

INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "E": NEW DELHI]

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA. No.5802/Del/2017
(Assessment Year:2011-12)

The Income tax Officer Ward 17 91) New Delhi	Vs.	Momentum Technologies Pvt Ltd B-21 Moti Nagar New Delhi. PAN AACCM6467C
(Appellant)		(Respondent)

Assessee by :	Shri Kapil Goel, Advocate
Revenue by:	Ms. Aman Preet, Sr. D.R.;
Date of Hearing	25/03/2021
Date of pronouncement	31/03/2021

O R D E R

PER PRASHANT MAHARISHI, A. M.

- 01 This appeal is filed by The Income Tax Officer , Ward 17 (1), New Delhi (the learned AO) against the order passed by The Commissioner Of Income Tax (Appeals) – 33, New Delhi dated 31/7/2017 for assessment year 2011 – 12 raising following grounds of appeal:-
- whether on the facts and circumstances of the case, the learned CIT (A) is legally justified in deleting the addition of ₹ 59,303,873/- u/s 68 of The Income Tax Act, 1961 (The Act) on account of cash deposits in bank account even when the assessee had failed to discharge its initial onus to prove the genuineness of source of cash deposited in the bank during the

course of assessment proceedings even after providing sufficient opportunities to the assessee.

- ii. whether on the facts and circumstances of the case, the learned CIT – A is legally justified in deleting the addition of ₹ 59,303,873/- on account of cash deposits in bank account by ignoring the provisions of Section 68 of the act in this regard and by ignoring the fact that the assessee has failed to discharge its initial onus laid down u/s 68 of the act
- iii. whether on the facts and circumstances of the case, the learned CIT (A) is legally justified in deleting the addition of ₹ 59,303,873 u/s 68 of the act 1961 on account of cash deposits in bank account made on the basis of credible information by accepting submissions filed by the assessee during appellate proceedings even when the assessee had not fulfilled conditions as laid down Under rule 46 – A of The Income Tax Rules, 1962 (The Rule) and no opportunity was provided to the assessing officer of being heard.

02 Brief facts of the case shows that that assessee is a company who filed its return of income on 27/9/2011 declaring an income of ₹ 421,835/-. It is also revised its return of income on 12/2/2013 declaring taxable income of ₹ 1,014,894. Reasons behind revising return of income is stated to include 1% commission on accounted turnover in ICICI bank Ltd of app Rs 59303873/-.

03 In this case the information was received from the Deputy Director of Income Tax (Investigation) unit IV (2) New Delhi vide F. NO. DDIT (inv) Unit Iv(2) 87/2012 – 13/561 dated 14/3/2013 that suspicious transaction report [STR] was received in the case of the assessee with the allegation that assessee is having three accounts with the same permanent account number and it was triggered for the large value cash transaction in those account. The transaction pattern shows high amounts of transfer and cash deposits from the different branches followed by immediate withdrawal of cash/ by cheque as well as transferred to 3rd party accounts. As per the enhanced due diligence conducted by bank official the customer is importing laptop from China and USA and is trading at various locations in India. No precise information pertaining to validation of source and usage pattern of funds in the business of the customer was revealed from enhanced

due diligence. The DDIT (investigation) has also stated that the inquiries were conducted in this case and revealed that there are various cash deposits in the bank account statement. It was stated that Assessee Company is doing business in computer accessories and computer peripherals.

