IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "B" BENCH

BEFORE: SHRI WASEEM AHMED, ACCOUNTANT MEMBER AND
SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER

ITA No. 697/Ahd/2018 **(Assessment Year: 2013-14)**

M/s Meridian Telesoft Limited. 132, Sarap, Opp Navjivan Press, Ashram Road, Ahmedabad	**V/S**	**Assistant Commissioner of Income Tax** Circle-2(1)(2), Ahmedabad
(Appellant)		**(Respondent)**

PAN: AABCM4067D

Appellant by	**: Shri Tushar Hemani, Advocate**
Respondent by	**: Ms. Saumya Pandey, Sr. D.R.**

आदेश/O R D E R

Date of hearing : 23 -08-2023
Date of Pronouncement : 20 -11-2023

PER WASEEM AHMED, ACCOUTANT MEMBER:

The appeal has been preferred by the assessee against the order of the Commissioner of Income Tax (Appeals)-2, Ahmedabad ('CIT(A)' in short) dated 02.11.2017 arising in the assessment order dated 28.03.2016 passed by the Assessing Officer (AO) under s. 143(3) of the Income Tax Act, 1961 (the Act) concerning A.Y 2013-14.

2. The assessee has raised following grounds of appeal:

1. The learned CIT(A) has erred both in law and on the facts of the case in confirming the action of AO of treating share application money as unexplained cash credits and making an addition of Rs.13,00,000/- u/s.68 r.w.s.115BBE of the Act.

2. The learned CIT(A) has erred both in law and on the facts of the case in confirming the disallowance of interest expenses to the extent of Rs.2.04,991/- u/s.40(a)(ia) r.w.s.194A of the Act.

3. The learned CIT(A) has erred both in law and on the facts of the case in confirming the disallowance of cost of improvement of Rs.1,19,00,000/- from the Long Term Capital Loss resulting in an addition of Long Term Capital Gain of Rs. 1,14,02.391/-.

4. The learned CIT(A) has erred both in law and on the facts of the case in confirming the disallowance of cost of improvement despite the fact that AO did not give the appellant opportunity to cross-examine sub-contractor whose statement was relied upon to make the disallowance.

5. Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.

6. The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id. AO in levying interest u / s 234/ B / C of the Act.

7. The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id. AO in initiating penalty u / s 271(1)(c) of the Act.

The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.

3. The first issue raised by the assessee is that the learned CIT(A) erred in confirming the addition made by the AO by treating the receipt of share capital as unexplained cash credit under section 68 of the Act.

4. The facts in brief are that the assessee, a public limited company, is engaged in the business of mass SMS services and software development. The

assessee during the year under consideration received share application money for Rs. 13 lacs from 3 persons detailed as under:

1. Shri Harban Singh Rs. 2 Lakh
2. Smt. Sudesh Kewal Krsihna Rs. 1 Lakh
3. Shri Promod Bothra Rs. 10 Lakh

4.1 During the assessment proceedings, the assessee failed to submit necessary documents as required by the AO establishing the identity, creditworthiness of the parties and genuineness of the transactions. Therefore, the AO treated the credit of share application money for Rs. 13,00,000/- as unexplained cash credit under section 68 of the Act and added the same to the total income of the assessee.

5. The aggrieved assessee preferred an appeal before the learned CIT(A). The assessee before the learned CIT(A) furnished names, addresses, PAN of the shareholders, their confirmation letters, and the copy of the share certificate issued to the shareholders. The assessee accordingly claimed that it discharged the onus cast under section 68 of the Act by furnishing necessary details by establishing the identity of the investors, their creditworthiness and the genuineness of investment made by them. However, the learned CIT(A) confirmed the addition made by the AO by observing as under:

> *4.3. I have carefully considered the facts of the case, assessment order and contention of the appellant. The Assessing Officer has made the addition of Rs. 13.00.000/- being share application money from Shri Harbans Singh of Rs.2.00.000/-, Shri Suresh Kewal Krishna of Rs.1,00,000/- and Shri Pramod Bothra of Rs. 10,00,000/-. As the appellant before the AO despite giving sufficient opportunity did not furnish evidence to establish the identity, genuineness and creditworthiness of snare application the AO made the addition of Rs.13,00,000/- u/s. 68 of the Act. During the appellate proceedings, the appellant submitted PAN Number, address and share certificate in support of the claim of share application money. However, appellant even at this stage failed to submit bank statement, income tax return and confirmation of the creditor from whom share application have been received. In view of the above, appellant has not discharged its onus of proving capacity and genuineness of the creditors. In view of the above, the addition made by the AO is confirmed.*

6. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

7. The learned AR before us furnished paper book running from pages 1 to 98 and submitted that all the details of the share subscribers such as name, date of advance, amount, share certificates and confirmation were filed and therefore the onus cast under section 68 of the Act was duly discharged by the assessee. According to the learned AR, no addition in such facts and circumstances is warranted under section 68 of the Act.

