आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCH 'B', JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
Before : Shri Vijay Pal Rao, JM & Shri Vikram Singh Yadav, AM

आयकर अपील सं./ITA No. 691/JP/2017
निर्धारण वर्ष/Assessment Year : 2012-13

The ITO Ward- 4 (2) Jaipur	बनाम Vs.	M/s.Skyways Industrial Estate Company (P) Ltd. F-42, Shri Nath Tower, Central Spine, Vidhyadhar Nagar, Jaipur
स्थायी लेखा सं./जीआईआर सं./	PAN/GIR No.: AANCS 1102 P	
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

राजस्व की ओर से/ Revenue by : Shri B.K. Gupta, CIT-DR
निर्धारिती की ओर से/ Assessee by : Shri Vedant Agarwal, Advocate

सुनवाई की तारीख/ Date of Hearing : 06/02/2020
घोषणा की तारीख/ Date of Pronouncement : 21 /02/2020

आदेश/ ORDER

PER VIJAY PAL RAO, JM

This appeal by the Revenue is directed against the order of ld. CIT(A), Ajmer dated 27-06-2017 for the Assessment Year 2012-13. The Revenue has raised the following ground:-

> ''Whether in the facts and circumstances of the case and in law the ld. CIT(A) is right in deleting the addition of Rs. 3,98,00,000/- made u/s 68 of the I.T. Act, 1961 without appreciating the fact that the assessee has introduced cash amounting to Rs. 3,98,00,000/- in the form of share capital

> thorough the racket of entry provider operating in Kolkata, information of which was provided by the Investigation Wing, Kolkata.''

2.1 The assessee is a company and engaged in the business of real estate and developers. During the year under consideration, the assessee received share capital of Rs. 3,98,00,000/- from M/s. Abhishek Advisory Pvt. Ltd.. The AO questioned the genuineness of the receipt of the said amount on account of share capital at a premium of Rs.790/- per share of Rs. 10/- each. The AO proposed to make the addition u/s 68 of the Act on the basis that search and survey action was carried out in the case of one Shri Anand Sharma, Kolkata on 02-07-2013 whereby various incriminating documents were seized and impounded. The said search action revealed and proved that Shri Ananad Sharma through a web of companies run and operated by him is engaged in providing accommodation entries of various natures like bogus unsecured loans, bogus share application and bogus sales etc. The AO referred to the statement of Shri Anand Sharma recorded by the Investigation Wing, Kolkata, in the search and seizure action carried out on 02-07-2013 and observed that Shri Anand Sharma in his statement admitted to have engaged in providing the accommodation entries for commission. The AO came to the conclusion that M/s. Abhishek Advisory Pvt. Ltd. is one of the companies owned and controlled by Shri Anand Sharma for the purpose of providing accommodation entries. Based on the statement of Shri Anand Sharma recorded by the Investigation Wing, Kolkata, the AO made the addition of the said amount of Rs. 3.98 crores and treated the same as unexplained cash credit. The assessee challenged the action of the AO before the ld. CIT(A) and submitted that it had produced all the details before the AO to prove beyond doubt the identity of M/s. Abhishek Advisory Pvt. Ltd., creditworthiness of the said company and genuineness of the transactions. The assessee referred to the documents produced before the AO which included PAN Card of M/s. Abhishek Advisory Pvt. Ltd., copy of Company's Master Data generated from MCA Website showing the status of the company as active, copy of Income Tax Returns for the Assessment Years 2009-10 to 2013-14 as well as the assessment order passed u/s 143(3) in the case of M/s. Abhishek Advisory Pvt. Ltd. by ITO, Ward- 1(1), Kolkata for the Assessment Year 2008-09. Thus the assessee explained that while passing the scrutiny assessment for the Assessment Year 2008-09, the AO examined the source of funds being share capital received by M/s. Abhishek Advisory Pvt. Ltd. from its shareholders and found to be genuine. Once the said company was having the sufficient funds and received the funds on account of share capital then the investments made by the said company in the shares of the assessee cannot be doubted. The assessee has made elaborate submissions before the ld. CIT(A) and also referred to various decisions as well as documentary evidences produced before the AO. The ld. CIT(A) after going through the record and material noted that Shri Anand Sharma, in his statement has not disclosed the name of M/s. Abhishek Advisory Pvt. Ltd. as a company or concern controlled by him for providing accommodation entries. The ld. CIT(A) directed the AO to furnish certain information which includes the copies of statement of Shri Anand Sharma and other seized materials as well as source of list of the companies as referred by the AO in the assessment order being the concerns controlled and manager by Shri Anand Sharma. Since the AO did not respond to these queries raised by the ld. CIT(A), therefore, the ld. CIT(A) proceeded to decide the appeal on the basis of record available before him. Thus the ld. CIT(A) has deleted the addition made by the AO on the ground that the AO has not referred to any seized materials or any other materials which could prove that the assessee has received the accommodation entries in the form of share application money. Aggrieved by the impugned order of the ld. CIT(A), the Revenue filed the present appeal.

