

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.1796 OF 2018

Principal Commissioner of Income-tax - 14)
Room No.469, Aayakar Bhavan,)
M.K.Road, Mumbai 400020)
Mumbai – 400 001.) .. Appellant

Versus

M/s Buniyad Chemicals Ltd.)
Block H, Shri Sadashiv CHS Ltd)
6th Road, Santacruz East,)
Mumbai 400055) .. Respondent

Mr. Suresh Kumar for the petitioner.
Mr. Aditya Sharma i/by M.A.Narvekar for the respondent-
assessee.

**CORAM M.S. Sonak &
Jitendra Jain, JJ.**

**RESERVED ON: 5 March 2025
PRONOUNCED ON: 17 March 2025**

JUDGMENT (Per Jitendra Jain, J):-

1. This appeal filed by the appellant-revenue for the assessment year (AY) 2009-10 challenges an order of the Income-tax Appellate Tribunal dated 30 May 2017 and same was admitted under Section 260A of the Income-tax Act, 1961 vide our order dated 5 February 2025 on the following substantial questions of law :

“(a) Whether, on the facts and in the circumstances of the case and in law, the Hon’ble Tribunal was justified in restricting the addition made on account of unexplained cash credits u/s. 68 of the Act to 0.15% without appreciating that the assessee had failed to furnish satisfactory explanation with regard to the

identity of the parties and the sources and genuineness of the transaction ?

(b) Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in restricting the addition to the commission income at 0.15% without considering that the material found during the course of search clearly established that the net commission charged by the assessee group of companies varied between 1.5% and 3.5% ?”

Brief Facts :

2. The petitioner is a company formed and registered under the Companies Act, 1956.
3. On 29 August 2009, return of income was filed by the respondent-assessee declaring 'NIL' income. The said return of income was selected for scrutiny assessment by issuing notice under Section 142(1) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act').
4. On 28 December 2011, an assessment order under Section 143(3) was passed assessing the income of the respondent-assessee at Rs.10,73,52,550/-. In the said order it is stated that the respondent had prepared profit and loss account and filed tax audit report. In the assessment order, an addition under Section 68 of the Act was made amounting to Rs.10,73,52,553/- under the head 'Income from other sources'. The said addition was made on the ground that the credits appearing in the disclosed and undisclosed bank accounts of the respondent-assessee are unexplained, and since no details or explanation regarding the identity, source and genuineness of such deposits were submitted, the same were treated as unexplained cash credits.
5. During the assessment proceedings, the respondent-

assessee admitted that he is merely an accommodation entry provider, and the receipts and payments appearing in the bank accounts are of the customers from whom amounts were received for giving accommodation entries. However, from the assessment order, it is evident that no details of such customers were ever provided to the Assessing Officer.

6. The respondent-assessee challenged the assessment order by filing an appeal to the Commissioner of Income-tax (Appeals) [hereinafter referred to as 'the CIT(A)']. On 4 October 2012, the CIT(A) disposed of the appeal, and the operative part of the order reads as follows:

4.3 I have considered the facts of the case. In view of the decision of my predecessor, if the beneficiaries are identified by the appellant, the A.O. would adopt the rate of commission @ 0.37% for A.Y.2009-10 as it is in the earlier assessment year. In case the appellant fails to identify the beneficiaries in that case the amounts credited in the bank account of the appellant would stand confirmed as unexplained cash credit u/s.68 of the I. T. Act. In the result, this ground of appeal is partly allowed.

[emphasis supplied]

7. Aggrieved by the CIT(A)'s order, the respondent-assessee filed an appeal to the Tribunal being Appeal No.7447/M/2012. The relevant grounds raised before the Tribunal in form No.36 reads as follows:

1. On the facts and circumstances of the case the learned Commissioner of Income Tax (Appeals) has erred in law and in facts in passing the order u/s. 250 of the Act.

2. The learned Commissioner of Income Tax (Appeals) has erred in law and in facts in passing the order without complying with the principles of natural justice.

3. On the facts and circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) has erred in confirming the additions at 0.37% on the gross deposits as against 0.15% offered by the appellant

4. The learned Commissioner of Income Tax (Appeals) has erred in law and in facts in directing to assess the gross receipts 0.37% on the condition that the appellant shall furnish the names & addresses of the beneficiaries and failed to appreciate the facts that the records including names and addresses of beneficiaries are in possession of Income Tax Department and no copy of computerized documents including the names & addresses were furnished to the appellant

5. The learned Assessing Officer has erred in law and in facts in levying interest u/s. 234B and 234C of the Act.

6. The appellant craves leave to add to, alter, amend and / or delete in all the foregoing grounds of appeal.

8. On 30 May 2017, the Tribunal disposed of the appeal. In para 11 of its order, the Tribunal reduced the rate of 0.37% to 0.15% by merely following its own order for earlier assessment years.

