

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : F : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.2608/Del/2018
Assessment Year: 2014-15

ITO,
Ward-27(4),
New Delhi.

Vs Zexus Air Services Pvt. Ltd.,
148-149, Centrum Plaza,
Sector-53, DLF Phase-V,
Gurgaon.

PAN: AAACZ6541L

CO No.121/Del/2018
(ITA No.2608/Del/2018)
Assessment Year: 2014-15

Zexus Air Services Pvt. Ltd.,
148-149, Centrum Plaza,
Sector-53, DLF Phase-V,
Gurgaon.

Vs. ITO,
Ward-27(4),
New Delhi.

PAN: AAACZ6541L

(Appellant)

(Respondent)

Assessee by	:	Shri Gaurav Bansal, CA
Revenue by	:	Smt. Sushma Singh, CIT-DR
Date of Hearing	:	31.03.2021
Date of Pronouncement	:	23.04.2021

ORDER

PER R.K. PANDA, AM:

This appeal filed by the Revenue is directed against the order dated 12th
January, 2018 of the CIT(A)-9, New Delhi, relating to assessment year 2014-15.

The assessee has filed the CO against the appeal filed by the Revenue. For the sake of convenience, these were heard together and are being disposed of by this common order.

2. The grounds raised by the Revenue read as under:-

“1. On the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting the addition of Rs. 20,00,00,000/- made u/s 68 of the Act ignoring the fact that share capital of the assessee company was increased to Rs. 20,00,00,000/- with no satisfactory explanation with regard to settled accounting practices, hence the same must be added back to the income of the assessee.”

“2. That the appellant craves, leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”

3. Facts of the case, in brief, are that the assessee company was incorporated on 12th April, 2013 with the object of providing airline services. It filed its return of income on 31st October, 2015 declaring nil income. During the course of assessment proceedings, the AO noted that shares have been allotted to Shri Surinder Kumar Kaushik in lieu of goodwill and without any monetary consideration. On being questioned by the AO, the assessee filed certain submissions which has been reproduced in the body of the assessment order and which reads as under:-

“Increase in share capital: As mentioned in our earlier reply, share having face value of Rs.20 crores were issued to Sh. Surinder Kumar Kaushik, against goodwill for acknowledging his efforts for procurement of aviation license. No monetary transaction was involved in this allotment of shares. Copies of forms filed with ROC for this purpose are enclosed herewith. As equal amount of Goodwill was booked as assets in the balance sheet of the company. It may please be noted that there is no impact on income tax due to this transaction.

Mr. Surinder Kumar Kaushik has expired. There is no change in shareholding in the books of the company till now.”

4. The AO observed from Form No.2 of the ROC that the assessee has mentioned in the column of the consideration for which such shares have been allotted as “for blessings and efforts.” He, therefore, asked the assessee to furnish the reasons of shares allotted on the basis of blessings and efforts as stated in Form No.2 of the ROC documents and also asked to furnish the details of rationale and justification of the value of goodwill. The assessee filed the following submission which has been reproduced by the AO and which reads as under:-

"Justification of share capital/goodwill: As submitted earlier, shares having face value Rs.20crores were issued to Sh Surinder Kumar Kaushik, against goodwill for acknowledging his efforts for procurement of aviation license. He had helped the company to procure the aviation license. As a result of his efforts, the license was subsequently granted to the company (copy enclosed).

It may please be noted that there is no tax implication of this share capital and goodwill.

Mr. Surinder Kumar Kaushik has expired. There is no change in shareholding in the books of the company till now.”

5. The AO, thereafter asked the assessee to furnish the details of the services and efforts made by Shri Surinder Kumar Kaushik for procuring the aviation licence. He asked the assessee to furnish the details regarding intimation of death to the Indian Authorities, i.e., ROC and other government departments. So far as the death of Shri Kaushik is concerned, it was submitted that the same was intimated to the ROC and the reason for appearance of the name in the list of directors at the ROC website is due to technical errors. So far as the services rendered by Mr.

Surinder Kumar Kaushik is concerned, it was submitted that he was instrumental in obtaining the aviation licence as he and Mr. R.K. Sharma were the only persons on the Board of Directors of the company. The copy of approval from Ministry of Civil Aviation was submitted before the AO. The obtaining of licence in itself was shown as the evidence of his efforts. It was submitted that Shri Kaushik was a renowned advisor in aviation industry and was instrumental in obtaining the above licence. So far as the valuation of goodwill is concerned, it was submitted that two crores of shares of Rs.10 each were issued to Shri Kaushik because DGCA had a condition that only those companies are entitled to apply for aviation licence who have an issued capital of Rs.20 crores. Face value of shares (Rs.20 crores) were booked as goodwill in the books of the company which is a common practice where shares are issued at a discount where the difference in issue price and face value is capitalized in form of goodwill. In the instant case, the shares were issued without any monetary consideration and therefore entire amount of face value has been booked as goodwill. It was argued that the issue of shares to Shri Kaushik without any consideration and booking of goodwill in the books of the company for the said amount has no impact on taxation of the company. Any tax liability on goodwill will arise only when the shares are allotted and that too in the hands of the shareholders to whom shares have been allotted and not in the hands of the company under any circumstance.