2.2 Before us, the ld. DR has submitted that the assessee issued the shares of Rs. 10/- each at a premium of Rs. 790/- per share without justifying the value of its shares to carry such a high premium. The ld. DR has further submitted that the assessee was duly confronted with the search and seizure action in the case of M/s. Abhishek Advisory Pvt. Ltd., by the DCIT (Inv.) and also shown the statement of Shri Anand Sharma in which all the statements were narrated by the Investigation Wing. Thus the assessee was given the opportunity by issuing show cause notice as to why share capital of Rs. 3.98 crores introduced during the year under consideration from the said company may not be treated as non-genuine as the same is only diversion of profit to evade the tax liability. The ld. DR has referred to the statement of Shri Anand Sharma and submitted that he has explained the modus operandi of creating the paper company for the purpose of providing accommodation entries. The ld. DR thus contended that M/s. Abhishek Advisory Pvt. Ltd. was also controlled and managed by Shri Anand Sharma as his brother, the director of the said company. The ld. DR submitted that the list of companies as reproduced by the AO in the assessment order is taken by the Investigation Wing, Kolkata from the system of Shri Anand Sharma, maintained in Tally. Therefore, this clearly shows that M/s. Abhishek Advisory Pvt. Ltd. is one of the companies managed and controlled by Shri Anand Sharma otherwise how the name of the said company is the part of the list maintained by him in his computer. The ld. DR further contended that even the financial statement of these companies were also part of his system which shows that he was managing and controlling all these companies for providing accommodation entries. The ld. DR has referred to the financial statement of the investor companies and submitted that there is no real estate business carried out by these companies except receiving the money in the shape of share capital and investing the same as providing the accommodation entries in the garb of investment in shares or loans provided to various persons. The ld. DR has further referred to the assessment order and submitted that the AO in order to verify the genuineness of the transactions issued notices u/s 133(6) of the Act to M/s. Abhishek Advisory Pvt. Ltd. but the said letter was received back unserved with the remarks that ''no such company on this address.'' The AO then issued a commission to DDIT (Inv.), Kolkata with the request to conduct an enquiry and give an enquiry report on the issue. The DDIT (Inv.), Kolkata then sent a report dated 25/26-03-2015 which shows that the information was sought to be gathered from Shri Anand Sharma by recording his statement for confirmation of the fact of providing accommodation entries. However, despite summon u/s 131 (1) of the Act to Shri Anand Sharma at the address available with this office, he did not turn up. The AO after taking these steps asked the assessee to produce the director of the investor company for examination. The assessee failed to produce the director the investor company. Thus all these exercises and investigations conducted by the Department as well as by the AO during the assessment proceeding clearly establish that the assessee has failed to prove the identity, creditworthiness and genuineness of the transactions as required u/s 68 of the I.T. Act, 1961. The ld. DR has also referred various documents which have been filed first time before the Tribunal as additional evidence and submitted that these documents are nothing but the returns filed by M/s. Abhishek Advisory Pvt. Ltd. with R.O.C. which discloses the facts relevant to the issue. The ld. DR submitted that the said company is now owned by three group companies of the assessee namely (1) M/s. Skyway Colonizers Pvt.Ltd. (2) Skyway Ispat Pvt.Ltd and (3) Skyway Township Pvt. Ltd.. Therefore, this company is one of the group companies of the assessee and the assessee was required to furnish all the requisite details to prove the genuineness of the transactions. The ld. DR further contended that the shares of M/s. Abhishek Advisory Pvt. Ltd. were purchased by the group concerns from the assessee at less than Rs. 2/- per share whereas the assessee issued the shares at huge premium of Rs. 790/- per share . The ld. DR has submitted that the ld. CIT(A) has not appreciated the facts as well as the materials brought on record by the AO which establishes that the assessee has failed to discharge its onus u/s 68 of the Act. The ld. CIT(A) has given his findings based on the submissions of the assessee ignoring the fact that the AO issued notices u/s 133(6) of the Act which were received back unserved and further the AO also issued a commission for conducting an enquiry by the DDIT (Inv.), Kolkata. The ld. DR further submitted that the investor company is not having any income but only a meager amount of Rs. 2,68,625/- was declared as Revenue for the Assessment Year 2012-13 that too under the head

''Income from other Sources'', substantiate the view of the AO that creditworthiness of the said company is not proved. The ld. DR thus relied on the order of the AO as well as following case laws.

