* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 07.09.2018
Pronounced on : 12.09.2018

\+ **ITA 544/2005**

COMMISSIONER OF INCOME TAX ……Appellant
Through: Mr. Raghavendra Singh, Advocate.

Versus

M/S. JRD STOCK BROKERS PVT. LTD. …..Respondents
Through: Sh. M.P. Rastogi, Sh. K.N. Ahuja and Sh. Manu Giri, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

%

1. The question of law, framed in this appeal by the revenue – under Section 260A of the Income Tax Act, 1961 ("the Act" hereafter) is:

> *"Whether the order passed by the ITAT to the extent the same deletes the additions made by the assessing officer suffers from perversity?"*

2. The facts necessary to decide the case are that the assessee, a Chartered Accountant was also a member of Delhi Stock Exchange; he commenced business in 1990. He later converted the proprietorship concern into a Joint Stock Company by the name of M/ s J.R.D Stock Brokers (Pvt.) Ltd. A search was conducted on 24.11.2000. During course of search, the

assessee accepted that he had been providing accommodation entries to various parties and has opened fictitious bank accounts for which amounts were deposited in cash which were later on transferred into his concern - M/s. Ashok Gupta and Co. The Assessing Officer (hereafter "AO") brought to tax ₹ 3,99,35,142/ - on account of unexplained cash/ credit in the bank accounts by invoking the provisions of Section 68 of the Income Tax Act. The AO also made an addition of ₹ 76,82,551/- being the 1.5% commission of ₹51,21,70,060/-, the amount, which represented the total turnover of the period in question. On appeal, both additions were upheld by the CIT(Appeals). The ITAT, whom the assessee had approached held that the addition of ₹3,99,35,142/ - was not justified; it was of the opinion that Section 68 was inapplicable. On the other issue, the ITAT reduced the rate of commission from 1.5% to 0.60%. For doing so, ITAT relied on its order passed in M/s. JRD Stock Brokers (Pvt.) Ltd., against which revenue filed an appeal before this court (ITA No. 544/05).

3. During the hearing of the appeal, two issues were broadly argued: one, the reduction of the commission (from 1.5 % to 0.6%) and the other, the deletion of the sum brought to tax, by the revenue, under Section 68 of the Act. Mr. Singh submitted firstly that the reduction of the commission rate substantially, was without reason and, therefore, deserved to be set aside. He submitted that when both the tax authorities had concurred on the issue, the ITAT should not have interfered with the exercise of its discretion. On this aspect, the court is of opinion that no fault can be found with the ITAT. The total turnover brought to tax (on which the commission rate was to be applied) was over ₹ 100 crores. Although both lower authorities did impose a higher commission rate, their orders too show that this was based on some

rough and ready estimate; in these circumstances, the ITAT's decision to reduce the commission cannot be regarded as an error of law, calling for correction.

4. On the second issue, it was contended that the ITAT fell into error in holding that the addition under Section 68 was unwarranted. Counsel urged that there is no anomaly in bringing to tax amounts on one or other head of income and also, additionally holding that Section 68 applied. Mr. Raghavendra Singh, learned counsel for the revenue, relied on *Kale Khan Mohammad Hanif v. Commissioner Of Income-Tax* **(**1963) 50 ITR 1 (SC) in this regard. It was submitted that the assessment record shows that the feeder accounts were opened either in the name of employees or in the name of persons who give their names for consideration and operate at the instruction of Mr. Ashok Gupta. Moreover, these persons have completely denied of having any knowledge of transactions in such bank accounts.

5. Counsel pointed out the findings of the lower revenue authorities; it was submitted that under section 68, when a cash credit entry appeared in the assessee's books of accounts, the assessee was under an obligation to explain it to the satisfaction of the AO. In absence of such satisfactory explanation or failure to tender evidence, the AO could hold that income was income from undisclosed sources. The assessee had to establish *prima facie* the transactions, which resulted in cash credit in its books of account. This was proof of identity, capacity of creditors to advance and genuineness of the transaction. In the present case, neither the capacity of the creditors was proved nor the genuineness of the transaction was established as the assessee admitted that the transactions were bogus. Thus, the onus upon the assessee to prove the cash deposit in the bank accounts was not discharged.