- 04 The director's statement stated that he is director in the above company and was asked to produce the books of accounts of the company. The authorised representative of the assessee company appeared and submitted that the transaction in the bank account number 3344 at ICICI bank, West Patel Nagar, New Delhi have not been recorded in the regular books of accounts of the assessee. There are cash deposits from various geography and places like Haldwani & Jalalndhar in the bank account and subsequently transferred to other parties. The assessee explained that the bank account was open for the purpose of maintaining of volume of orders procured through the assessee against which he was entitled for a commission of at the rate of 1% of the order value. The assessee transfer the funds or hands over cheques on behalf of or as per the order given by the parties. The assessee book the orders and advise the buyer is to deposit the account in this particular account and pass on the details to the party for further action i.e. delivery/courier of the branded laptops to them. Since the price of those, branded laptop as compared to the price in the market so advance payment has been received from the buyer has and issued cheque and transfers the funds to the party account as per the instructions. In all these, process the assessee is entitled for amount equal to 1% of the order-received money deposited as commission. Thus, the assessee has revised the income tax return for assessment year 2011 - 12 and assessment year 2012 - 13 stating that the transaction in the bank account number 3344 is the commission income of the company from selling the laptops on behalf of the other parties. This commission income from the transaction in the bank account number 3344 has been offered as income from other sources in the revised income tax return filed by the assessee company for assessment year 2011 - 12 at the rate of 1%. The total cash deposit in the bank account and commission income offered by the assessee company for financial year 2010 - 11 i.e. assessment year 11 - 12 was ₹ 59,303,873 and the commission income thereon was ₹ 593,039/-. The assessee company

- also deposited the additional income tax on the commission income offered.
- 05 The learned assessing officer on that basis was of the view that the income of the assessee to the extent of ₹ 59,303,873 has escaped assessment. It was also stated in the reasons recorded that without prejudice to the above, assessee has filed its revised return on 12/2/2013 declaring an income of ₹ 1,014,894/- whereas the proceedings u/s 143 (1) of the act has so far been completed at original return income of ₹ 421,855. Thus, the income of ₹ 593,039 has escaped assessment.
- 06 On this reasons the notice u/s 148 of the income tax act were issued on 15/4/2013. In response to the above notice, the assessee submitted that it has filed the original return on 27/9/2011 and subsequently the revised return on 12/2/2013, which may be treated as, filed against the notice issued u/s 148 of the income tax act. The assessee also asked for the reasons recorded for reopening of the assessment, which were provided by the learned AO on 30/8/2013.
- 07 During the course of assessment proceedings, the assessee was asked to furnish the details regarding the business activities conducted by them including the transactions in the above-unaccounted ICICI bank account. Assessee furnished the details regarding the business activities declared in the original return filed by the assessee however, no details regarding the business activities on which commission income declared was filed. Therefore the learned assessing officer was of the view that assessee has failed to provide the existence of the business of trading of laptop as claimed by the assessee has no sale/purchase bills were submitted. He also noted that the bank account submitted by the assessee reveals that the cash has been deposited from different parts of India and transferred to parties for which assessee claimed for business activities. Therefore, the learned assessing officer held that the assessee company has not submitted any basis of 1% of the commission declared on the cash deposited of ₹ 59,303,873 in the ICICI bank account. He also noted that the investigation wing sent letter to the parties from whom cash deposits were received and details of the party to whom funds were transferred for supply of the laptop for furnishing the documentary evidence and to substantiate the commission at the rate of 1% on the above sale stated by the assessee. Furthermore, the statement of the director of

the company was also recorded wherein he stated that he was to procure the orders of the commission basis of laptops and accessories from different parties and provided the address of the above parties. The learned assessing officer issued notices u/s 133 (6) of the act to the parties to whom amount was transferred but all the notices returned with the postal remark that no such party at the given address. Therefore, the show cause notice was also issued to the assessee to explain the return of the above notices. The assessee submitted that it does not have any documentary evidence with respect to these transaction as far as the justification of 1% of the commission is concerned and electronic item in today's scenario the retail margin is only 1% - 2% whereas this was the bulk sale transaction and therefore the margin shown by the assessee at the rate of 1% was quite healthy margin at that time. Assessee also submitted that to buy peace of mind the assessee has declared this income and revised his return of income. The learned assessing officer then noted that assessee company has failed to provide the source of cash deposited with the ICICI bank account and also the existence of the business of trading of laptop and accessories has claimed and therefore he made an addition of ₹ 59,303,873/- to the income of the assessee u/s 68 of the income tax act 1961. Consequently the assessment was determined at ₹ 59,725,730/- against the returned income as per the original return of income of Rs 421,855/- by passing an order u/s 143 (3) read with Section 147 of The Income Tax Act, 1961 on 27/3/2015.