1. Pr. CIT vs NRA Iron & Steel (P) Ltd. (2019) 103 Taxmann.com 48 (SC).
2. ITO vs APJ Construction Pvt. Ltd (ITA No. 722/Del/2015 for the Assessment Year 2005-06 dated 31-12-2019 – Delhi Trib)
3. Prem Castings (P) Ltd. vs CIT (2017) 88 Taxmann.com 189 (All)

2.3 On the other hand, the ld.AR of the assessee submitted that the assessee produced all the relevant documentary evidences to prove the identity and creditworthiness of the investor company as well as the genuineness of the transactions. He has referred to the assessment order passed by the AO for the Assessment Year 2008-09 dated 06-01-2010 and submitted that the AO has verified the share capital received by the said company and accepted the same. Further, the said company has been regularly filing the return of income and also shown as active as per company Master Data of ROC. The ld.AR of the assessee has also filed the assessment order dated 6-12-2019 for the Assessment Year 2017-18 and submitted that the AO has passed the scrutiny assessment order in the case of Investor Company. The ld.AR of the assessee further submitted that notices issued u/s 143(2) and 142(1) of the Act were duly served upon the Investor Company. Therefore, the identity and existence of the said company cannot be disturbed. As per record of ROC, the said company has been regularly filing the return which shows existence of the said company as well as genuineness of the company. The ld.AR of the assessee contended that once the AO has examined the source of funds in the hands of the Investor Company then the investment made in the shares of the assessee company from the said amount available with M/s. Abhishek Advisory Pvt. Ltd. cannot be doubted. The theory of no income or very less income cannot be applied when the said company was enough funds to receive as share capital as well as reserved funds and the investment shown from the said funds and not the income from operation. Once the funds in the hands of the Investor Company are not in dispute and transaction is through banking channel then creditworthiness and genuineness of the transaction is also proved. The ld.AR of the assessee relied on the order of the ld. CIT(A) and submitted that the ld. CIT(A) has specifically asked the AO to clarify certain facts and also furnish the requisite information including the statement of Shri Anand

Sharma but despite repeated directions of the ld. CIT(A), the AO did not furnish the requisite information. Further, the AO has relied on the statement of Shri Anand Sharma without any corroborative evidence to show that the assessee has received accommodation entries. The ld.AR of the assessee thus contended that even from the statement of Shri Anand Sharma, it cannot be concluded that the investor company M/s. Abhishek Advisory Pvt. Ltd. was managed and controlled by him and used for providing accommodation entries. Once this company is even not owned by Shri Anand Sharma or any of his associates or relatives at the relevant point of time when the share application money was received by the assessee then the question of providing the accommodation entries by Shri Anand Sharma does not arise. The ld.AR of the assessee vehemently opposed the additional evidence proposed to be filed by the ld. DR and submitted that it is beyond the scope of proceedings before this Tribunal. The ld. DR cannot go beyond the assessment record as well as the assessment order but he can support the order of the AO based on the record available in the assessment order. In support of his contentions, the ld.AR of the assessee relied on following decisions.

1. Mahindra & Mahindra Ltd vs DCIT, (2009) 122 TTJ 0577 / 22 DTR 0362

2. KWL Pro Exports vs ACIT 110 ITD 059

The ld.AR of the assessee further contended that the notices issued by the AO u/s 133(6) of the Act to M/s. Abhishek Advisory Pvt. Ltd. may be at old address and not at the current address. The ld.AR of the assessee referred to the annual return filed by the said company and submitted that the correct address is available on record but the AO might have issued the notices at wrong address. In support of his contentions, the ld.AR of the assessee relied on the order dated 01-07-2019 of the Coordinate Bench of this Tribunal in the case of M/s. Izzy Metals Pvt. Ltd. vs ITO (ITA No.75/JP/2018 for the Assessment Year 2012-13). The ld.AR of the assessee thus supported the findings of the ld. CIT(A) and submitted that the addition made by the AO is based on surmises and conjectures and without having any tangible material to show that the transaction is not genuine.

