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

+ **ITA 175/2022**

PR. COMMISSIONER OF INCOME TAX 7

DELHI

.....Appellant

Through: Mr. Sunil Agarwal, SSC with
Mr. Shivansh B. Pandya, Mr.
Viplav Acharya, Ms. Priya
Sarkar, JSCs & Mr. Utkarsh
Tiwari, Adv.

versus

ZEXUS AIR SERVICES PVT. LTD.Respondent

Through: Mr. Inder Paul Bansal & Mr.
Vivek Bansal, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

**HON'BLE MR. JUSTICE HARISH VAIDYANATHAN
SHANKAR**

ORDER
28.01.2025

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1. The Principal Commissioner of Income Tax impugns the order of the **Income Tax Appellate Tribunal**¹ dated 23 April 2021 and has posed the following questions of law for our consideration:-

“A. Whether in the facts and circumstances of the case, the order of Ld. ITAT is erroneous in law as the Ld. ITAT has only considered cash credit to be taxable under the provisions of section 68, whereas the provision covers within its ambit ‘any sum credited in the Books’?

B. Whether in the facts and circumstances of the case, the order of Ld. ITAT is erroneous and untenable in law as the Ld. ITAT has failed to consider that the impugned transaction is a colorable devise to avoid tax liability and the facts clearly show that the assessee party has made the credit/ debit entries in contravention of

¹ Tribunal



provisions laid by the Act?

C. Whether in the facts and circumstances of the case, the order of Ld. ITAT is erroneous and untenable in law as the Ld. ITAT has erred in suggesting that the additions, if any, shall be made in the hands of the deceased, i.e. Sh. Surinder Kumar Kaushik or his legal Heirs instead of the Assessee company?”

2. The principal issue which arises is with respect to the validity of the additions which were made by the **Assessing Officer**² in terms of Section 68 of the **Income Tax Act, 1961**³. That provision for ready reference is extracted hereinbelow:-

“**68. Cash credits** - 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 sum so credited consists of loan or borrowing or any such amount, by whatever name called, any explanation offered by such assessee shall be deemed to be not satisfactory, unless,—

- (a) the person in whose name such credit is recorded in the books of such assessee 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 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:

² AO

³ ACT



Provided also that nothing contained in the first proviso or second 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.”

3. The issue itself arose in the context of the following facts which have also been noticed by the Tribunal in the order impugned before us. The assessee company had filed its Return of Income on 31 October 2015 declaring ‘Nil’ income. In the course of the assessment proceedings, the AO appears to have picked up an issue with respect to allotment of shares to one Mr. Surinder Kumar Kaushik in lieu of goodwill and without any monetary consideration. On being posed with the query raised by the AO in that respect, the assessee took the position that in light of the services rendered by Mr. Kaushik, the company had decided to allocate shares having a face value of INR 20 crores against goodwill in recognition of his efforts to the business. The AO however, took the view that additions were liable to be made in terms contemplated under Section 68 of the Act.

4. Before us, it was undisputed that the shares had been issued without any monetary consideration. The respondent appears to have debited the goodwill account of the company and made a corresponding credit to the share capital account for the purposes of allotment of shares to Mr. Kaushik. It was in the aforesaid light that it had taken the position that it was merely a book entry and thus, would not have fallen within the ambit of Section 68.

5. While proceeding to delete the additions which had been made, the **Commissioner of Income Tax (Appeals)**⁴ in its order had observed as follows:

⁴ CIT(A)



“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 extra ordinary 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.

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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 assesses, which thus implies, existence of books 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 and 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.”

6. It is this view which has come to be affirmed by the Tribunal in its judgment which is questioned before us. The Tribunal while dealing with the aspect, has held as follows:

“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.”

7. In our considered opinion, the view as expressed by the CIT(A) and which came to be affirmed by the Tribunal does not merit any interference bearing in mind the undisputed fact that the transaction



did not represent an actual receipt of any cash in the hands of the assessee company. In absence of any such consideration having entered the books, the provisions of Section 68 were clearly not attracted. The assessee had in any case satisfactorily explained the circumstances attached to the book entry in question.

8. We are thus, of the considered opinion that the appeal fails to raise any substantial question of law. The appeal is, consequently, dismissed.

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.

JANUARY 28, 2025/v