08 The assessee aggrieved with the order of the learned assessing officer preferred an appeal before the learned CIT (A). The identical additions were also made in the hands of the assessee for assessment year 2012 - 13. Learned CIT - A passed a common order for both the assessment years. The learned CIT - A decided the issue as Under:-

"5.15 I have considered that order of the AO and the submission of the assessee and I find some merit in the submission of the assessee that the AO is not justified to make the addition of the entire cash deposits in the ICICI bank account when the cash deposits are made of small amounts over a period of time and all over the country and at that same time the payment in cheques have been made from the same bank account out of the same sale

proceeds or out of the same cash deposits. It is apparent that the Cash deposits of smaller amounts have been made over a period of time in the bank account of the assessee all over the country and the cheques have been issued out of the same bank account out of the same cash deposits and the AO is not justified to make the addition of the entire turnover or the case deposits in the form of total cash deposits in both the assessment year 2011 - 12 of ₹ 59,303,873/- and assessment year 2012 - 13 of ₹ 103,966,491/-.

5.16 The AO has failed to appreciate and ignore the additional Commission income, which has been offered in the revised return for the assessment year 2011 - 12 and 2012 - 13, which has been apparently offered by the assessee from the same business of computer business and the transaction in the same ICICI bank account.

5.17 It is apparent that the AO is not justified to make the addition of the aggregate cash deposits in the ICICI bank account without considering the subsequent cheque payments from the same ICICI bank account in which the cash has been apparently deposited and at the same time the AO has failed to prove that the payments which have been made in cheque from the same ICICI bank account has been received back by the assessee in any form. The AO has failed to appreciate that the income tax is a tax on real income and not on the turnover as done by the AO in both the assessment year 2011 - 12 and 2012 - 13.

5.18 After considering all the facts and circumstances of the case of both the assessment years of assessment year 2011 - 12 and 2012 - 13, I am of the view that AO is not justified to make the additions of the entire cash deposits without considering the withdrawals in the form of cheque payments to suppliers and the ends of justice will be met if the peak theory income of the assessee is accepted of ₹ 6,329,851/- as on 15/4/2011 as the transactions falling in the two assessment years are running on integrated or composite transactions in the same ICICI bank account and the peak amount as on 15/4/2011 comes to ₹

6,329,851/- just after the peak balance of ₹ 3,918,897/- as on 31/3/2011 and accordingly the additions made by the AO are deleted and the income for both the assessment year is recomputed as Under:-

5.19 Assessment Year 2011 – 12:- The AO is directed to accept the revised return of income of ₹ 1,014,894/- for the assessment year 2011 – 12 and all the additions deleted which are being taken care of and computed in the assessment year 2012 – 13.

5.20 Assessment Year 2012 – 13:- The AO is directed to make the estimated on lump-sum amount of addition of ₹ 70 lakhs for assessment year 2012 – 13 on the basis of peak theory income of ₹ 6,329,851/- as on 15/4/2011 treating the transactions of cash deposits in both the assessment year as a running and composite transaction and to be fair to the assessee, the AO is directed to reduce the additional Commissioner income of ₹ 593,039/- which has been offered in the revised return of assessment year 2011 – 12 and also reduce the additional income of ₹ 1,039,665/- which has been offered in the revised return for assessment year 2012 – 13 and consequently the AO is directed to make the net addition of ₹ 5,367,296 for the assessment year 2012-13 after considering accepting the revised return of income of ₹ 1,550,213/- and assessed the total income at ₹ 6,917,509 and all the other additions are directed to be deleted.”