8. On the other hand, the learned DR before us vehemently supported the order of the authorities below.

9. We have heard the rival contentions of both the parties and perused the materials available on record. The issue on hand has bearing on the provisions of section 68 of the Act. The provisions of section 68 of the Act suggest that if there is any sum credited in the books of account maintained for any previous year then the assessee is required to offer a proper and reasonable explanation regarding the nature and sources of such credit to the satisfaction of the AO. Thus, the primary onus lies with the assessee to explain the source of credit in the books. Over the period, the Hon'ble Courts have laid down that the assessee to discharge its onus is required to furnish evidence with respect to identity of the creditor, genuineness of transaction and credit worthiness of the creditor. If the assessee fails to discharge the primary onus cast or the explanation and evidence submitted by the assessee was not found satisfactory by the AO, then the sum credited in the books shall be deemed as income of the assessee. The Hon'ble Supreme Court in case of CIT vs. P. Mohanakala reported in 291 ITR 278 while dealing with scope of provisions of the section 68 of the Act held that "*the opinion of the AO that the*

explanation furnished by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the sine qua non for forming the opinion." In other words, once the assessee submits primary evidence regarding identity and credit worthiness of creditor and the genuineness of the transaction, the onus shifts upon the AO to consider the material provided and make independent inquiry to find out genuineness of the evidence or bring material contrary to the fact explained by the assessee. The AO cannot reject the primary evidence furnished by the assessee without appreciating the facts available on record or without bringing any contrary material to form the belief that primary document or explanation furnished by the assessee is not satisfactory.

9.1 Undeniably, the assessee during the appellate/remand proceedings in support of genuineness of credit of share capital has furnished Name, Address, PAN, and confirmation of the shareholders and copy of share certificate issued to them. The money was credited in the books of the assessee through the banking channel. However, the AO and learned CIT(A) without considering the same and making independent inquiry of whatsoever held that the assessee failed to explain the nature and sources of credit of share capital. In our considered opinion, the approach taken by the revenue is not justified. As such, the assessee provided necessary details and thus, the onus shifted on the revenue to carry out independent inquiry/investigation and bring contrary material, but the AO failed to do so. Therefore, we hereby set aside the finding of the learned CIT(A) and direct the AO to delete the addition made by him. Hence, the ground of appeal of the assessee is hereby allowed.

10. The next issue raised by the assessee is that the learned CIT(A) erred in confirming the disallowance of interest expense on account of non-deduction of tax at sources.

11. The AO found that the assessee has made payment of interest to the non-banking financial institution (NBFC) like Tata Capital, Relegare Finvest, Barclay Interest & Loans and Kotak-car loans aggregating to Rs. 5,98,044/- only without deducting tax at sources under the provision of section 194A of the Act. Thus, the AO disallowed the claim of impugned interest expense as per the provision of section 40(a)(ia) of the Act and added to total income of the assessee.

12. The aggrieved assessee preferred an appeal before the learned CIT(A) and submitted that interest expense disallowed by the AO includes an amount aggregating to Rs. 1,95,881/- paid to the banks namely Kotak and Barclays to which the provisions of section 194A of the Act are not applicable. Regarding the remaining amount of interest expenses paid to NBFCs, the assessee furnished form 26A certifying that the party to whom payment was made without tax deduction had fulfilled the condition laid down under first proviso to subsection (1) of section 201 of the Act. Therefore, as per the second proviso to section 40(a)(ia) of the Act, no disallowance is required to be made.

13. However, the learned CIT(A) partly confirmed the addition made by the AO by observing as under:

> *5.3. I have carefully considered the facts of the case, assessme and submission of the appellant. The AO has made the addition of Rs.5,98,044/- on the ground that TDS has not been deducted from the interest paid to various parties. The appellant submitted that TDS provisions is not applicable in the case of interest payment to bank namely: Barclay and Kotak Bank amounting to Rs.1,95,881/-. As regard to interest payment to Religare Finance Ltd. and Tata Capital Services Ltd.. appellant has submitted copy of C. A. Certificate certifying that the above income has been shown in their return of income and tax has*

been duly paid. In view of the above, section 40(a)[ia] is not applicable to the extent of interest of Rs.1,97,170/-.

5.4. In view of the above, addition U / 5 40(a)(ia) to the extent of Rs. 3,93,051/- is deleted and balance addition is confirmed. The ground of appeal is partly allowed.

14. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

15. The learned AR before us contended that the recipients of the interest payment made by the assessee have already paid the taxes on such interest and therefore the same cannot be subject matter of disallowance as per 2nd proviso to section 40(a)(ia) of the Act.

16. On the other hand, the learned DR before us vehemently supported the order of the authorities below.

17. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly, the assessee has made payment of interest expense to certain NBFCs without deducting tax at source under the relevant provisions of the Act. In this regard, we note it is the duty of the assessee to deduct appropriate tax from the amount paid/payable to any party i.e. payee if such amount fall under the purview of provision of chapter XVII (B) of the Act i.e. deduction at source. Further, the provision of section 40(a)(ia) of the Act provides that if assessee fails to deduct or fails to deposit appropriate tax after deduction on the amount paid which was subject to TDS then, such amount will not be allowed as business expense. However, the legislator provided relaxation to the assessee by inserting the 2nd proviso to section 40(a)(ia) Act vide Finance Act 2012 applicable from 1st April 2013. If an assessee who fails to deduct tax at source, but such assessee is not deemed to be assessee in default under first proviso to subsection (1) to section 201 of section, then it is to be deemed that provision of

section 40(a)(ia) has been complied with. The impugned proviso has been held as retrospective in nature by the Hon'ble Delhi High Court in case of *CIT v. Ansal Land Mark Township (P) Ltd.* (2015) 61 taxmann.com 45 (Del).

17.1 As per the first proviso to subsection (1) to section 201 of the Act, an assessee is deemed to be not in default if no loss to revenue resulted due to short deduction/non-deduction of Tax i.e.

(A) Payee has included the impugned amount on which tax was not deducted/short deducted in his return of income filed under section 139 and pays taxes due on returned income and

(B) Payer produces a certificate in prescribed form from a CA to the effect that the payee has included the income in return and paid taxes thereof.

17.2 The CBDT has prescribed Form No. 26A for CA certificate to be obtained and furnished by payer evidencing compliance by payee. In the present case, the assessee before the learned CIT(A) provided certificate from chartered accountant to fulfil the condition laid down in the first proviso to section 201(1) of the Act which are placed on pages 77 to 82 of the paper book. Therefore, we are of the considered opinion that no disallowance under section 40(a)(ia) of the Act is required to be made on account of non-deduction of tax. Accordingly, we hereby set aside the finding of the learned CIT(A) and direct the AO to delete the addition made by him. Hence, the ground of appeal of the assessee is hereby allowed.

18. The next issue raised by the assessee is that the ld. CIT-A erred in confirming the disallowance made by the AO for Rs. 1.19 crores representing the construction of shade.

19. The assessee in the year under consideration sold one vacant piece of land for Rs. 2,52,66,000/- only. According to the assessee, the vacant land consisted of one shade measuring 12,426 sq. mtrs., which was claimed to be constructed at a cost of Rs. 1.19 crores. Thus, the assessee claimed the same as cost of improvement besides the land cost while calculating the capital gain on the transfer of land. The assessee in support of such cost of improvement has furnished the copy of the invoice issued by M/s Monarch Realtors and confirmation of sub-contractor, namely M/s Ceeje Builder. However, the AO has taken the statement of M/s Ceeje Builder under Section 131 of the Act wherein it was admitted having constructed four go-downs on behalf of M/s Monarch Realtors on the vacant land. Thus, the AO doubted the claim made by the assessee representing the cost of improvement of Rs. 1.19 Crore. As per the AO, the assessee has also not furnished the exact nature of shade and the material involved in the construction of such shade. On question by the AO, the assessee submitted that subcontractor M/s Ceeje Builder has nowhere denied about the work which was carried out on the vacant land. However, it may be possible that the sub-contractor has also constructed the go-down for M/s Monarch Realtors. But the AO disagreed with the contention of the assessee and held that the construction cost on the shade is a makeshift arrangement and accordingly disallowed the cost of improvement claimed by the assessee.

20. On appeal, the assessee contented that the shade was constructed which can be verified from the sale deed and this fact was also admitted by the sub-contractor. It was also contended by the assessee that the statement of the sub-contractor was obtained behind the back of the assessee. Even the statement of the sub-contractor was not provided for the rebuttal. Furthermore, the opportunity of cross examination was also not afforded to the assessee. However, the Ld. CIT(A) confirmed the order of the AO by observing as under:

" 6.3. I have carefully considered the facts of the case, assessment order and contention of the appellant. Appellant has claimed long term capital loss of Rs.15,13,278/- on the sale of land at 142/143. Vasna Chachar Vadi. Changodar. In the computation of income, appellant has claimed cost of improvement of Rs.1.19.000/- over and above the cost of acquisition of Rs.1.38.63.609/-. The appellant contended that cost of improvement was for construction made on the land through M/s. Touch Chem Tech Pvt. Ltd. and M/s. Monarch Realtors. Appellant further claimed that M/s. Monarch Realtors sub contracted the work to Ceeje Builders for work amounting to Rs.90.90.477/--