2.4 We have considered the rival submissions as well as the relevant materials available on record. The AO has proceeded to make the addition u/s 68 of the Act in respect of share application money received by the assessee from M/s. Abhishek Advisory Pvt. Ltd. by referring to the search and survey action carried out by the DGIT (Inv.) Kolkata, in para 3.1 as under:-

> ''3(1). A search and survey action was carried out in the case of Shri Anand Sharma, Kolkata (entry provider) and his Group by the DGIT(Inv.), Kolkata on 02-07-2013 when various incriminating documents were seized and impounded. The search action resulted into collection of evidences and other findings which conclusively proved that Shri Anand Sharma through a web of concerns run and operated by him, is engaged in providing accommodation entries of various nature like bogus unsecured loans, bogus share application and bogus sales etc.''

It is clear that the AO has proceeded on the basis of the statement of Shri Anand Sharma recorded by Investigation Wing, Kolkata during search and survey action carried out on 02-07-2013. There is no dispute that in his statement recorded by the Investigation Wing, Kolkata, Shri Anand Sharma has admitted that he is engaged in providing the accommodation entries in respect of share application money, unsecure loans etc. However, in the entire statement Shri Anand Sharma has not stated that M/s. Abhishek Advisory Pvt. Ltd. is one of the concerns / companies controlled or managed by him in providing such accommodation entries.

Even otherwise when the statement was recorded on 02-07-2013, M/s. Abhishek Advisory Pvt. Ltd. was not a company either owned or controlled by Shri Anand Sharma directly or indirectly. This fact is manifest from the records as produced by the ld. DR as additional evidence that 100% shareholding of the said company M/s. Abhishek Advisory Pvt. Ltd. was acquired by the following group concerns of the assessee company.

(1) M/s. Skyway Colonizers Pvt. Ltd.
(2) Skyway Ispat Pvt. Ltd and
(3) Skyway Township Pvt. Ltd.

This fact is also revealed from the annual return filed by the said company in the office of ROC for the year 2009-10 as on 30-09-2009**.** Thus when the company was already owned by three group concerns of the assessee company then the statement of Shri Anand Sharma admitting his involvement in providing the accommodation entries is not relevant in the case of investor company M/s. Abhishek Advisory Pvt. Ltd. The entire basis of the addition made by the AO is turned out to be contrary to the actual facts. Once the investor company is a wholly owned company of the group concerns of the assessee itself then there is no reason to have role of Shri Anand Sharma in making the investment by this company in the shares of the assessee company. The very basis of the AO that transaction is bogus being the accommodation entries provided by Shri Anand Sharma through his concern, has no legs to stand upon. Therefore, the proceedings conducted by the AO on the assumption of accommodation entries provided by Shri Anand Sharma stands vitiated by the fact that the investor company was neither owned nor controlled nor managed either directly or indirectly by Shri Anand Sharma as on the date of transaction of investment in shares or on the date of search on. 02-07-2013. Therefore, the case of the Department is solely based on surmises that this company is one of the concerns managed and controlled by Shri Anand Sharma and his involvement in providing the accommodation entries is only the assumption of incorrect facts. Even otherwise, the assessee in order to discharge its onus u/s 68 of the Act has produced the PAN, Income Tax Return and the assessment order passed by the AO u/s 143(3) of the Act for the Assessment Year 2008-09 dated 6-01-2010. For ready reference, we reproduce the assessment order passed by ITO, Ward- 1(1), Kolkata.

''The assessee company filed its e-return for the assessment year 2008-09 on 30.09.2008 declaring of total income of Rs. Nil. The return was duly processed u/s 143(1) on 12.08.2009. The case was selected for compulsory scrutiny by issuing notice u/s 148. Accordingly, notices u/s 143(2) & 143(1) along with questionnaire were issued and served upon the assessee.

In response to the aforesaid notices, Sri Sanjoy Kr. Fogla, the A/R of the assessee company being duly authorised by the assessee company, appeared for hearing from time to time. The A/R during the course of hearing, explained the return, filed some relevant documents in support of its return and has also produced its books of accounts for examination. The case was discussed and heard.

In this case, the assessee company was incorporated on 01.10.2007 and as on 31.03.2008, it had paid up capital amounting to Rs. 56,97,500/- and share premium reserve amounting to Rs. 10,03,33,500/-. During the course of hearing, inquires were conducted with various shareholders of the assessee company by issuing notices u/s 133(6).

During the year under consideration, the assessee had not carried out any business except investment on the other hand, it has incurred expenses amounting to Rs. 11,725/-. Therefore, the expenses so claimed are not allowed for deduction as the assessee has not carried out any business during the relevant previous year.

Subject to the above discussion, the total income of the assessee company is computed as under:

Total income (loss) -as per return	(-) Rs. 11,725/-
Add: Entire expenses disallowed- as discussed above.	Rs. 11,725/-
Assessed total income	Nil
Tax on above	Nil

Assessed U/s 143(3) of the Income Tax Act, 1961, issued company of order and demand notice to the assessee company.