6. However, the AO was not satisfied with the arguments advanced by the assessee. Relying on various decisions, the AO held that the expenses and the

basis of justification was not proved by the assessee and cannot be allowed.

Invoking the provisions of section 68 of the Act and relying on the decision of the Hon'ble Supreme Court in the case of McDowell and Co. Ltd. Vs. CTO 154 ITR 148 (SC), the AO made an addition of Rs.20 crores u/s 68 of the Act by observing as under:-

“5.2 This is worth mentioning here the reasons given below for drawing the view of disallowing the same and treating as unexplained credits:

- i. The basis of goodwill was not provided by the assessee, merely stating that *"Services rendered by Mr. Surinder Kumar Kaushik: As already mentioned Mr. Surinder Kumar Kaushik was a renowned advisor in aviation industry. He, was instrumental in obtaining the aviation license. The license in itself is an evidence of his efforts "* would not allow the assessee to get away with the burden of proving the genuineness of the transaction.
- ii. During the course of assessment proceedings, the assessee itself has submitted that "2 Crore shares of Rs.10/- each were issued to him because DGCA had a condition that only those companies are entitled to apply for aviation licence who have a issued capital of Rs.20 crore. Face value of shares (Rs.20 crores) were booked as goodwill in the books the company, which is a common practice where shares are issued at a discount, where the difference in issue price and face value is capitalized in form of goodwill In this case,the shares were issued without any monetary consideration and therefore entire amount of face value has been booked as goodwill." The assessee is not permitted under law to use of this coloured device to reduce incidence of tax and also can't be part of the tax planning as held in the celebrated case of McDowell and Co. Ltd. Vs. CTO 154 ITR 148 (SC). It was observed by the the Hon'ble Supreme Court:

“Colourable devices cannot be part of tax planning and it is wrong to encourage avoidance of tax by dubious methods. It is for the court to take stock and determine the nature of legal devices to avoid taxes, and to expose these devices for what they really are ”
- iii. Even the assessee could not provide the supportive evidence of work/services rendered for which the goodwill was created.
- iv. Even the other agencies have also informed to this office that the

assessee company is facing the complaint proceedings of cheating and fraud.

- v. Since, an amount of Rs.20 crores has been shown as Capital of the assessee in the balance sheet for accounting period 01.04.2013 to 31.03.2014 relevant to this assessment year and Balances Sheet is part and parcel of the Books of Accounts, it tantamount to credit of Rs.20 crores in the Books of accounts of the assessee. The assessee's version that the shares were issued to the director namely Shri Surinder Kumar Kaushik lieu of goodwill of the value of Rs.20 core raised Sh. Surinder Kumar Kaushik. It has also been stated by the counsel that Sh. Surinder Kumar Kaushik has expired. Thus, neither statement of late Sh. Surinder Kumar Kaushik could be recorded as to how he had raised goodwill even when the license for running airline company had not been issued by the DGCA at the time of allotment of shares, and therefore, the company, might not have shared of its business of aviation. Without the license the company cannot function thus the question of raising goodwill does not arise. Moreover, no satisfactory reply or evidence has been filed which may show that there was goodwill to the extent of Rs.20 crores of Shri Sh. Surinder Kumar Kaushik in lieu of which shares of Rs.20 crore have been issued to him and thereby capital of the company raised. The dement of past experience, technical qualification aviation knowledge, longevity of existence in business, market share, quality of services rendered, the edge over its competitions in the market, brand position and efforts taken to establish brand of the company and valuation etc. are missing in this case for the justification of the goodwill. Hence, the goodwill is not justified and moreover there is no basis and authentic evidence w.r.t. the valuation of goodwill of Rs.20 crores. Further, assessee's version that no money transaction was involved and the way adopted by the company to raise capital has no impact on income tax due to this transaction is not a satisfactory reply.

6. In the light of the above discussion, section 68 fully and completely applies in the case. Therefore, an addition of Rs.20 crores is made and has been added back to the income of assessee."

7. Before the Id.CIT(A), it was submitted that Shri Surinder Kumar Kaushik had experience and expertise to turn around the business/jumpstart business which had utilized for starting the business of assessee company. The Director – Shri Surinder Kumar Kaushik who was the moving force behind the company, when the

company was incorporated and its activities were in a nascent stage he labored and later on secured an aviation licence for it. In consideration of his yeomen services the company issued shares, under the category 'shares issued other than for cash' to him. This was done by debiting goodwill account in the company and crediting the share capital account. The creation of goodwill in the books of account is at the discretion of the company. It represents merely a book entry. There is no law regulating the creation of this provision. The Company is empowered to evaluate goodwill at its sole discretion. Therefore, the AO could not seek any explanation or justification from the Company for the creation of goodwill. Like-wise the company has the discretion to issue share capital as well. That again cannot be questioned. The AO is in the wrong footing in asking for a justification for the creation of goodwill. He did not perhaps realize that doing so was the assumed prerogative. There is no onus which is cast on the assessee to prove the genuineness of the share capital introduced through reciprocating entries in the books.