6.4. The AO made inquiry from M/s. Ceeje Builders and recorded statement of Shri Shankarial Patel, Principal Officer of the above concern who stated that he has constructed four godowns for M/s. Monarch Realtors for the consideration of Rs.1.32 crores. However, as per the sale deed. the sale consideration of Rs 2.52.66.000/- has been received for land and industrial shed, and therefore, AO concluded that appellant has not done any improvement and claimed the cost of improvement on the wrong bill to reduce the capital gain. Appelant has contended that it has been mentioned in the sale deed itself that land is inclusive of industrial shed, and as per statement of Mr. Shankarial Patel, the construction of four godown does not mean that shed was not constructed.

6.5. The appellant has claimed cost of improvement on the basis of confirmation given by M/s. Touch Chem Tech Pvt. Ltd. and Monarch Realtors. M/s. Monarch Realtors has sub contracted the work to M/s Ceeje Builders who has stated that it has constructed four godown on the premises and was paid Rs.1.32 crore. As evident from the sales agreement, consideration of Rs.2.52.66,000/- has been received for land with industrial shed The industrial shed is stated to be 750 Sq. Mtr, as per the sales agreement. However, as per the statement of Mr. Shankarial Patel, M/s. Ceeje Builder has constructed four godowns measuring 3200 Sq. Mtr. Therefore, the appellant's contention that cost of improvement claimed was for the work done by Ceeje Builders is not proved. In view of Ine above disallowance made by the AO is confirmed."

21. Being aggrieved by the order of the Ld. CIT(A), the assessee preferred appeal before us.

22. The Ld. AR before us submitted that the statement of the sub-contractor was not provided to the assessee for its rebuttal, which is against the principle of natural justice and therefore the same cannot be relied upon. The Ld. AR also submitted that the opportunity of cross examination of the sub-contractor was not provided by the Revenue. The Ld. AR also contended that the subcontractor has nowhere denied having carried out the work on impugned vacant land. As such,

there was a possibility that the subcontractor had carried out other work as well on behalf of the M/s Monarch Realtors.

23. On the other hand, Ld. DR vehemently supported the orders of the authorities below.

24. We have heard the rival contentions of both the parties and perused the materials available on record. At the threshold, we note that the AO has not reproduced the full copy of the statement recorded under section 131 of the Act in assessment order. Even, the AO has not reproduced the answer to question No. 5 of the statement of the subcontractor in the assessment order though the same was connected to the dispute on hand. It is the settled law that the basis of disallowing the claim of the assessee has to be confronted to the assessee. But it has not been done so. The Hon'ble Supreme Court in the case of Kishichand Chellaram vs. CIT reported in 125 ITR 713 had held as under:

> *The statements contained in this letter addressed by the manager of the bank to the ITO were in the nature of here say evidence and could not be relied upon by the revenue authorities. The revenue authorities could have very well called upon the manager of the bank to produce the documents and papers on the basis of which he made the statements contained in his letter and confronted the assessee with those documents and papers but instead of doing so, the revenue authorities chose to rely merely on the statements contained in the letter and that too, without showing the letter to the assessee.*

24.1 Moving further, we note that the opportunity of cross examination of the subcontractor has not been given to the assessee, which is against the principles of natural justice. In this regard, we draw support and guidance from the judgment of Hon'ble Supreme Court in the case of Andaman Timber Industries v. CCE reported in 62 taxmann.com 3 wherein it was held as under:

> *"Assessment - Natural justice - Denial of opportunity to cross-examine witnesses - Denial of opportunity to the assessee to cross-examine the witnesses whose statements were made the sole basis of the assessment is a serious flaw rendering the order a nullity in as much as it amounted to violation of principles of natural justice - Impugned order as passed by the Tribunal is set aside."*

24.2 Besides the above, we note that there is a lack of clarity in the statement furnished by the subcontractor under Section 131 of the Act. On perusal of the statement, there is no denial by the subcontractor of not having carried out any work on the impugned vacant land. In view of the above and after considering the facts in totality, we do not find any reason to uphold the finding of the Ld. CIT(A). Hence, we set aside the finding of the Ld. CIT(A) and direct the AO to delete the addition made by him. Hence, the ground of appeal filed by the assessee is allowed.

25. In the result, the appeal preferred by the assessee is allowed.

Order pronounced in Open Court on 20-11- 2023

Sd/- Sd/-

(T.R. SENTHIL KUMAR) **(WASEEM AHMED)**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Ahmedabad: Dated **(True Copy)**