which has not been or could not be produced or filed before lower authorities either because proper and sufficient opportunity was not provided or because it was not solicited or its need was not appreciated.

7. The appellant craves leave to and permission of the Hon'ble ITAT to add to or alter any of the grounds of appeal at any time up to the final decision of the appeal.

8. *The order of the A.O. as upheld by the learned CIT-A be declared as null and void ab-initio, additions made by AO and upheld by Ld. CITA be deleted, and the income returned be accepted as true as per law; or such other order as Your Honours may deem fit under the circumstances of the case be passed."*

4. Ld.Counsel for the assessee strongly opposed the order of Ld.CIT(A) in confirming the addition made by the AO and upholding the reassessment proceedings as valid. So far as the validity of reassessment proceedings are concerned, he submitted that the AO without independent application of mind has mechanically acted on the basis of information received from the Investigation Wing which were obtained behind the back of the assessee and no opportunity of cross examination was given. He submitted that S.148 notice was issued to assessee on different dates by the same AO. Despite requests being made to the AO to supply the copy of the statement recorded of Shri Surendra Kumar Jain/ Virendra Kumar Jain that they are engaged in the business of providing accommodation entries and have provided accommodation entries to the assessee company, however, no such statements were provided to assessee. Relying on various decisions, he submitted that the reassessment proceedings initiated by the AO are not valid.

5. In his alternative argument the Ld.Counsel for assessee, without prejudice to the above, submitted that when the premises of Shri Surendra Kumar Jain was searched u/s 132 and some incriminating materials relating to the assessee were found, the proper course of action should have been initiation of proceedings u/s 153C and recourse u/s 147/148 of the Act should not have

been taken. For the above proposition he relied on various decisions.

5.1. So far as the merits of the case is concerned, he submitted that various details such as PAN number of the company, bank account details, assessment particulars etc. were filed before the AO to discharge the initial onus cast on the assessee. Referring to the decision of Hon'ble Supreme Court in the case of PCIT vs. NRA Iron & Steel P. Ltd. reported in 103 Taxmann.com 48, he drew attention of the Bench to para 11 of the said order which reads as under.

"11. The principles which emerge where sums of money are credited as Share Capital/Premium are :

i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.

ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/subscriber verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.

iii. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.

In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act."

6. He submitted that the assessee in the instant case has filed the requisite details to discharge the primary onus cast on the

assessee, however, the AO failed in his duty, to investigate the credit worthiness of the creditors and the genuineness of the transaction, therefore, in the light of the above decision since the assessee has discharged the initial onus cast on it, and the AO simply made additions without conducting any further enquiry, therefore, the addition cannot be sustained. He accordingly submitted that both legally and factually the reassessment proceedings cannot be held as valid and the addition cannot be made u/s 68 of the Act.

7. Ld.D.R. on the other hand strongly supported the order of the AO and the Ld.CIT(A). He submitted that it is wrong to say that the AO has not conducted any enquiry. Referring to page 29 para 9 of the assessment order, he drew the attention of the Bench to the following observations of AO

"9. The AR of the assessee again vide letter dated 29.02.2016 and 04.03.2016 sought some information/ details and the request made by the assessee has been examined. It is observed that relevant details/information were the part of modus operandi of the accommodation entry provider i.e. Surender Kumar Jain Group entry operator group as determined by the Investigation Wing on the basis of documents found and seized during the course of search & survey operation carried out on the group, and post search proceeding. Relevant details/information pertaining to the assessee have already been provided to the assessee vide this office letter dated 22.02.2016, Instead of producing the Principal Officer/ Directors of the share subscriber companies, the AR of assessee again filed letter dated 07.03.2016 which was sent through speed post and was received on 09.03.2016 therein again filed frivolous objections and seeking some information/ details, However, the objections filed by

the AR of the assessee have been carefully examined, it is evident from the records that objection made by the assessee have already been disposed off by this office and the relevant information / details pertaining to the assessee have already been provided, therefore, the same stands disposed off."

7.1. He submitted that despite repeated opportunities granted by AO to produce the Principal Officer/Director of the subscriber companies, the assessee failed to produce those Directors for examination of the AO. He submitted that the Tribunal in the case of SK Jain Group of Companies had clearly held that they are indulged in providing accommodation entries. Referring to the decision of Hon'ble Supreme Court in the case of NRA Iron & Steel (P) Ltd. (supra) the Ld.DR drew attention of the Bench to para 14 page 1 of the said order which reads as under:

"14. The practice of conversion of un-accounted money through the cloak of Share Capital/Premium must be subjected to careful scrutiny. This would be particularly so in the case of private placement of shares, where a higher onus is required to be placed on the Assessee since the information is within the personal knowledge of the Assessee. The Assessee is under a legal obligation to prove the receipt of share capital/premium to the satisfaction of the AO, failure of which, would justify addition of the said amount to the income of the Assessee."