Sd/-
(Mingur Dorjee)
ITO, Ward- 1(1), Kolkata''

The AO has stated that during the course of hearing, the ld.AR of the said company explained the return filed, relevant documents in support of the return and also produced the books of account for examination. The AO also recorded the date of incorporation as well as the share capital and premium received by the said company to the tune of Rs. 10,63,3,500/-. The AO also conducted the enquiry from various shareholders by issuing notices u/s 133(6) of the Act to verify the transactions of share capital and share premium received by the said company. Only after satisfaction from the enquiry, the AO accepted the same. Thus even in first year of its incorporation, the said company received the share capital and share premium to the tune of Rs. 10,63,3,500/- and the said amount was also in the books of said company and even at the time of investing this amount of Rs.3.98crores in the shares of assessee company. The transaction of payments of the share application money is through banking channel. We further note that the said company at the time of investment is fully owned by the group concerns as stated above and the directors of the said companies were also Shri Ronak Royal Gupta and Smt. Rajni Gupta who are also the shareholders and directors of the group concerns as well as one of the directors is also the director of the assessee company.

Therefore, the said company was neither owned nor controlled by Shri Anand Sharma. As regards the notices issued by the AO u/s 133(6) of the Act, there is no dispute that earlier the address of the said company was different from the current address as it is apparent from records as well as assessment order for the Assessment Year 2008-09 and other subsequent records available with ROC. Therefore, the possibility of sending the notices by the AO at the old address cannot be ruled out. Once there is a change of address then assessee cannot be blamed for non-delivery of the notice. As regards the Commission issued by the AO, it was only for conducting an enquiry from Shri Anand Shrma and not from the investor company. The DDIT (Inv.), Kolkata has clearly submitted the report without conducting any enquiry by giving the reasons that despite summon issued to Shri Anand Sharma, he did not turn up. Therefore, this was an empty and futile exercise. Once Shri Anand Sharma was not controlling or managing the investor company either directly or indirectly at the relevant time then the so-called enquiry would not have resulted any positive outcome. Further, we note that the AO has not supplied any documentary or incriminating evidences to the assessee. Even the statement of Shri Anand Sharma was not supplied to the assessee but it is stated in the assessment order that the assessee was apprised the facts of the case in brief in respect of search of Shri Anand Sharma. The relevant part of the assessment order in para 4 (iii) is as under:-

> ''4(iii). It is important to mention here that the assessee was apprised the facts of the case in briefly in respect of search action of Shri Anand Sharma by DGIT (Inv), Kolkatta and also shown the statement of Shri Anand Sharma in which all the evidences were narrated by the Investigation Wing and was asked to give their comments and also asked to show caused as to why the share capital of Rs. 3,98,00,000/- introduced during the F.Y. 2011-12 from the group aforesaid companies may not be treated as non-genuine as the same is only diversion of profits to evade the tax liabilities.''

This clearly shows that the AO was not having any documentary evidence or corroborative evidence which cannot be considered as incriminating material to show that the assessee has received the accommodation entries in the shape of share capital/ share application money/ premium. Even the ld. CIT(A) has specifically asked the AO to produce the copy of statement of Shri Anand Sharma as well as other seized materials . It appears that since the AO was not having any evidence in his possession, therefore, he did not respond to the said request of the ld. CIT(A). The ld.

CIT(A) has discussed all these facts in para 5.3 to 5.11and has given his findings in para 5.12 which are reproduced as under:-

''5.3 I have gone through the assessment order, statement of facts, grounds of appeal and written submission carefully. It is seen from para 3.1 of the assessment order that a search and survey action was carried out in the case of Shri Anand Sharma and hisgroup by the DDIT Investigation Kolkata on 02.07.2013. According to AO, the search action resulted into collection of evidences and other finding which conclusively proved that Shri Anand Sharma, through a web of concerns run and operated by him, was engaged in providing accommodation entries of various nature like bogus unsecured loans, bogus share application and bogus shares etc. But the AO has not discussed the evidences and other findings "which conclusively proved that Shri Anand Sharma through a web of concerns run and operated by him was engaged in providing accommodation entries". Again at para 4.5, the AO has mentioned that various incriminating documents/ material was seized during the course of search and according to AO, during the post search investigation and perusal of seized documents, it was observed that Shri Anand Sharma was engaged in business of providing accommodation entries by providing cheques/ POIDD in lieu of cash to a large number of beneficiary companies through various paper and dummy company operated and controlled by him. However, the AO has not brought on record any evidence to show that the appellant company has paid cash for obtaining the accommodation entry in the form of share application money from M/s Abhishek Advisory Pvt. Limited. From page no. 4 to 10 of the assessment order, the AO has quoted the statement of Shri Anand Kumar Sharma recorded during the course of search. In reply to question no. 7 and 8, Shri Anand Sharma has stated as under:

"Q.7 Please state the name of the companies in which you and your family members are associated with?