- 09 Thus, revenue is aggrieved by the order of the learned CIT – AI has preferred this appeal.
- 10 The learned senior DR vehemently supported the order of the learned assessing officer and submitted that the income offered by the assessee in the revised return cannot be accepted in absence of any information given by the assessee with respect to the trading activities conducted by it. Therefore, the amount of cash deposited in the bank account should have been confirmed by the learned and CIT – A.
- 11 The learned authorised representative vehemently supported the order of the learned CIT – A as well as invoked the provisions of Rule 27 to state that when the assessee has revised its return of income which is pending before the learned assessing officer, he could not have

initiated the proceedings u/s 148 of the income tax act. He submitted that all these facts are coming out of from the orders of the learned assessing officer as well as the order of the learned CIT – A. He submitted that for the assessment year 2011 – 12 the original return of income was filed u/s 139 (1) on 27/9/2011 declaring an income of Rs 421,855/-. This return was validly revised within the time allowed u/s 139 (5) of the act on 12th/2/2013 at ₹ 1,014,894/-. It included the commission income on the above amount at the rate of 1%. He further submitted that notice u/s 143 (2) and notice u/s 148 of the income tax act was issued on 15/4/2013. He further noted that assessment order there is a specific reference of revision of the return filed by the assessee. He further referred to the para number 4.16 passed by the learned CIT – A and stated that the assessing officer is not aggrieved with the above order and has not challenged the same. He therefore submitted that for assessment year 2011 – 12 the time limit for issuing notice u/s 143 (2) of the Act was available up to 30 September 2013 and therefore the notice issued u/s 148 of the income tax act on 15/4/2013 within the time available for the issue of notice u/s 143 (2) is bad in law and therefore the assessment is required to be void ab initio. For invocation of rule 27 he heavily relied on the decision of the honourable Delhi High Court in case of Sanjeev sawhnwy in ITA number 834/2019 dated 18/05/2020. He further submitted that the revised return filed u/s 139 (5) has the effect of replacing the original return filed u/s 139 (1) by revised return provided it is timely filed within the stipulated time limit. He submitted that assessee has accordingly filed the revised return within the time allowed. He also submitted that the learned assessing officer has ignored the revised return filed and made assessment on the original return of income filed by the assessee, which does not have any legal sanctity and becomes non est by the scheme of law. In view of this, he submitted that the assessment order passed by the learned assessing officer is defective as it is completed based on an invalid and nonexistent original return of income which was subsequently revised. He further stated that assessment order passed by the learned assessing officer also suffer from the deficiency of issuance of reopening of notice u/s 148 within the time available for issuance of notice u/s 143 (2) as reckoned from the revised return filed u/s 139 (5) of the act.

12 On the merits of the issue, it is submitted that Assessee Company got incorporated on 27/4/2000 and is engaged in the business of trading and providing services in the field of computer hardware including peripherals and computer softwares. He referred to the memorandum of Association of the assessee. He further submitted a detailed chart of the assessee's working of the 10 years turnover and profit on thereon he also took us to the statement recorded of the director of the company u/s 131 (1A) of the income tax act on 8/1/2013. He referred to the question number [5], which gives the address of the assessee as well as the godown of the assessee. He also referred to question number [10] wherein the turnover of the assessee company has been explained. He also referred to question number [11] wherein it has been stated by the director that the company used to procure orders on commission basis of laptops and accessories for two different parties and the contact person in both the concerns was given along with the mobile number. The addresses of both these parties are also stated. The director also stated that company has not dealt with these two companies for the last one and half years. He further referred to question number [12] where the modus operandi was explained as the customers deposited advance, order is given on behalf of the two parties, and the laptops were dispatched on daily basis. It was also stated that assessee first accepted cash deposit in the bank account and courier companies pickup the goods from the suppliers and deliver the items to them. He also gave the name and address of the major suppliers per question number [13]. He also explained the major brands dealt with by the assessee in response to question number [14] are Dell, HP, Lenovo, and Acer. In response to question number [15] he submitted that assessee used to purchase Dell and HP laptops from these two parties. He also submitted that even note of investigation wing also states that assessee is a company dealing in computer accessories and computers. Therefore, doubt created by LD Ao is devoid of any merit. He also submitted that when the director has stated that company has not done any business with the parties for last two years, it is therefore not possible for assessee now to trace them as 133 (6) notices have come back. He also relied on various para of orders of Id CIT (A). In view of this he submitted that there is no doubt that, the assessee is carrying on the

- business of computer peripherals and computers. Thus, he stated that there is no infirmity in the order of the learned CIT – A on merits.
- 13 He also supported the order of the learned CIT appeal stating that from the bank account of the ICICI bank, the learned CIT – A has upheld the addition of ₹ 70 lakhs based on the peak theory of income. The peak balance of the assessee on 15/4/2011 treating the transaction of cash deposited for the assessment years was ₹ 6,329,851/- on 15/4/2011 and thus has confirmed the addition of ₹ 70 lakhs in the hands of the assessee for assessment year 2012 – 13. He therefore stated that the total addition has already been made in the hands of the assessee arising out of the above bank account of ₹ 70 lakhs and no further additions are warranted. Thus, he supported the order of the learned CIT – A on quantum of addition sustained.
- 14 We have carefully considered the rival contentions and perused the facts available on record along with the orders of the lower authorities. The first contention raised by assessee invoking rule 27 of the income tax appellate tribunal rules 1963, the contention raised that when the return of income is pending before the learned assessing officer, whether the reopening can be made by issue of notice u/s 148 of the income tax act or not. For impugned AY , assessee has filed original return of income for assessment year 2011 – 12 on 27/9/2011 declaring income of ₹ 421,855/- the assessee could have revised its return of income noting any error and omission in the original return of income filed by the assessee. Such return of income could have been revised at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier. Thus, the assessee could have revised its return of income on or before 31st of March 2013 or before the completion of the assessment, whichever is earlier. The assessee revised its return of income on 12 February 2013 declaring wherein the income which was not disclosed in the original return of income. Thus the total income was revised at ₹ 1,014,894/-. Naturally, the assessment was not framed by the time assessee revised its return of income. Therefore, the revised return filed by the assessee is within the time allowed u/s 139 (5) of the act.
- 15 Neither the assessee nor the learned CIT – A has held that the revised return filed by the assessee is not bona fide and is not on account of any error or omission in the return of income filed originally.

Therefore, the revised return filed by the assessee is necessarily to be accepted.

- 16 Provision of section 143 (2) of the act dealing with assessment provides as under :-

[Assessment.

³⁰143.

[(2) Where a return has been furnished under [section 139](#), or in response to a notice under sub-section (1) of [section 142](#), the Assessing Officer shall,—

(i) where he has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim:

³⁴[Provided that no notice under this clause shall be served on the assessee on or after the 1st day of June, 2003;]

(ii) notwithstanding anything contained in clause (i), if he considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced, any evidence on which the assessee may rely in support of the return:

³⁵[Provided that no notice under clause (ii) shall be served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished.]]

- 17 The above provisions does not make any distinction between return of income filed u/s 139(1) or U/s 139 (5) of the act. If the return filed u/s 139[5] is a valid return , then the notice u/s 143(2) of the act can be issued to the assessee within expiry of six months from the end of the Financial Year in which revised return of income is filed. In this case, Revised return is filed on 12/2/2013, so 143 (2) notice could have been issued to the assessee on or before 30/9/2013. Therefore, the assessment proceedings were pending before Id AO. However, Id AO issued notice u/s 148 of the act on 15/04/2013, i.e. when the

original assessment proceedings were pending as time limit for issue of notice u/s 143 (2) did not expire. Section 142(1) and Section 148 of the Act cannot operate simultaneously. There is no discretion vested with the Assessing Officer to utilize any one of them. The two provisions govern different fields and can be exercised in different circumstances. If income escapes assessment, then the only way to initiate assessment proceedings is to issue notice under Section 148 of the Act. In fact, the proceedings are pending u/s 143 of the act, it looks in appropriate to call for a return under Section 148 of the Act because income cannot be said to have escaped assessment when the assessment proceedings are pending. Such is also held by Honourable Madras High court in COMMISSIONER OF INCOME-TAX V QATALYS SOFTWARE TECHNOLOGIES LTD. [2009] 308 ITR 249 (Madras) where in following the decision of the Honourable High court in COMMISSIONER OF INCOME-TAX v. K. M. PACHAYAPPAN in 304 ITR 264 (Madras) held that

“7. Applying the principles enunciated in the judgments of the Supreme Court as well as the Delhi High Court, cited supra, the Tribunal is right in coming to a conclusion that no action could be initiated under section 147 of the Act, when there is a pendency of the return before the Assessing Officer. The reasons given by the Tribunal are based on valid materials and evidence and we do not find any error or illegality in the order of the Tribunal so as to warrant interference.”