8. So far as objection of Ld.Counsel for assessee that assessee was not given opportunity to cross examine, he drew attention of the Bench to para 16.5 of the order of AO which reads as under.

"The assessee vide letters dated 04.03.2016, 07.03.2016 and 11.03.2016 sought certain information / details / statements. The information relevant to the case have already been provided to the assessee. Further, it may be reiterated that Jain brothers controlled the company through which accommodation entry has been provided to the assessee as discussed in show-cause notice. Moreover,

the statement of Jain brothers and intermediary -Sh. Y.K.Gupta has not been used as evidence against the assessee, therefore, the same was not provided to the assessee. As discussed in above para, ample opportunities were provided to the assessee to produce the principal officers of the investors companies from whom share capital and share premium were received by the assessee company but till date, the assessee has failed to produce them for examination. The seized material seized from premises of Jain brothers is duly confronted to the assessee for their examination & comments. The said seized material is self speaking in the elaborate manner in which the record of accommodation entries has been maintained and self explanatory. It does not require any external props to reach the conclusion which have been arrived at in the case."

8.1. He accordingly submitted that the reassessment proceedings have rightly been held as valid by Ld.CIT(A) and the addition has also rightly been upheld by Ld.CIT(A) u/s 68 of the Act.

9. I have considered the rival arguments made by both sides and perused the orders of the AO and Ld CIT(A). I have also considered the various decisions cited before me. I find the AO in the instant case after receiving information from the Investigation Wing has duly applied his mind and recorded reasons before issue of notice u/s 148 of the Act. Although three Notices u/s 148 were issued, however, it is seen that because of certain clerical mistake, the name of the company was wrongly mentioned which was corrected on the same date and fresh notice was issued at correct postal address mentioning the correct addresses. Therefore, I concur with the finding of Ld.CIT(A) that it was a bonafide mistake or small irregularity which was immediately corrected/rectified by the AO within the time available and without hampering the legality of the reassessment proceedings. Since the assessment was reopened on the basis of specific information received that the assessee is a

beneficiary of taking accommodation entry of Rs.30 lakhs in the garb of share application money from entry providers Shri Surendra Kumar Jain / Virendra Kumar Jain which was identified by Investigation Wing of the department after thorough investigation and enquiries and the AO after due application of mind has recorded the reasons for reopening of the assessment, therefore, in view of the detailed reasoning given by Ld.CIT(A), I find no infirmity in the same. Accordingly, grounds relating to validity of reassessment proceedings are dismissed.

10. Now coming to the merits of the case, it is an admitted fact that due to non-production of the Directors of the Investment Companies in the shares of assessee company and non-fulfillment of conditions laid down in terms of provisions of S.68 of the Act, the AO made addition of Rs 30 lakhs u/s 68 of the Act in respect of the share application money received from the five investing companies and further made addition of Rs.60,000/- u/s 69C of the Act being the commission expenses incurred for arranging the accommodation entries. Subsequent to passing of the order of Ld.CIT(A) two decisions have come viz., the decision of Hon'ble Delhi High Court in the case of PCIT vs. NDR Promoters P.Ltd. reported in 401 ITR 379 and the decision of Hon'ble Supreme Court in the case of PCIT vs. NRA Iron & Steel P. Ltd. 103 Taxmann.com 48. Neither the assessee nor the AO/Ld.CIT(A) had the benefit of the above two decisions wherein the issue relating to bogus share application money/share capital have been considered and certain observations were made. Considering the totality of facts of the

case in the interest of justice, I deem it fit and proper to restore the issue to the file of AO with the direction to give one more opportunity to the assessee to substantiate with evidence to his satisfaction regarding the identity and credit worthiness of the share applicant companies and genuineness of the transaction. The AO shall decide the issue as per fact and law after giving due opportunity of being heard to the assessee. While doing so he shall also keep in mind the decision of Hon'ble Supreme Court in the case of PCIT vs. NRA Iron & Steel P. Ltd. (supra) and the decision of Hon'ble Delhi High Court in the case of PCIT vs. NDR Promoters P.Ltd. (supra). I hold and direct accordingly.

10.1. The grounds raised by assessee are accordingly partly allowed for statistical purposes.

11. In the result, the appeal filed by assessee is partly allowed for statistical purposes.

Order pronounced in Open Court, on 07th June, 2019.

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 07th June, 2019.

*Gmv

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

- TRUE COPY -

By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches

	Date
Draft dictated on	03/06/19
Draft placed before author	04/06/19
Draft proposed & placed before the second member	
Draft discussed/approved by Second Member.	
Approved Draft comes to the Sr.PS/PS	06/06/19
Kept for pronouncement on & Order uploaded on :	07/06/19
File sent to the Bench Clerk	
Date on which file goes to the AR	
Date on which file goes to the Head Clerk.	
Date of dispatch of Order.	