Ans. I am a Director in Quality Jewel Box & Display Pvt. Ltd apart from that I am also a director in my other companies. My wife Smt. Sobha Sharma is also another Director in Quality Jewel Box & Display Pvt. Ltd. apart from that I am also a director in many other companies. The details for the above will be furnished subsequently.

Q.8 Please state the name of the companies managed/ controlled by you and also state who are the directors in these companies? be submitted later on .

Ans. As far as my knowledge is concerned, around 500 companies approximately are being controlled by me, the books of accounts of those companies are maintained in the computer in this office. I will also provide separate list of all the other companies controlled by me...."

However, from the assessment order, it is not clear whether Shri Anand Shama had submitted any list of companies controlled by him.

5.4 As the AO has at page 11 of the assessment order has pasted copy of a screen shot wherein list of companies is given and in that list name of M/s Abhishek Advisory Pvt. Ltd. is appearing, therefore, the AO vide letter dated 11.05.2017 was requested to furnish following information

"1. You are requested to furnish copy of the statement of Shri Anand Sharma and other seized / impounded material on which the AO has relied upon for making the addition of Rs. 3,99,00,000/- u/s 68 in respect of the share application money and share premium received by the appellant from M/s Abhishek Advisory Pvt. Limited.

2. At Page No. 11 of the assessment order, a scanned copy of "list of companies" has been pasted. You are requested to clarify whether the list is part of the statement of Shri Anand Sharma because at Page No. 10, the AO has mentioned at para 4.(vii) "in view of the above statement dated 02.07.2013, as per reply of Question No. 8 of Shri Anand Sharma, it was accepted by him that he is controlling around 500 companies and M/s Abhishek Advisory Pvt. Ltd. is one of them. We are producing list of company operated by Shri Anand Sharma which was maintaining in a accounting software is as under". If the scanned copy of the list pasted at Page No. 11 is not the part of the statement of Shri Anand Sharma then what is the source of this list."

As no response was received from the AO therefore, again reminder were issued on 29.05.2017.

Along with his letter dated 30.05.2017, the ITO, Ward-4(2), Jaipur has only enclosed statement dated 02.07.2013 of Shri Anand Kumar Sharma recorded during the course of survey operation u/s 133A and copy of the screenshot pasted at page 12 of the assessment order. However, the AO has not clarified whether the list of companies pasted at page 12 of the assessment order was part of the statement of Shri Anand Sharma and if the list of companies was not part of the statement of Shri Anand Shama then what is the source of that list.

5.5 At page 11, the AO referring to the copy of the screen shot pasted at 2, page no. 11 has mentioned that "as per the above list it is very much clear that M/s Abhishek Advisory Pvt. Ltd. from whom the assessee had taken share application money, which are controlled by Shri Anand Sharma and to accommodation entry has been provided". As already discussed above, neither in the assessment order nor during the course of appellate proceedings, the AO has given the source of the screen pasted at page 11 of the assessment order.

5.6 At para 4(viii), the AO has stated "In view of above, all the books of account and all the relevant paper of these persons act only as their stooges. All the books of account and all the relevant paper of these companies were found at the business premises. This clearly shows that these companies are run by Sh. Anand Sharma and he controlled all these companies through dummy directors/ principal officers of these companies. This could be established by a careful examination of seized material, including the computer hard discs, PAN drive and tally data, which contain the books of account of these companies. During the course of search daily cash books, balance sheet and cheque books were found wherein details of cash received from different companies/ persons through various middlemen/ agents in lieu of accommodation entries provided to them on different dates have been recorded". However, the AO has not discussed any seized document in which the cash received from the assessee company for obtaining the accommodation entry from M/s Abhishek Advisory Pvt. Ltd. was found recorded.

5.7 At para 5.1, the AO refers the investigation carried out by the Investigation Wing, Kolkata as well as the documents and papers seized during the course of search but he has not discussed anything about the documents and papers seized during the course of search in the case of Shri Anand Sharma and investigation carried out by the Investigation Wing, Kolkata. Again at para 5.(ii), the AO has stated "on examination of the materials provided by the investigation Wing, it has been noticed that assessee had received accommodation entry from the above mentioned fictitious company floated by Shri Anand Sharma". But the AO has not discussed what was the material provided by the Investigation Wing and examined by him.