7.1 So far as the decision of the Hon'ble Supreme Court in the case of McDowell & Co. Limited vs. CTO 154 ITR 448 (SC) is concerned, it was argued that the said decision is not applicable in the facts of the instant case. In that case, it was held that any and every method used by the assessee in order to reduce his tax liability cannot be called a colorable device. The Revenue has first to show how the assessee has resorted to a device let alone a colorable device. Referring to

the decision of the Hon'ble High Court in the case of New Holland Tractor India P. Ltd., it was submitted that the the Hon'ble High Court in the said decision has held that tax planning may be legitimate provided it is within the framework of law and held that the Tribunal was in error in applying principle enunciated in McDowell & Co. Ltd. vs. CTO (1985) 154 ITR 148 (SC). It was argued that in the instant case the assessee has not used any device to avoid tax, therefore, the said decision is not at all applicable. It was further argued that the provisions of section 68 cannot be invoked unless there is a credit entry emerging out of cash or in bank account of the assessee in the books of the company. Even otherwise transaction stands confirmed and the AO is not able to prove or bring on record that any investment worth Rs. 20 Crores has been made by the assessee which can be taken as unexplained investment u/s 69 of the I.T. Act, 1961. It was argued that the addition of Rs.20 Crores made by the AO is erroneous and totally illegal.

7.2 Based on the arguments advanced by the assessee, the Id.CIT(A) deleted the addition by observing as under:-

“5.3 I have perused the detailed submission including the copy of Board Resolution to allot shares of Rs.20 crores, form NO.5 to ROC (increase in share capital), notice calling extraordinary general meeting of the member of the company, extracts of minutes of meeting and other materials which were filed before the AO and has been made a part of submission before me which is placed in the file. These documents go to demonstrate that the appellant has followed due procedure of increasing the authorized share capital and subsequently issue of shares to Sh. Surender Kumar Kaushik, one of the directors/shareholders.

5.4 The issue at hand to be decided is whether Sh. Surender Kumar Kaushik was really having expertise and the appellant has acquired the same

from the said director by way of any legal/valid documents and whether in the circumstances provision of section 68 of the Act is applicable in this case.

5.5 To appreciate the issue at hand, it is worth referring to the provision of section 68 of the Act. Bare reading of Section - 68, Income-tax Act, 1961 is as under-

Cash credits.

S.68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year:

Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—

- (a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and
- (b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10.

There are 4 limbs to the provision of section 68 as under:

First is vis-a-vis sum, Second is that sum is to be found credited in the books of accounts of assessee for that year, third is regarding explanation about the nature and source thereof and the last limb regarding in the case of a company is substantiating Identity of the creditor, Genuineness of the transaction and Credit worthiness of the creditor.

5.6 During the year under consideration, the appellant company is found to have raised share capital. Instead of receiving the consideration amount through Bank, the Company has cls'med to have received Goodwill of the share holders / director and the Share Capital has been credited against the

same. As per the facts of the case there is no such amount which has been actually received by the appellant company.

The provision relating to cash credit, as in section 68 of the Act, was provided for the first time in the Income Tax Act 1961 (Act No.43 of 1961) as there was no corresponding provision in the Income Tax Act, 1922. Provisions of Section 68 of the Act comes into play when there is receipt of money in the books of accounts of the assessee as even the name suggests "Cash Credits".

In the case at hand, the amount credited does not constitute any sum of money received from anyone and therefore provisions of Section 68 of the Act do not apply. In this case no money has been routed, being the purpose for which the provision was introduced.

5.7 Section 68 of the Act, is attracted where an entry relating to a sum is found to have been credited in the books kept by the assessee, which thus implies, existence of books and recording of a sum which the Assessing Officer considers as doubtful. The Assessing Officer then starts enquiry, specifically to satisfy himself of the source of such credit. If during the course of enquiry, AO is satisfied that the entries are not genuine, then he will have every right to add the said sum represented by such credit entry as income from other sources. The satisfaction of the assessing officer is the basis of invocation of his powers under section 68. However, such satisfaction must not be illusory or imaginative but must have been derived from relevant facts and factors, and is on the basis of proper enquiry of all material before him but also to which he has command.

5.8 If at all the provisions of Section 68 are invoked, it is apparent that the appellant has duly explained the source and the nature of the transaction. The provisions could have been applied or the addition could have been made if an undisclosed income is found from an unknown source or if the amount represents some canceled income which was not credited in the books kept by him. Section 68 applies when the source of the capital contribution made by the share holders is not disclosed or disclosed but not satisfactorily explained to the assessing officer. Introduction of share capital does not always mean that provisions of Section 68 have to come into play necessarily. Without prejudice to above, the amount before being credited to share capital account, is credited to the share applicant, details such as Name, address, PAN, ITR are available on records.