6. Counsel for the assessee, Mr. Rastogi urged that *Kale Khan (supra)* had no application to the facts of this case. It was argued that having once assessed and brought to tax the larger amount of ₹ 104 crore, the AO could not have carved out a "peak credit" amount from amongst that turnover, based on aggregate of the amounts in the assessee's account in a particular year, to give treatment under Section 68 of the Act. He relied on the ITAT's observations, relying on its previous order, in this regard.

7. On appeal, the CIT (A) held that the assessee's argument with respect to treatment of peak credit during the period, i.e. the block assessment years, for the purpose of Section 68 was justified, observing as follows:

> *"7.1 These grounds of appeal relate to estimation of appellant's undisclosed income on the basis of peak cash credit at Rs.7,13,96,210/ -.*
>
> *7.2 The A.R. submitted that the determination of peak and valuation thereof is neither correctly determined nor required to be made under Chapter XIV B. The addition, if any, required was to be made in the hands of the beneficiaries and not in the hands of the appellant. As per Section 68, addition under this section was required to be made on the basis of entries in the books of accounts and not on the basis of bank statement. Moreover, the addition made is without any evidence or proof to establish the fact that the deposits represents appellant's undisclosed income.*
>
> *7.3 The A.R. further argued that the deposits represent deposits of money received from beneficiaries for exchange of Cheque as the entire business of the appellant is exchange of money for money, which does not call for any addition. It was submitted that since all the transactions have been treated as business and cash assumed to be deposited by the beneficiaries, there is nothing, which can be added in the appellant's hand*

and any addition, if required, is to be made only in those accounts where the appellant has no business connection. Reliance was also placed on the block assessment of Mr. Manoj Aggarwal where no such addition was made.

7.4 I have gone through the submissions made by the appellant. The assessment record shows that the feeder accounts were opened either in the name of employees or in the name of persons who land their names for consideration and operated at the instruction of Mr. Ashok Gupta. Moreover, these persons have completely denied of having any knowledge of transactions in such bank accounts.

7.5 Regarding bank statement cannot be treated as books of accounts; the appellant's contention is not maintainable on the ground that the alleged accounts books and annual accounts showing such entries are also made on the basis of these bank accounts.

XXXXXX XXXXXX XXXXXX

7.7 The issue is to be decided is whether the addition under Section 68 had rightly been made or not. As per section 68, when a cash credit entry appears in the appellant's books of accounts, the appellant is under legal obligation to explain the same that too to the satisfaction of the A.O. In case the appellant did not offer any explanation or fails to tender evidence or burkes an enquiry then the A.O. can hold that income as income from undisclosed sources. It is thus, imperative for the appellant to prove prima facie the transactions, which resulted in cash credit in its books of account. Such proof includes proof of identity, capacity of creditors to advance and genuineness of the transaction. In case these three basic ingredients have been proved then only the onus would have been treated as discharged. Whereas in the present case neither the capacity of the creditors was proved not the genuineness of the transaction was established as the appellant himself admitted the transactions were made

with mala fide intentions. Thus, the onus lied upon the appellant to prove the cash found deposited in the bank accounts was not discharged either before the A.O. or before me.

7.8 Keeping in view the facts narrated above, in my opinion, in absence of any supporting/ corroborative evidences, the A.O. was justified in making addition of peak cash credit of Rs.7,30,71,530/ -. Accordingly, the order of the A.O. is confirmed on this ground."

8. The ITAT's decision in this case, directing the deletion of ₹ 3,99,35,142/-, was based on the fact that its previous order in the same block assessment period (Delhi Bench "G" in IT(SS) 54/Del/2004 dated 30.11.2004) had held as follows:

"22. We have given careful thought to the rival submissions of the parties. At the very outset we hold that provision of sec. 68 of the Income-tax Act has no application. The addition has been made not for any cash credits in the books of accounts of the assessee but for peak of credits in the bank accounts of the assessee. The provision in question (section 68) could not be applied on credits in books of account of bank. If at all, addition could be made, the same could be made under section 69 of the Income-tax Act. On facts of the case, we are of the view that no addition of peak cash credits is justified in this case. The reason being that the revenue has practically accepted the case of the assessee that it was mainly carrying on the business of providing accommodation entries of share loss/ share profit through fictitious entries and this way had carried total transactions worth more than Rs 104 crores. The assessee further claimed that it received cash from its clients and gave them cheques of profit or loss in share dealings to give genuine colour from fictitious transactions. Thus when case of the assessee has been accepted and total turnover taken at more that Rs 104 crores for computing income from transactions, we