9. It is on the above backdrop, that the present appeal is filed by the appellant-revenue.

Submissions of the appellant-revenue :

10. Mr. Suresh Kumar, learned counsel for the appellant-revenue, submitted that since the respondent-assessee did not give the details of the credits appearing in its disclosed and undisclosed bank accounts, the same stands unexplained and therefore, the addition made under Section 68 of the Act is justified. He further submitted that the CIT (A) finding on the issue of applicability of Section 68 of the Act was not expressly challenged by the respondent-assessee before the Tribunal and therefore, no submissions on this count should be entertained. He further submitted that CIT (A) was fair in restricting the addition under Section 68 only to those cases where the respondent-assessee failed to identify the beneficiaries of the

amounts credited in the bank accounts. He, however, submitted that the Tribunal was not justified in directing the adoption of 0.15% on all the deposits, whether explained or unexplained and thereby impliedly reversing the latter part of the order of the CIT (A), which confirms additions under Section 68 if beneficiaries are not identified. He submitted that to that extent, the Tribunal's order needs to be reversed. He, therefore, prayed that the appeal be allowed in favour of the revenue.

Submissions of the respondent-assessee :

11. Per contra, Mr. Aditya Sharma, learned counsel for the respondent-assessee, submitted and admitted that the respondent-assessee company is engaged in “*a racket of illegal business of providing accommodation entries*” and, therefore, queried the Court “*How could such illegal transactions be recorded by maintaining any books of accounts?*” He further submitted that the amounts credited in the bank account do not belong to the respondent-assessee but belong to its customers. He further submitted that only the commission amount deposited in the bank accounts can be added as his income, which they have already offered for tax. He further submitted that provisions of Section 68 are not applicable since credits in the bank account do not constitute credits in the assessee's books.

12. Mr. Aditya Sharma heavily relied upon a statement recorded on 16 January 2013 of Mr. Mukesh Choksi, Director of the respondent-assessee company under Section 131 of the Act. He stated that although the respondent-assessee and

director are engaged in the racket of providing accommodation entries, the credits in the bank account, which are not explained, cannot be taxed in the hands of the respondent-assessee. He orally also submitted that these amounts are already taxed in the hands of the beneficiaries. In support of his submissions, Mr Sharma relied upon the decision of this Court in the case of *CIT (Pune) Vs Bhaichand H. Gandhi*¹ and in the case of sister concern of the group company of the respondent-assessee in the case of *PCIT Vs Alag Securities Pvt. Ltd.*² for the assessment year 2003-04. No other submissions have been advanced by the learned counsel for the respondent- assessee.

Analysis and Conclusion :

13. We have heard learned counsel for the appellant-revenue and the respondent-assessee.

14. Section 68 of the Act as it existed for the assessment year 2009-10 reads as under:

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.

15. Before we delve into the issues raised in the present appeal, it is important to reproduce the statement of the Director of the respondent-assessee on which heavy reliance is placed by the counsel for the respondent-assessee. The said

¹ (1983) 141 ITR 67

² Income Tax Appeal No.1512 of 2017

statement is scanned as follows:

② Sharma
5/3/13 Statement u/s 131
of Shri Mukesh Choksi

Statement of Shri Mukesh Choksi, aged about 59 years, S/o Maneklal Choksi working in the capacity of Director of Mahasagar Securities and other companies is recorded under section 131 of the I.T.Act-1961, at my office in room no.659, 6th Floor, Aayakar Bhavan, M.K.Road, Mumbai-400 052 on 16.01.2013 at 2:30 P.M.

OATH ADMINISTERED

Before me
(P.S.NAIK)
CIT, Central Circle-46, Mumbai.