5.9 In the present case the "sum" has been identified by the Ld. AO as per the value of the goodwill claimed to be parted by the shareholder (late. Sh. Surender Kumar Kaushik) in favour of re company. Though there has been no infusion of funds in the books of accounts, the Ld. AO has taken the figure of the goodwill as if the amounts have been infused by the shareholder in re cooks of accounts and this figure has been taken as a sum credited.

5.10 It is however a non-disputed fact that the Ld. AO called for the due evidence and production of the director for examination so as to ascertain the existence and genuineness of the expertise/ goodwill. The fact is that the appellant failed to adduce any cogent evidence/documents which could have proved the existence of the expertise with the director who has been allotted the share of Rs.20 crore and also the fact that the said director was no more in existence (passed away) and therefore could not be produced for examination.

5.11 In absence of any other cognizable reason, the explanation offered by the appellant in this regard appears acceptable wherein the appellant has submitted that in Company Law whenever shares are issued at a discount, then difference in issue price and face value is capitalized in the form of goodwill. As in this case the face value was-Rs.10 but issue price in the form of money was Rs. NIL, so the entire amount was capitalized in the form of goodwill. It is a jurisdiction of the businessman to decide and value its goodwill as has been held by Hon'ble High Court of Delhi in Maruti Insurance Distribution Services Ltd vs Commissioner of Income tax 47 taxmann.com 140.

5.12 Thus, the said fictitious asset in the nature of Goodwill valued at Rs. 20 crores in the books of account of the appellant tantamounts to a self created and revalued intangible asset. The valuation of the goodwill is a business decisions which has to be left to the businessmen and the same is permissible within the provision of the Company Act as well. Subsequently, the shares worth Rs. 20 crores is found to have been issued to the said directors Sh. Surender Kumar Kaushik by crediting his account of this value in the books of account by making the following entries:

Goodwill	Dr.	20 crores
Share Capital	Cr.	20 crores

5.13 The limitation associated with such kind of self created/revalued intangible assets in the nature of goodwill is that they cannot be qualified for claiming any depreciation for the reason this intangible asset (goodwill) appearing in the books of account of the appellant is not an asset for which any purchase cost has been paid or it is also not the case where appellant has acquired the same by incurring any expenditure. The appellant though has not claimed any depreciation on this self created/revalued Goodwill of Rs.20 crore in its P & L A/c for the current previous year, is not entitled to claim the same in the future either.

5.14 A detailed scrutiny of the documents on records including form 5 submitted to the ROC for increase in the share capital reveals the reason adduced for issuing share worth Rs.20 crore to its one of the directors Sh. Surender Kumar Kaushik that shares were issued for "blessings and efforts" and his goodwill which helped in obtaining aviation license. Under the circumstances, it amounts to a kind of payment/ESOP to the said shareholder

without consideration and this vary aspect has been recorded by the Ld. AO in the impugned order.

5.15 So far observation of the Ld. AO that the assessee has adopted a colorable device to evade the tax is concerned, in the fact of the case where the appellant has created a fictitious asset in the nature of goodwill for the apparent objective of enhancing its authorized share capital and issuing the corresponding amount of shares valued at Rs.20 crore to one of its shareholder is not found to be within the meaning of any colorable device for the reason that this mechanism of transaction is not directly or indirectly reducing the tax implication on the income of the appellant. It is not the case that the share of Rs. 20 crore issued without consideration to Sh. Surender Kumar Kaushik, one of the directors/shareholder is not susceptible to the tax incidence in the hands of the recipient.

5.16 Based on above finding, the nature of transaction in the present case is self creation/valuation of a fictitious assets in the nature of goodwill by capitalizing the difference in issue price and face value of the shares which is fully disclosed / incorporated in the books of accounts. Source of transaction is not applicable in the present case because there has been no inflow of funds as such. It is also not the case of Ld. AO that the appellant has received some undisclosed income or has made some unexplained expenditure outside of books of accounts through said director/shareholder Sh. Surender Kumar Kaushik. Thus, I do not find any merit in the observation of the Ld. AO in this regard. A reference to the decision of Hon'ble ITAT, Delhi in the case of Addl. CIT vs Gurshant Rotary Compressors Ltd. (ITAT, Del-TM) 116 ITD 131 is worth mentioning here wherein, though in a different fact it was held that "mere entries of sale in books of accounts of assessee were not enough to justify cash credit. "

5.17 In light of detailed deliberation above, it is noted that the appellant has self created/revalued its own goodwill to the tune of Rs.20 crores with the sole objective of increasing the authorized share capital/net worth of the company so that it can meet the conditions precedent to acquire aviation license. The shares of Rs.20 crores has been issued to the director/shareholder (Late Sh. Surender Kumar Kaushik) for "blessing and efforts for further expansion of business of civil aviation" by debiting the goodwill account in the books of account. The shares have been issued without any consideration and therefore in the nature of ESOP/salary and most importantly there has not been any transaction/receipt of cash or bank or any other realizable assets against the alleged share capital.