see no justification for not accepting case relating to credit of less than Rs 8 Crores in the accounts of the assessee. On facts of the case above credits cannot be treated as unexplained. These are part and parcel of total credits of Rs 104 crores duly accepted by the revenue for computing assessee's commission income. Besides cash received from the clients was credited in various bank accounts described as main/ feeder / fictitious accounts maintained by the assessee in the names of his employees like Surinder Rawat etc. Admittedly from the above account cash was brought to the bank account of the assessee. Therefore, as far as credit entries in the bank account of the assessee are concerned, these are explained with reference to the cash available in the main or feeder accounts. The addition for unaccounted cash is made, if any, in the feeder/main accounts which have been treated by the revenue as benami accounts of the assessee if the case of the assessee that its clients gave cash to the assessee for getting cheques supported by fictitious entries of profit/loss in share dealing was not accepted. But as stated earlier, the case pleaded by the assessee as per statement of Shri Ashok Gupta recorded under sec. 132(4) has been accepted. In this connection, reference is invited to observation In the assessment orders and that of the order of Ld. CIT(A). A portion of the said order has been reproduced in para 5 above. Thus, when cash credits have been accepted in feeder/fictitious accounts there is no question of making addition for cash credits in bank accounts. These cash credits have proximity can be treated as unexplained with reference to deposit/withdrawals from feeder accounts. The assessee is also entitled off set of the commission income added in the hands of the assessee. Thus considered from any angle we see no justification for sustaining addition for peak credits under section 68 of the Income-tax Act. The same is directed to be deleted."

9. In *Kale Khan* (*supra*) the facts were that the assessee, a trader was carrying on two businesses, (general merchandise and bidis). He had income from property too. Four of the years concerned, he had submitted a return;

however, his accounts were not found complete and reliable. The AO assessed the gross profits of the businesses on the basis of certain percentages of the total sales which had also to be fixed by estimates. This was not questioned. Later, while dealing with another year, the AO noted that various credit entries in the assessees' books of account that appeared to have escaped his attention at the time of the assessment for the concerned years mentioned. The entries were (i) Gold Khata- ₹41,300 (ii) Ghar Khata- ₹33,000 /- (iii) Mohammad Islam Khata ₹ 10,000/- (iv) Muslim Bi Khata ₹11,000. The total for the year was ₹ 95,300. Likewise, for the other year (1947-48) these were an aggregate of ₹39,575.The AO duly re-opened the assessments in respect of these years and after giving the assessee opportunity to explain the nature of these entries made fresh assessments. In the fresh assessments, he added to the previously estimated incomes the said sum of ₹ 95,300 in respect of the year 1945-46 and the said sum of ₹ 39,575 in respect of the year 1947-48, as he was unable to accept the explanation offered by the assessee in support of his contention that the credit entries did not represent income. The Supreme Court dealt with the assessee's submission that the amount brought to tax as undisclosed could have been, since income was previously assessed on percentage basis. The Court held as follows:

> *"We have now to deal with the last question, question No.6, which, as framed in the case for the assessment year 1945-46, is set out below :*
>
> > *"Whether having regard to the fact that the Income-tax Officer has assessed the income on a percentage basis, he was justified in treating the*

said sums of Rs. 41,300 and Rs. 11,000 as profits from an undisclosed source ?"

In the case for the assessment year 1947-48 the corresponding question was in identical terms except that the figures mentioned in it were Rs. 19,575 and Rs. 20,000. The High Court answered the question in the affirmative, and in our view rightly, for we do not think that any other answer is possible.
We are in some difficulty in appreciating the point of this question also. The question would seem to suggest that because the income from a disclosed source has been computed on the basis of an estimate and not on the basis of the return filed in respect of it, an income represented by a credit entry in the books of account of that source cannot be held to be income from another and undisclosed source. We do not see why it cannot be so held. It appears from the judgment of the High Court that the reason given in support of the suggestion was that if that income was held to be income of an undisclosed source, the result would be double taxation of the same income which the Income Tax Act does not contemplate. Apparently, it was said that there would be double taxation because it was assumed that the same income had once been earlier taxed on the basis of an estimate. This reason is obviously fallacious, for if the income is treated as one from an undisclosed source which the question postulates, it is not treated as income of the disclosed source which had previously been assessed to tax and, therefore, there is in such a case no double taxation. It is not a case where the income sought to be taxed was held to be undisclosed income of a disclosed source, the income of which source had previously been taxed on the basis of an estimate. If it were so, the question of double taxation might have been legitimately raised. That, however, is clearly not the case here as the question as framed itself shows.

We concede that the question as to the source from which a particular income is derived is one which has to be decided on all the facts of the case. Hence the question whether income represented by an entry in the books of a business is income of

that business or of another business would have to be decided on the facts which showed the business to which it belonged. But quite clearly the answer to that question would not depend on whether the income from the first mentioned business had been computed on the basis of a return filed or of an estimate of the income made by the taxing authorities. This, however, is what the question as framed suggests, and that suggestion is in our view wholly without foundation. Therefore, it cannot be said that the taxing authorities were precluded from treating the amounts of the credit entries as income from undisclosed sources simply because the entries appear in the books of a business whose income they had previously computed on a percentage basis. That is why we think that the answer to the question as framed must be in the affirmative.

As we have earlier said, the question as to the source from which a particular income is derived has to be decided on all the facts of the case. In the present case, the Income-tax Officer held the income represented by the credit entries to be income from undisclosed sources, that is, neither from the manihari (general merchandise) nor from the bidi business of the assessee which he had disclosed. This view was upheld by the Appellate Commissioner and by the Tribunal excepting as to two of the amounts earlier mentioned. It was open to the assessee to raise the question that the finding that those amounts were income received from undisclosed sources was not based on any evidence or was, for other reasons, perverse. It appears that he did raise some questions of this type before the Tribunal for reference to the High Court but the Tribunal did not think that those questions legitimately arose and did not refer them to the High Court. The assessee accepted the decision of the Tribunal and did not move the High Court to direct a reference in regard to those questions under section 66 (2). Those questions, therefore, cannot be raised in this court. We have dealt with the reference made on the basis that the finding that the amounts of the credit entries were income received from undisclosed sources was disputed only on the ground that the income from the business had been computed

on the basis of an estimate. In the circumstances of the case we could not have done anything else."

10. In the present case, the basis for addition under Section 68 is that the assessee could not explain or establish the identity, genuineness (of the credit transaction), or creditworthiness of the party. That these amounts were included in the larger turnover, in terms of *Kale Khan (supra)*, does not *ipso facto* shut out an inquiry into the credits, which have to be explained. These amounts were in fact "peak credit" amounts that were brought to tax, since the assessee's explanations were inadequate. This kind of acceptance of "peak credit" theory to bring to tax amounts under Section 68 was approved by this court in *Commissioner of Income Tax v. D.K. Garg* 2018 (404) ITR 757 (Del).

> *"19. 13. There have been numerous cases before the AO, CIT (A), the ITAT and for that matter even before this Court, where the question involved concerns the treatment of 'accommodation entries'. Basically, what an accommodation entry provider does is to accept cash from an Assessee and arranges to have a cheque issued from his own account or some other account, usually of 'paper' or fake entities, to make it appear to be a loan or an investment in share capital. The accommodation entry provider usually charges a commission which is deducted upfront. Where the Assessee is unable to explain the source of such credit in his account - i.e. by demonstrating the identity of the provider of the credit, the creditworthiness of such entity, and the genuineness of the transaction - the credit entry is treated as unexplained and the income is treated under Section 68 of the Act as the income of the Assessee.*
>
> *14. In cases where the Assessee discharges the initial onus of establishing the identity and creditworthiness of the credit provider and the genuineness of the transaction, be it one of*

loan or subscribing to share capital, the onus shifts to the revenue to show the contrary. Where, for instance, an Assessee furnishes the complete details of the entity like its certificate of incorporation, PAN number, income tax returns, bank accounts, names and addresses of the directors and so on, the Courts have insisted on the AO to make a proper enquiry to examine the identity and creditworthiness of such companies and the genuineness of the transactions in question. Where the AO fails to make such an enquiry, a Court might delete the additions made by the AO.