- 18 Same is also the mandate of Honourable Delhi High court in [2007] 292 ITR 49 KLM ROYAL DUTCH AIRLINES v. ASSISTANT DIRECTOR OF INCOME-TAX where in it has been held that *Where an assessment has not been framed at all, it is not possible to posit that income has escaped assessment.*
- 19 In view of this we also held that when the revised return is pending before Id AO, Time limit for picking that return for scrutiny is pending u/s 143 (2) of the act, the Id AO could not have multiplied the proceedings and initiated proceedings u/s 148 of the act.
- 20 Even otherwise on the merits of the case the learned CIT – A has noted that there were 887 instances of cash deposits during the year

and similarly 1135 instances of cash deposits in the next year for assessment year 2011 – 12 the maximum cash deposit was of Rs 4 lakhs. He also noted that the entire amount of cash deposits, which was made on various dates in the bank account, was in smaller amounts. The cash deposits were also made from different parts of the country. He also noted that there are subsequent check payments from the same and bank account in which the cash has been deposited. He further held that the income tax is a tax on real income and not on the turnover. Further, the DDIT (investigation) has also conducted certain inquiries wherein it was noted that Assessee Company is doing business in computer assessee reason and computer peripherals. The director of the company was also examined and his statement was recorded by the investigation wing on 8 January 2013. The various questions referred to Indo statement the director has clearly referred to the name of Assessee Company stating that it is carrying on business in computer accessories and peripherals. The address of the Godown of the company was also mentioned. The company maintains eight bank accounts as per question number seven out of which one was found to be out of books. The director of the company has also given reference to the turnover of this company and mentioned the names of the suppliers. It was also stated that assessee has not dealt with the above concerns for the last one and half years. On reading of question number 11 it is apparent that the amount of cheques issued to Messer's Atul traders and Vicetex International and Shri Dev Narain Shukla's transactions were asked for by the investigation wing. Assessee submitted their mobile number as well as the addresses. The source of cash deposit was also stated by the assessee. The assessee in fact gave details with respect to four different other suppliers in response to question number 13 and mentioned the major brands dealt with by it. All the four parties mentioned in question number 13 remains unquestioned; the turnover of the assessee other than the undisclosed bank account also remained undisturbed. Furthermore, the learned CIT – A has upheld the addition u/s 68 of the act itself on the peak balance in the bank account of the assessee. In view of the above facts we do not find any infirmity in the order of the learned and CIT – A. In the result ground number 1, 2 of the appeal are dismissed. Further the learned senior departmental representative could not show us what are the additional

evidences admitted by the learned CIT – A, we also did not find any additional evidence discussed by the learned CIT – A, in view of this ground number 3 of the appeal of the AO is also dismissed.

- 21 In view of above facts and circumstances, for the reasons stated above, appeal of the learned assessing officer is dismissed.

Order pronounced in the open court on: 31 /03/2021.

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated : 31 /03/2021.

MEHTA

Copy forwarded to

1. Appellant;
2. Respondent
3. CIT
4. CIT (Appeals)

5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	23.03.2021.
Date on which the typed draft is placed before the dictating member	23.03.2021.
Date on which the typed draft is placed before the other member	31.03.2021.

Date on which the approved draft comes to the Sr. PS/ PS	31.03.2021.
Date on which the fair order is placed before the dictating member for pronouncement	31.03.2021.
Date on which the fair order comes back to the Sr. PS/ PS	31.03.2021.
Date on which the final order is uploaded on the website of ITAT	31.03.2021.
date on which the file goes to the Bench Clerk	31.03.2021.
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	