In factum of the case, section 68 of the Act cannot be invoked. Therefore, addition of Rs.20 crore made u/s 68 requires to be deleted. The Ld. AO is directed accordingly. Thus, the appellant succeeds in this ground of appeal."

7.3 Aggrieved with such order of the CIT(A), the Revenue is in appeal before the Tribunal.

8. The Id. DR strongly challenged the order of the CIT(A) in deleting the addition made by the AO. She submitted that the Id.CIT(A) without any valid reasons has deleted the addition which under the facts and circumstances of the case, is not justified. She submitted that the director of the assessee company was never produced before the AO. Further, there is no basis of valuation of such goodwill. According to the Id. DR, no such valuation report was ever provided by the assessee to the AO. Referring to the copy of the assessment order, she submitted that the AO at para 5.2 of the order has given a finding that other agencies have also never informed to his office that the assessee company is facing a complaint proceedings of cheating and fraud. Therefore, in absence of production of the director before the AO and in absence of the basis of valuation of such goodwill, the Id.CIT(A) could not have deleted the addition.

9. The Id. Counsel, on the other hand, heavily relied on the order of the CIT(A) in deleting the addition made by the AO. He submitted that the provisions of section 68 of the Act comes into play when there is receipt of money in the books of account of the assessee. However, in the instant case, the amount credited does not constitute any sum of money received from any one and, therefore, the provisions of section 68 are not applicable to the facts of the present case. He submitted that the assessee has duly explained the source and the nature of the

transaction before the AO by giving the details such as name, address, PAN, ITR, etc., of the director to whom such shares were issued on account of goodwill. He submitted that it is the decision of the businessmen to decide and value its goodwill as has been held by the Hon'ble Delhi High Court in the case of Maruti Insurance Distribution Services Ltd. vs. CIT, 47 taxmann.com 140. He submitted that the assessee has not claimed any depreciation on the self created/revalued goodwill of Rs.20 crores in its profit & loss account of the current previous year which the Id.CIT(A) has mentioned at para 5.13 of his order. He submitted that the amount of goodwill is a kind of payment/ESOP to the shareholder without consideration and this very aspect has been recorded by the AO in the impugned order. He submitted that the increase in the share capital of the company against goodwill is not found to be within the meaning of any colourable device since this mechanism of transaction is not directly or indirectly reducing the tax implication on the income of the assessee. He submitted that there is no movement of actual money either in cash or through bank and the shares were allotted to the shareholders against goodwill. Referring to the following decisions, he submitted that the provisions of section 68 cannot be applied to the instant case as there is no actual receipt of money by the assessee whether by cash or cheque during the accounting year relevant to the assessment year under consideration. Therefore, the Id. CIT(A) was fully justified in deleting the addition. The Id. Counsel for the assessee relied on the following decisions:-

- i) V.R. Global Energy Pvt. Ltd. vs. ITO, 407 ITR 145 (Madras);

- ii) Jatia Investment Company vs. CIT, 206 ITR 718;
- iii) ACIT vs. Shri Suren Goel, ITA No.1767/Del/2011, order dated 1st December, 2011;
- iv) ITO vs. Anand Enterprises Ltd., ITA No.1614/Kol/2016;
- v) ACIT vs. Mahendra Kumar Agarwal, 23 taxmann.com 285;
- vi) Abhijeet Enterprises Ltd. vs. ITO, ITA No.308/Kol/2017;
- vii) ITO vs. Bhagawat Marcom Pvt. Ltd., 109 taxman.com 350;
- viii) H.H. Sri Rama Verma vs. CIT, 57 taxmann 149 (SC); and
- ix) Abhishek Estate Ltd. vs. ITO, ITA No.1585/Ahm/2007.

10. We have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find, the AO, in the instant case, made addition of Rs.20 crores to the total income of the assessee u/s 68 of the IT Act being the amount of Rs.20 crores shown as goodwill and on which shares were issued in lieu of this goodwill to Mr.Surinder Kumar Kaushik. We find, the Id. CIT(A) deleted the addition, the reasons of which are already reproduced in the preceding paragraph. It is the submission of the Id. DR that the assessee could not provide the basis of such goodwill and, therefore, the genuineness of such transaction remained unproved. Further, the assessee could not provide any supportive evidence of work/services rendered for which the goodwill was created. According to the Id. DR, the basis of such valuation at

Rs.20 crores and not at a lower amount or higher amount has not been substantiated. It is the submission of the Id. counsel for the assessee that the provisions of section 68 are not applicable to the facts of the present case since the assessee has not received any actual amount of cash. It is also his submission that the various documents filed before the Ministry of Corporate Affairs such as Forms No.2, 3 and 5 filed with ROC relating to issue of shares for a consideration other than cash was not disputed by the ROC. It is also his submission that addition, if any could have been made in the hands of the shareholder and definitely not in the hands of the assessee.

11. We find some force in the above argument of the Id. Counsel for the assessee. As mentioned in the body of the assessment order as well as in the finding of the CIT(A), it is an undisputed fact that there is no actual receipt of any cash by the assessee company in the instant case towards issue of share capital and such shares were issued in lieu of goodwill. In the instant case, the assessee has debited goodwill account of Rs.20 crores and, credited the same to share capital of Rs.20 crores wherein the shares were allotted to Shri Surinder Kumar Kaushik towards goodwill. It has been held in various decisions that the provisions of section 68 can be applied if there is an actual receipt of money by the assessee whether by cash or cheque during the accounting year relevant to the assessment year under consideration. It has been held in these decisions that when the cash did not pass at any stage and when the respective parties did not receive cash nor

did pay any cash, there was no real credit of cash in the cash book and, therefore, the question of inclusion of the amount of the entry as unexplained cash credit u/s 68 could not arise.

12. We find, the Hon'ble Madras High Court in the case of VR Global Energy Pvt. Ltd. (supra) has held that where the assessee allotted shares to a company in settlement of pre-existing liability of assessee to the said company by way of adjustment and since no cash was involved in transaction of said allotment of shares, conversion of these liabilities into share capital and share premium could not be treated as unexplained cash credit u/s 68 of the Act. It was held that since the cash credits towards share capital were only by way of book adjustment and not actual receipts, therefore, the same could not be treated as receipt towards share subscription money. Since no cash was involved in transaction of said allotment of shares, conversion of these liabilities into share capital and share premium could not be treated as unexplained cash credits u/s 68 of the IT Act. We find, the Revenue challenged this decision of the Hon'ble Madras High Court before the Hon'ble Supreme Court and the Hon'ble Supreme Court dismissed the SLP filed by the Revenue reported in 268 taxmann.com 392.

12.1 We find, the Delhi Bench of the Tribunal in the case of ACIT vs. Shri Suren Goyal (supra), has held that where the assessee has received loan of Rs.20 lakhs from his father through a journal entry in the books of account and there was no physical transfer of money from the account of his father, addition of the same u/s

68 of the Act is not justified and accordingly the Tribunal dismissed the appeal filed by the Revenue against the order of the CIT(A) deleting the addition made by the AO u/s 68 of the IT Act on account of the journal entry.

13. We find the Kolkata Bench of the Tribunal in the case of ITO vs. Bhagawat Marcom Pvt. Ltd., reported in 178 ITD 684 while deciding somewhat similar case has held that where the assessee company, during the year under consideration issued shares at premium to certain companies in lieu of shares held by the said companies and the said transactions were entered in the books of account of the assessee company by way of journal entries and it did not involve any credit to cash account, therefore, the amount of entry could not be treated as unexplained cash credit u/s 68 of the IT Act.

13.1 We find, the Jaipur Bench of the Tribunal in the case of ACIT vs. Mahendra Kumar Agrawal (supra) has held that in provisions of section 68, the words used are “where any sum is found credited in the books of an assessee.” In this connection, the word ‘sum’ is of paramount importance. The words “any sum” cannot be taken as parallel to “any entry.” The provisions of section 68 are deeming provisions and therefore, onus is on the Department to prove that any sum was credited to the books of the assessee.

14. We find, a somewhat similar issue had come up before the Kolkata Bench of the Tribunal in the case of ITO vs. M/s Anand Enterprises Ltd. (supra). In that case, the assessee company purchased shares of another company from various

parties. The assessee company did not pay any cash consideration for making these investments in shares and, instead, issued shares from its company to the aforesaid shareholders in lieu of purchase consideration for investment in shares. In other words, the shares were issued by the assessee company to the tune of Rs.20,07,60,000/- for consideration other than cash in lieu of making investment in shares of another company. The AO, however, observed that there was no receipt of cash consideration of share capital and the transaction had happened for the same only through book entries. According to the AO, the assessee had actually introduced unaccounted money in its company through issue of bogus shares to various shareholders. According to him, the entire set of transactions entered into by the assessee shareholder, the assessee or company in which the assessee has invested has a pre-designed set of transactions executed to introduce unaccounted money in garb of share capital and share premium. Applying the provisions of section 68 of the IT Act, the AO made addition of Rs.20,07,60,000/- to the total income of the assessee. In appeal, the Id.CIT(A) deleted the addition. On further appeal by the Revenue, the Tribunal upheld the order of the CIT(A) and dismissed the appeal filed by the Revenue by observing as under:-

“4. We have heard the rival submissions. At the outset, we find that the assessee had not raised any share capital by receipt of cash consideration in the instant case. The shares were issued for consideration other than cash in lieu of assessee company making investment in shares in some other company. Effectively, the assessee purchased certain shares from the aforesaid six shareholders and instead of paying cash to them, the assessee company issued shares in its own company to those shareholders. Hence the assessee had made investments in shares of another company for which consideration was settled through issuance of its shares to those shareholders. Now the crucial point is

whether the provisions of section 68 could be invoked in the instant case for making investment towards share capital. There was no receipt of any sum as provided u/s 68 of the Act in the instant case. It would be pertinent here to refer to the decision of Hon'ble Supreme Court in the case of Shri H.H. Rama Varma vs. CIT reported in 187 ITR 308 (SC) wherein it was held that 'any sum' means 'sum of money'. We find that Id. CIT(A) had deleted the addition by observing as under:

"6. On consideration of the AR's submission, especially the portion reproduced above, it is seen that section 68 of I.T. Act, 1961 does not apply to cases of purchase of share assets and allotment of shares by the appellant when purchase and allotment are under a barter system. The AO has not refuted the appellant's claim that shares were allotted in exchange for acquisition of shares by the appellant from the companies which surrendered such shares to the appellant. Though as per the AO to apply section 68 to make the said addition in the appellant's hand. Transactions purportedly executed by entry operators involve multiple layers and other complexities, introducing delays in introduction of unaccounted cash/money and multiple players being incorporated entities. Measures taken by the AO in the course of the assessment proceeding falls much short of what is required to be done in such case laws, which have evolved on this issue, call for concerted actions on the part of the AO pinpointing utilization of unexplained/unaccounted/untaxed money and the players and the beneficiaries effectively using the weblike scheme to plunder black money. For example introduction and use of black money in the present case may be at a different point of time and in different hands. The AO's action in the present case cannot be upheld in law. I, therefore, delete the additions and grounds of appeal Nos. 3 & 4 are allowed."

4.1. We find that the Hon'ble Allahabad High Court in the case of CIT vs. Sohanlal Singhanian reported in 235 ITR 616 (All) had held in the context of allowability of donation as deduction u/s 80G of the Act that the expression 'any sum paid' used in the said section denotes 'sum of money paid'. Hence if certain shares were donated by a person, then the same would not fall eligible for deduction u/s 80G of the Act. We also find that the Hon'ble Jurisdictional High Court in the case of Jatia Investment Company vs. CIT reported in 206 ITR 718 (Cal) also supports the case of the assessee herein, wherein it was held as under:

"It is finally emphasised by learned counsel for the assessee that the ultimate result is that the firm becomes a debtor to GB and Co. and the three non-financial companies of the group got discharged. Learned counsel also emphasised that, at the worst, it can be said that the assessee-firm has received valuable assets being the said shares of the equivalent value of the debt taken over by it from the companies, i.e., Rs. 11.20 lakhs.

Therefore, the question of cash credit does not come in, there being no actual passing or receipt of cash. In other words, the transactions are mere book entries. It was contended that the fact that the entries passed through the cash book could not detract from or efface the essential nature of the entries. It was also urged that the entries were passed through the cash book so that the repayment of loans by the said three companies could be established before the Reserve Bank of India. But, according to Shri Bajoria, that does not mean that it amounts to an artifice employed to deceive any authorities, because the transactions showing the amount as received in cash and paid away spontaneously and simultaneously were not actual but only notional. He, however, stated that, as far as the question of section 68 is concerned, the nature of the transactions and the entries clearly show that no cash, in fact, flowed. It was further stressed that the transactions are above board. No outsider is involved. The entries were made in the books of the concerns of the same group. The shares in question were also of the companies of the group. There was no attempt at hiding the transactions. Nor is it the case of any of the parties to the transaction that there was any passing of cash. Every party unequivocally stated that the transactions were carried into effect merely by way of adjustments of the said loans and the share transfers.

Shri A. C. Moitra, the learned advocate for the Revenue, reiterated the grounds on which the Tribunal has affirmed the addition of the amount of Rs. 11.20 lakhs as unexplained cash credit. He particularly emphasised that the assessee's contention that the entries are only adjustment entries is not acceptable, because the adjustment entries are not made through the cash book. It is an accepted principle of accounting that book adjustments and the entries in effecting them are made by journal entries and not cash entries. He urged that the purported motive of the entries being the reduction of loans of the three limited companies does not explain the whole matter, because the entries are cash entries. The fact remains that, at every stage, the parties showed the payments and receipts of cash even when there was no cash available for such entries. This quite justifies the addition as sustained by the Tribunal.

We have perused the assessment order carefully. We find that cash did not pass at any stage though entries were made in the cash book showing payments and receipts ; but since the entries made a complete round, no passing of cash was necessary for the purpose of making the entries. That there was no passing of cash is also admitted by the Income- tax Officer himself. We have already extracted the observation of the Income- tax Officer in paragraph 14 of his assessment order. The Income- tax Officer has clearly opined that all the respective parties did not receive cash nor did pay cash as none had any cash for the purpose. The only point in the assessment order is that the entries not involving the passing of cash should not have found a place in the cash book, but in the ledger account through journal entries. There is another self- contradiction in the Income-tax Officer's finding that, if there was

no real cash entry on the credit side of the cash book, but merely a notional or fictitious cash entry, as admitted by him, there is no real credit of cash to its cash book ; the question of inclusion of the amount of the entry as unexplained cash credit cannot arise.