5.8 As the notice issued u/s 133(6) to M/s Abhishek Advisory Pvt. Ltd., Kolkata was returned unserved, therefore the AO issued commission u/s 131(1)(d) to DDIT Investigation, office of the DGIT

Investigation Kolkata. According to AO, the commission was issued to record the statement of Shri Anand Sharma for confirmation of the fact of providing accommodation entries as aforementioned so as to ensure that the assessee company can not take shelter before the appellate authority. The DDIT has reported that summons u/s 131 was sent to Shri Anand Sharma at the three addresses available with his office, however Shri Anand Sharma did not turn up. Therefore, the DDIT requested the AO "to do the needful whatever deemed fit in the interest of revenue". Thus, it is clear that the AO inspite of having issuedcommission u/s 131(1)(d), could not get the statement of Shri Anand Sharma recorded, confirming that he had provided any accommodation entry to the appellant company through M/s Abhishek Advisory Pvt.Limited.

5.9 At para 5(iv), the AO has mentioned that "all the evidences available on record clearly establish that the assessee company is one of the beneficiaries who obtained accommodation entry in the form of share application money from the dummy companies floated by Shri Anand Sharma". However he has not discussed what are the evidences available on record which according to AO clearly establishes that the assessee company is one of the beneficiary who obtained accommodation entry in the form of share application_money_from the dummy company floated by Shri Anand Sharma.

5.10 During the course of assessment proceedings, the appellant vide its letter dated 21.01.2015 (at para 6) had requested the AO to supply any adverse material and allow the opportunity of cross examination. Para 6 of letter dated 21.01.2015 of the appellant is reproduced here under for ready reference:

"It is also submitted that there is no material to suggest that the share capital contributed to the company is not genuine. No material has been provided which indicates that the said company or its director had stated anything about the company. If there is any such adverse material the same may kindly be supplied to the assessee, and further the opportunity of cross examination may kindly be allowed. The general statements cannot be used against the assessee unless the same is given for the specific company of the assessee and for the investment in shares being made. It is well settled law that no adverse material can be used against the assessee unless the same is being supplied to the assessee and opportunity is being provided to cross examine the same. Your kind attention is invited towards the following decisions in this regard."

However, the AO did not provide any opportunity to the appellant to cross examine the person on whose statement he has relied upon for making the addition u/s 68.

5.11 The appellant has furnished following documentary evidences to prove identity and creditworthiness of the share applicant and genuineness of the transaction:

1. Confirmatory letter of the share applicant.

2. Copy of the acknowledgement of the ITR 4 and 5 (A.Y. 2013-14).

3. Copy of Balance Sheet and P&L account dated 31.03.2016.

4. Bank statement of the share applicant wherein the payments made to the appellant toward share application money are appearing. There is no cash deposit immediately before or after the issue of cheques to the appellant company.

5. Copy of ROC document (Form No. 20B, Form No. 23AC, Form No. 23ACA, Form No. 66, Form No. 23B) and Annual Return for the relevant period (FY 2011-12) and (F.Y. 2015-16).

6. Copy of assessment order dated 06.01.2010 of M/s Abhishek Advisory Pvt. Ltd. for the A.Y. 2008-09 passed u/s 143(3) r.w.s. 148. In the assessment order, the AO has mentioned that M/s Abhishek Advisory Pvt. Ltd. was incorporated on 01.10.2007 and as on 31.03.2008, it had paid up capital of Rs. 55,97,500/- and share premium reserve of Rs. 10,63,33,500/-. The AO did conduct enquiries u/s 133(6) with various shareholders of the assessee company.

5.12. Thus, from the above discussion, it is clear that the appellant has furnished all the documentary evidences to prove identity and creditworthiness of M/s Abhishek Advisory Pvt. Ltd. and genuineness of the transactions. Whereas the AO has made the addition without bringing on record any evidence to show that the appellant had paid cash for obtaining accommodation entry in the form of share application money, from M/s Abhishek Advisory Pvt. Limited. The AO has not discussed any evidence which proves that M/s Abhishek Advisory Pvt. Ltd. was the company controlled and managed by Shri Anand Sharma. The source of the "list of companies" pasted at page 11 of the assessment order has not been clarified by the AO. The AO has not discussed any seized material or the investigation carried out by Investigation Wing Kolkata which