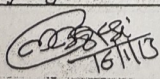
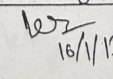
Deponent
(MUKESH M.CHOKSI)

Q. No.1	Please identify yourself and conform that oath has been administered or you and you have been made aware of the consequences of furnishing a false statement under oath?
Ans:	I am Shri Mukesh M.Choksi, aged around 59 years, having office at Block-H, Shri Sadashiv Society, 6 th Road, Santacruz (E), Mumbai-400 055. I confirm that oath has been administered on me and I have been made aware of the consequences of furnishing a false statement under oath.
Q. No.2	Please explain in detail the activities carried out by you?
Ans:	Presently, I have no business activity. Earlier, my business activity was to provide accommodation entries for short term capital gains, long term capital gains, purchase, sales, share application money etc. to the persons who wanted to take entries for the purpose of claiming fictitious profit / loss etc. The accommodation entries are provided in lieu of cash for which I used to charge commission @ 0.15%. I continue to be the Directors of the following companies: (i) M/s Mihir Agencies Pvt. Ltd. (ii) M/s Alliance Intermediaries and Network Private Limited (iii) M/s Alpha Chemie Trade Agencies Pvt. Ltd. (iv) M/s Talent Infoway Ltd. (v) M/s Buniyad Chemicals Ltd. (vi) M/s Goldstar Securities Pvt. Ltd. (vii) M/s Richmond Securities Private Ltd. (now known as M/s Mahasagar Securities Pvt. Ltd.) (viii) M/s Kayee Share Broking Pvt. Ltd.
Q No.3	During the course of search action under section 132 of the I.T.Act-1961 in your case and also in your group cases on 25.11.2009, it was found that you were running network of bank accounts in the names of various companies. These bank accounts were used for providing accommodation entries. The data in respect of bills / entries provided has been extracted by the Investigation Wing for the F.Yrs.2002-03 to 2019-10. Please confirm the data.

पी. एस. नाईक/P. S. NAIK
आयकर उप आरुगत केंद्र, - 46,
Dy. Commissioner of Income-tax

Statement u/s 131
of Shri Mukesh Choksi

Ans:	Yes, I confirm that the data shown to me on two CDs has been extracted by the Investigation Wing from my books of accounts.
Q No.4	Please explain how you have arrived at your income on account of business activities carried out by you.
Ans:	We were charging 0.15% commission on accommodation entries, for receiving as well as paying by cheque. All these accommodation transactions are routed through banking channels.
Q No.5	Please explain / justify what is the basis of arriving at income @0.15% declared by you. Please also justify the expenses claimed against the such income?
Ans:	Generally, the clients are paying 0.15% for each bank entry and to earn this income we have to incur expenses, such as bank charges, salaries to employees, telephonic expenses, electricity expenses. The basis of 0.15% is general trade practice in this line of business.
Q No.6	Since the beneficiaries of these accommodation entries reap huge monetary benefit why is the rate of commission at low percentage 0.15% instead of 2% to 5%.
Ans:	Generally, there are three kinds of entries (i) simple profit/ loss entries for which the commission is charged @ 0.15%. (ii) long term / short term capital gains entries for shares to be received on hire to give it to the beneficiaries for which the rates are ranging between 2.25% to 3.5%, where the share hire charges are ranging between 2% to 3.25% so that income would be 0.15% to 0.25% to the broker. (iii) share application entries for which commission is charged at 0.15%. Therefore, net commission received by the broker is 0.15% in almost all the cases (except expenses).
Q No.7	From the data extracted from the CDs, it is noticed that in 3321 cases out of 5400 cases, PANs of the clients are not mentioned. Please provide PANs of these clients. In many cases full names & address are also not mentioned. Please provide full name, complete address and PANs of these clients?
Ans.	I confirm the data extracted from the CD. Whatever data regarding name, address and PAN is available in the CD itself and is the final data available. No further details in this regard are available with me.
Q No.8	I am showing the statement which is covering the profit ranging from Rs.5,00,000/- and loss ranging from Rs.5,00,000/-. Similarly, bills details relating to the clients having PAN, no PAN, no addresses are also shown to you. Please confirm the statement.
Ans:	I confirm the information contained in the statement and I have already placed my signature as token of having confirmed the same.