One of the grounds of the Tribunal for disbelieving the assessee's case is that the adjustment entries were made by notional cash entries with a view to bringing down the debt-and-capital ratio, i.e., that while being discharged of the debt the said companies also jettisoned their assets, i.e., the shares held by them of equivalent sum without achieving the avowed purpose. Here the Tribunal certainly misdirected itself. The ratio to be reduced is of the loan in relation to the share capital and the reserves. Jettisoning the shares had the desired effect of reducing the borrowed capital.

Again, as regards the Tribunal's refusal to take notice of the directions of the Reserve Bank, it is not correct for the Tribunal to hold that the said document was a new evidence in the true sense of the term. The assessee has been consistently pleading before the lower authorities that the entries had to be made in order to bring the companies in conformity with the said direction. Moreover, the direction of the Reserve Bank is a public document within the meaning of section 74 of the Evidence Act, 1872. Documents of a public nature and public authority are generally admissible in evidence subject to the mode of proving them as laid down in sections 76 and 78 of the Evidence Act. In our view, the effect and import of the transactions is that the assessee took over the liability of the aforesaid non-financial companies to GB and Co. in exchange for the shares as aforesaid.

In the premises, we answer all the questions, in the affirmative and in favour of the assessee and against the Revenue."

4.2. It would be pertinent to note that in the instant case, the Id. AO had not doubted the investment made in shares by the assessee company. There is no dispute raised by the Id. AO with regard to number of shares; value thereon invested by the assessee company. We also find that the Co-ordinate Bench decision of Pune Tribunal in the case of Kantilal and Bros. vs. ACIT reported in 52 ITD 412 (Pune Trib.) also supports the case of the assessee.

4.3. In view of the aforesaid observations, in the facts and circumstances of the case and respectfully following the aforesaid judicial precedents relied upon hereinabove, we hold that the Id. AO had erroneously invoked the provisions of section 68 of the Act to the facts of the instant case, which, in our considered opinion, are not at all applicable herein. This is a simple case of acquiring shares of certain companies from certain shareholders without paying any cash consideration and instead the consideration was settled through issuance of shares to the respective parties. Moreover, in the balance sheet of the assessee company in the schedule to share capital, it is very clearly mentioned by way of note that the fresh share capital was raised during

the year for consideration other than cash. Hence we hold that provision of section 68 of the Act are not applicable in the instant case and accordingly the entire addition deserves to be deleted which has rightly been done by the ld. CIT(A) which does not require any interference. Accordingly, grounds raised by the revenue are dismissed.”

15. In view of the above discussion and in view of the detailed reasoning given by learned CIT(A) on this issue, we do not find any infirmity in his order deleting the addition made by the AO invoking the provisions of section 68 of the Income Tax Act, 1961. Accordingly, the order of learned CIT(A) is upheld.

16. However, in our opinion, the addition, if any, in the instant case has to be made in the hands of Shri Surinder Kumar Kaushik to whom the shares were allotted for his services rendered by debiting the goodwill account in the books of account. Therefore, the AO may take necessary steps for bringing this amount to tax in the hands of Shri Surinder Kumar Kaushik or his legal heirs in accordance with law. We hold and direct accordingly.

16.1 The grounds raised by the Revenue are accordingly dismissed.

CO No.121/Del/2018 (A.Y. 2014-15)

17. The grounds raised by the assessee in its Cross Objection reads as under:-

“1. That the Ld. Assessing Officer has erred both in law & facts in making illegal addition of Rs. 20,00,00,000/- (Rupees Twenty Crore) made u/s 68 of the Act by wrongly stating the fact that Share Capital of the Company was increased to Rs. 20,00,00,000/- (Rupees Twenty Crore) & no satisfactory explanation was furnished with the AO. Share of Rs. 20,00,00,000 - (Rupees Twenty Crore) were issued to Sh. Suriender Kumar Kaushik against the Intangible Asset in the form of goodwill of the Company. All the necessary forms of ROC & Board Resolution confirming the same were filed before AO. No consideration of Cash & Bank was received from the Director.

The Assessee has duly explained the same and nature of the transaction. Treating the same as Unexplained Credit U/s 68 is illegal & unwarranted.

2. The CIT(A) has correctly allowed the appeal against the illegal addition of Rs. 20,00,00,000/- (Rupees Twenty Crore) U/s 68 of the Act and further correctly held that Section 68 of the Act cannot be invoked.”

18. After hearing both the sides, we find, the grounds raised by the CO are in support of the order of the CIT(A). Since the appeal filed by the Revenue has been dismissed, therefore, the grounds in the CO become infructuous. Accordingly, the same are dismissed.

19. In the result, the appeal filed by the Revenue as well as the CO filed by the assessee are dismissed.

Order pronounced in the open court on 23.04.2021.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 23rd April, 2021.

dk

Copy forwarded to

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

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

Asstt. Registrar, ITAT, New Delhi