> proves that the appellant company received accommodation entry in the form of share application money from ,M/s Abhishek Advisory Pvt. Ltd. by making cash payment to Shri Anand Sharma or his agent/ middle man. Though the AO has relied upon the statement of Shri Anand Sharma but inspite of having been requested specifically by the appellant, the AO did not provide any opportunity to the appellant to cross examine Shri Anand Sharma. In view of the above discussion, I am of the considered opinion that the appellant has furnished each documentary evidence to prove identity and creditworthiness of the share applicant and genuineness of the transactions. Whereas, the AO has failed to bring on record any evidence to show that the appellant had received accommodation entry in the form of share application money from M/s Abhishek Advisory Pvt. Ltd. by paying cash from undisclosed sources of income either to Shri Anand Sharma or to any of his agent/ middle man. Therefore, in view of the various decisions relied upon by the appellant, specifically the decision of Supreme Court in the case of Andaman Timber Industries vs CCE (order dated 02.09.2015) and decision of ITAT Jaipur Bench in the case of Jadau Jewellers & Manufacturers Pvt. Ltd. vs ACIT (175 TTJ (JP) 344), addition of Rs. 3,98,00,000/- made by the AO u/s 68 is hereby deleted.''

When the assessee has produced all the relevant documents as narrated by the ld. CIT(A) in para 5.11 above then onus casted u/s 68 of the Act has been duly discharged by the assessee. Once the assessee has discharged his primary onus then burden is shifted on the AO to bring on record the contrary material or facts to disprove evidence produced by the assessee. The AO except narrating the modus operandi as disclosed by Shri Anand Sharma, has not referred to any documentary evidence or other material to support his view and findings. Therefore, the findings of the AO are merely an assumption and based on conjecture and surmises and not on any tangible material. As regards the decision of Hon'ble Supreme Court in the case of Pr. CIT vs NRA Iron & Steel (P) Ltd (supra) relied on by the ld. DR, the Hon'ble Supreme Court has specifically mentioned the facts of the said case in para 9 as under:-

> *''9 The judgement cited hold that the Assessing Officer ought to conduct an independent enquiry to verify the genuineness of the credit entries.*
>
> *In the present case, the Assessing Officer made an independent and detailed enquiry, including survey of the so called investor companies from Mumbai, Kolkata and Guwahati to verify the creditworthiness of the parties, the source of funds invested and the genuineness of the transactions. The field reports revealed that the shareholders were either non-existent or lacked creditworthiness.''*

It is clear in the said case that the AO made an independent and detailed enquiry including survey of so-called investor company from Mumbai, Kolkata and Gauhati to verify the creditworthiness of the parties, source of funds and genuineness of the transactions. The field reports reveal that shareholders were either non-existent or lack of creditworthiness. On the contrary, in the case in hand, the investor company is very much in existence and subjected to scrutiny assessment. Even for the Assessment Year 2017-1, the said company has under gone scrutiny assessment.

Therefore, the existence of the company is not in dispute as it is established from the record. Secondly, the Hon'ble Supreme Court in the case of Pr. CIT vs NRA Iron & Steel (P) Ltd (supra) in para 13 observed that lower authorities have ignored the detailed enquiry conducted by the AO as well as the findings of the AO as under:-.

> Para 13. …The Court/ Authorities below did not even advert to the field enquiry conducted by the AO which revealed that in several cases the Investor Companies were found to be non-existent and the onus to establish the identity of the investor companies, was not discharged by the assessee.''

In the case in hand, the AO has not brought any material on record as a result of any enquiry. The commission issued to the DIT (Inv), Kolkata has not yielded any result. Thus except on the reliance of the statement of Shri Anand Sharma, the AO was not having either any document in his possession or any other facts detected as an outcome of enquiry. The said statement of Shri Anand Sharma has not made any allegation regarding transaction of investment made by M/s. Abhishek Advisory Pvt. Ltd. Therefore, the documentary evidence produced by the assessee cannot be ignored or rejected. Hence, in view of the above facts and circumstances of the case, we do not find any error or illegality in the order of the ld. CIT(A). Thus the appeal of the Revenue is dismissed.

3.0 In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 21 /02/2020.

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

Sd/-
(विजय पाल राव)
(Vijay Pal Rao)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 21/02/ 2020

*Mishra
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:
1. अपीलार्थी / The Appellant- The ITO, Ward- 4(2),Jaipur
2. प्रत्यर्थी / The Respondent- M/s.Skyways Industrial Estate Company (P) Ltd., Jaipur
3. आयकर आयुक्त(अपील) / CIT(A),
4. आयकर आयुक्त / CIT,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No.691/JP/2017)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar