

**HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT
JAIPUR**

D.B. Income Tax Appeal No. 281 / 2016

Pr Commissioner Of It Kota

----Appellant

Versus

M/S Rameshwaram Tolls Karoli

----Respondent

For Appellant(s) : Mrs. Parinitoo Jain

HON'BLE MR. JUSTICE K.S. JHAVERI

HON'BLE MR. JUSTICE VIJAY KUMAR VYAS

Judgment

25/04/2017

1. By way of this appeal, the appellant has challenged the judgment and order of the Tribunal whereby Tribunal has allowed the appeal of the assessee.

2. Counsel for the appellant has framed the following substantial question of law:

“1. Whether the Tribunal was legally justified in reversing the findings of the CIT(A) and deleting the penalty levied u/s 271(1)(c) on the basis that the quantum addition has been deleted?”

3. In this regard, the Tribunal has observed as under:-

“7. We have heard the rival contentions of both the parties and perused the material available on the record. It is undisputed fact that the Id Assessing Officer has made addition in the premise of cash receipts from the assessee deposited in M/s Abhaya Investment Pvt. Ltd. Thereafter, he got accommodation entry. The Id CIT(A) had discussed situation-1 in his order and held this addition is not justified but he having coterminous power and confirmed the addition by treating this loan as cash creditor, which has not been proved by the assessee as

onus cast on him. It is also not as per law as the Id CIT(A) has not provided any opportunity to the assessee before using coterminous power given under the law to him. The identical case has already been considered by the Coordinate Bench in ITA Nos.1351 to 1356/JP/2008 order dated 31/03/2010 where additions were made without providing cross examination of Shri Gajendra Porwal, which has been either confirmed or deleted by the Id. CIT(A), has been decided in favour of the assessee by the ITAT. The operative portion of the Coordinate Bench is as under:-

"Under the facts and circumstances in totality, we come to the conclusion that the admission made by Shri Porwal admitting that the transaction in question was managed by him for beneficiaries on charging of commission are not worth relying in absence of his being cross examined by the assessee and in absence of any supporting evidence especially when those admissions by Shri Porwal were suitable to his own interest. It is also surprising that no incriminating document was found during the course of search at the premises of Shri Gajendra Porwal to corroborate his statements about indulging in arranging accommodating entries which are being done at large scale in a systematic manner, as claimed. We thus hold that in the present case there was no sufficient material/evidence on record to come to the conclusion that transactions in question are bogus. Under this background, we are of the view that the Id. CIT(A) has rightly deleted the addition. For a ready reference the relevant para at pages 6 to 8 in the case of Shri Megh Raj Singh Shekhawat which is also common in the other appeals is being reproduced hereunder:-

"The contention of the A/R is considered. It appears that the sole basis for the addition is statement of Sh. Gajendra Porwal recorded u/s 132(4) during the course of search in his own case and his affidavit dated 1.11.2006. Based on the statement of Sh. Gajendra Porwal the AO inferred that as Sh. Gajendra Porwal was a entry provider and the company M/s. JTF SPL was also floated by him had not worth at all, transfer of share of M/s Gorbhandh Marbles Pvt. Ltd. and M/s. Kamod Commercial Services Pvt. Ltd., by the appellant to M/s. JTF SPL was not genuine but a sham transaction. That M/s. JTF SPL was used as a conduit to bring unaccounted money in the books of accounts by the appellant. That statement of Sh. Gajendra Porwal was supported with circumstantial evidences. AO also emphasis that Sh. Porwal did not retract his statement which is proved by the affidavit filed by him on 1.11.2006. The credit worthiness of Purchaser Company i.e. JTF SPL was doubted as before issuing cheques equivalent cash was deposited in its bank account. That credit worthiness of M/s. JTF SPL and genuineness of the transaction could

not be proved. The receipts of Rs. 41,50,000/- was therefore added as unexplained credit u/s 68 of IT Act. From the observation of the AO it is clear that he had no other material or evidence except the statement of Sh. Gajendra Porwal. For considering the credit entries as unexplained, the AO was supposed to prove that the amount credited is the appellant's own money. Also that M/s. JTF SPL was not credit worthy of paying this much amount and the transaction entered into between the appellant and M/s. JTF SPL was not genuine. The AO has taken support of the general statement given by Sh. Porwal, that the shares were subsequently been transferred to confidant of the beneficiaries. However, the AO failed to give any specific finding about a particular transaction under consideration that the shares purchased by M/s. JTF SPL were subsequently transferred to the appellant or its beneficiaries. In fact the AO has not quoted any specific question and its answer given by Sh. Porwal with reference to the transaction under reference. Sh. Porwal in his statement also admitted that he provided entry for a commission received in cash but in the present case the AO has not given any finding, how much commission was received by Sh. Porwal from the appellant for this transaction. No such entry for receipt of commission was found in the case of Sh. Gajendra Porwal nor any addition or an accounted payment of commission was made by the AO in the case of the appellant.

The appellant company asked for cross examination of Sh. Porwal which was though admitted by the AO but as Sh. Porwal did not remain present before his own AO, the opportunity of cross examination could not be availed by the appellant. Absence of Sh. Porwal for cross examination was justified by the AO on some assumptions. The AO has given weightage to the fact that Sh. Porwal in his affidavit filed much after the search action has confirmed his earlier statement recorded u/s 132(4). Thus the entire addition is based on the statement of Sh. Porwal recorded u/s 132(4). Not providing the opportunity of cross examination of Sh. Porwal is not justified. No material was borne out from the statement of Sh. Gajendra Porwal which justifies the additions. Except statement there is no other material to support that the transaction was an accommodation entry. The possession of shares in the hands of the appellant has not been doubted. To come out of clutches of section 68 of assessee is to prove identity and credit worthiness of the creditor and genuineness of the transaction. Identity of the creditor is established which is M/s. JTF SPL, a company incorporated. Regarding his credit worthiness to AO himself has mentioned that the cash was deposited before issuing the cheques in favour of the appellant and thus the credit worthiness is also

proved. So far as genuineness of the transaction is concerned the AO has not established that the money paid by JTF SPL to the appellant was the appellant's money. Copies of the share certificates were also filed along with the written submission which proves that the appellant had 415000 shares of M/s. Gorbandh Marbles Pvt. Ltd. And M/s. Kamod Commercial Services Pvt. Ltd. And on sale the assessee were also transferred in the name of JTF SPL and the amount was received by account payee cheque. Thus the genuineness of the transaction is also proved. The AO made distinction of the facts of the present case with the facts of the cases relied upon by the AO. Certainly circumstantial evidences can also be used against the appellant but in the present case except the statement of 3rd party which was partially retracted, no other evidence was used by the AO. Under the facts and circumstances of the case the addition made by the AO being not based on any evidence is directed to be deleted. The addition of Rs. 41,50,000/- made by the AO is therefore deleted. The 2nd ground of appeal is decided in favour of the appellant."

We fully concur with the above finding of the Id. CIT(A) under the facts and circumstances of the present case as discussed above. The first appellate order in this regard is thus upheld. The ground is accordingly rejected.

Recently, the Hon'ble Supreme Court in the case of Andaman Timber Industry Vs. Commissioner of Central excise in Civil appeal No. 4228/2006 vide order dated 2nd September, 2015 has held that not allowing the assessee to cross examine the witnesses by adjudicating the authority, though the statement of those witnesses were made the basis of impugned order is a serious flaw, which makes the order nullity, inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. This to be borne in mind that the order of the CCE was based upon the statement given by two witnesses. By respectfully following the order of the Coordinate Bench and proposition of Hon'ble Supreme Court, we allow the assessee's appeal."

4. We are in complete agreement with the view taken by the Tribunal. If the department has challenged the judgment in ITA nos. 1351 to 1356/JP/2008 vide order dt. 31.3.2010 and if the same is admitted, it will be open for the department to revive the appeal. Hence, no substantial question of law arises.

5. In view of the identical appeal being dismissed, the department while accepting the judgment will not follow the penalty provisions.

6. In view of the above, the appeal stands dismissed with liberty to revive in case the judgment comes within 90 days.

(VIJAY KUMAR VYAS),J.

(K.S. JHAVERI),J.

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RAJASTHAN HIGH COURT



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