15. The present case, however, is of a different nature. Here, we are dealing with an Assessee who does not deny that he is an accommodation entry provider. He, in fact, makes no bones of the fact that he either owned or floated 'paper companies' only for that purpose. He also does not dispute the fact that he has not been able to explain the source of all the deposits in his accounts or the ultimate destination of all the outgo from his accounts.

16. The Assessee's plea that he should be taxed only on a composite 'peak credit' is based entirely on principles of accountancy. He questions the logic behind allowing peak credits for some of the credit entries by way of cheques and denying it for the other entries in cash. He also questions the practice of working out separate peak credits for cheque and cash transactions.

17. The premise underlying the concept of peak credit is the squaring up of the deposits in the account with the corresponding payments out of the account to the same person. In Bhaiyalal Shyam Bihari v. CIT (supra), the Allahabad High Court explained that benefit of peak can be given only when the assessee owns up all the cash credits in the books of accounts. It was further held:

> *"For adjudicating upon the plea of peak credit the factual foundation has to be laid by the assessee. He has*

to own all cash credit entries in the books of account and only thereafter can the question of peak credit be raised."

19. The legal position in respect of an accommodation entry provider seeking the benefit of 'peak credit' appears to have been totally overlooked by the ITAT in the present case. Indeed, if the Assessee as a self-confessed accommodation entry provider wanted to avail the benefit of the 'peak credit', he had to make a clean breast of all the facts within his knowledge concerning the credit entries in the accounts. He has to explain with sufficient detail the source of all the deposits in his accounts as well as the corresponding destination of all payments from the accounts. The Assessee should be able to show that money has been transferred through banking channels from the bank account of creditors to the bank account of the Assessee, the identity of the creditors and that the money paid from the accounts of the Assessee has returned to the bank accounts of the creditors. The Assessee has to discharge the primary onus of disclosure in this regard.

20. While the AO in the present case did not question the working out of the peak credit by the Assessee, he, at the same time, insisted that the additions made by him to the returned income of the Assessee should be sustained. The peak credit worked out by the Assessee was on the basis that the principle of peak credit would apply, notwithstanding the failure of the Assessee to explain each of the sources of the deposits and the corresponding destination of the payment without squaring them off. That is not permissible in law as explained by the Allahabad High Court in the aforementioned decisions which, this Court concurs with.

Conclusion

21. As already noted, the ITAT went merely on the basis of accountancy, overlooking the settled legal position that peak credit is not applicable where deposits remain unexplained under Section 68 of the Act. The question of law framed by this Court, is accordingly, answered in the negative i.e. in favour of

the Revenue and against the Assessee. The impugned order of ITAT is, accordingly, set aside and the order of the AO is restored to file."

11. This court observes that the lower authorities found from the assessment records that the "feeder accounts" were opened either in the name of the assessee's employees or in the name of those who operated for consideration and operated at the instruction of Mr. Ashok Gupta, proprietor of the assessee. These individuals denied of having any knowledge of transactions in those bank accounts. The AO, in these circumstances felt that the bank statements were reliable because entries in the books (found during the search) reflecting the amounts, supported in the bank account statements seized. Having regard to *Kale Khan* (*supra*) and *D.K. Garg* (*supra*), it is held that *per se* the ITAT could have not ruled out taxability under Section 68, given the unsatisfactory nature of the explanation provided by the assessee. This court notices, at the same time that inconsistent approaches were adopted by the lower revenue authorities for two years: for the first block period, ending with AY 2000-2001, the assessee was sought to be taxed for a total amount of ₹ 71,396,211/-; for the later block period (in Appeal No. 178/2002-03) the CIT taxed (out of the same amount) only the sum of ₹ 3,99,35,142/-. It appears that the assessee could satisfactorily explain the genuineness and other necessary ingredients needed under Section 68 with respect to the balance except inability to co-relate the cheque or instruments with the creditor concerned. Given that on these aspects, the findings were in favour of the assessee (which do not appear to have been interfered with), the revenue's appeal can only succeed in part.

12. In view of the above finding, it is held that the revenue's appeal has to succeed in part; the amount of ₹ 3,99,35,142/- in the account of the assessee can be taxed under Section 68 of the Act. The appeal is allowed to this extent. There shall be no order on costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

SEPTEMBER 12, 2018