Statement u/s 131
of Shri Mukesh Choksi

Q No.9	From the information extracted, it is observed that there are 409 entries which are having your addresses i.e. Block-H, Shri Sadashiv Society, 6 th Road, Santacruz (E), Mumbai-400 055. Please explain why you have allowed to use your address for 409 accommodation entries.
Ans:	I have gone through the entries and clarify that these represent account created for passing contra entry in favour of beneficiaries. Suppose Mr. A want bill of profit so the corresponding contra entry will be in a dummy name.
Q.No.10	I am showing you some of the beneficiaries identified from the bank account of M/s Alliance Intermediaries Network with Axis Bank, P.M.Road Branch. The names are (i) M/s Om Corporation (ii) Ms.Chandrakant Mandowara (iii) M/s Netra Enterprises (iv) Mr.Satish Mandowara (v) M/s Garnet Construction Ltd. Please explain the nature of transactions with these parties.
Ans:	The name of shri Satish Mandowara appearing in the list is one of our sub broker. This particular bank account was operated by him and remaining parties are beneficiaries of the accommodation entries provided Shri Satish Mandowara who has used the bank account in the name of M/s Alliance Intermediaries Pvt. Ltd.. All transaction of payment and receipt related to fictitious sale and purchase bill are reflected in the bank account. we have received commission of 0.15% for all the entries shown in the bank account. We have declared this commission in return of income of M/s Alliance Intermediaries Pvt. Ltd. The details of these companies
Q No.11	Who comes to you asking for entries?
Ans:	People who want to have bank entries in their books of account. They obtain cheques from us or give the cheque to us. We do not know whether they are converting their black money in to white or not. They come to me for accommodation entries.
Q No.12	Do you give them bills or contract notes or arrange for documentation to convert their black money to white money or to suppress income? If so, explain in details with an example?
Ans:	We give the bills of profit /loss for either purchase of shares or sale of shares.
Q No.13	If this is correct, identify one or two parties to whom entries were given their name, address, PAN, quantum involved and approximate tax effect involved / tax savings for party?
Ans:	We are providing accommodation entries to the person who want such entries. The extent of benefit on such accommodation entries can not be quantified. However, I would like to submit where bill result either in profit or loss, the entire profit or loss can be considered as profit and loss accommodated to the beneficiaries. The list of the beneficiaries is lying with the income tax department and we do not have any details of the beneficiaries.
Q.No.14	How many years since you are doing the activity and how many times were you searched?
Ans:	I was practicing Chartered Accountancy from 1978 to 1993. I surrendered my certificate of practice as a Chartered Accountant in 1993 after receipt of NSE stock membership card. I conducted business as a share broker upto 1998 when I surrendered my NSE membership card due to huge loss incurred on account of bad deliveries. Since I had already surrendered my certificate of practice as a Chartered Accountant as well

[Signature]
16/11/13

[Signature]
16/01/13

Statement u/s 131
of Shri Mukesh Choksi

	as NSE membership, I started doing this activity of accommodation entry since 2000. I was surveyed in the years 2002, 2006 and searched on 25.11.2009.
Q.No.15	Do you mean to say that bills / vouchers, other documents given are not genuine?
Ans:	Yes, I say that bills given are not genuine because bills have been issued without any actual transaction taking place.
Q.No.16	Do you also admit that these people ought to have paid tax as the documentation is false and inaccurate?
Ans:	I agree that the beneficiaries should have paid tax. However, I cannot comment on the extent of the tax liability of the beneficiaries of these entries.
Q.No.17	As a Chartered Accountant would you admit that these parties have evaded tax and now Department can take action against them and collect taxes?
Ans.:	I do not know the nature of accommodation entries made in their books of accounts. It is open to the Department to make assessment in the case of the beneficiaries. I confirm that the transaction done through me and my group companies are not true as these are fully accommodative fictitious entries.
Q.No.18	Please show cause as to how you carried out these activities?
Ans.:	I carried out these activities at the instance of sub-brokers. We have about 10 to 15 sub-brokers from whom we receive commission from sub-brokers.
Q.No.19	Please tell me as to whether you can give names and addresses of all party, assessment year, quantum and nature of bill / voucher given, such that Department can take action against them?
Ans.	No, I cannot provide all the details as I have already submitted whatever information I had with me which is reflected in the CDs shown to me.
Q.No.20	When you are not giving specific details of these parties and as per the Bombay High Court judgement in the case of Ishwar Prabhudas Gandhi Vs. DCIT, Central Circle-5, Mumbai, dated 9.10.2012, penalty can be levied u/s 271(1)(c) of the I.T.Act-1961? What you have to say?
Ans.	I have already disclosed income out of my accommodation entry business. I am not liable to penalty under section 271(1)(c) of the Act.
Q.No.21	Do you admit that these persons i.e. who took accommodation entries evaded or attempted to evade tax?
Ans:	The answer to this question has already been given in reply to question no.16
Q.No.22	They evaded tax because of you. What do you say?
Ans:	I cannot say anything as answered above in question no.16.
Q.No.23	Since you are not able to give all details, there is a tax evasion on their part forever. What do you say?
Ans:	I cannot provide all the details as I have already answered that whatever details were available are reflected in the CD available with the

16/11/13 16/01/13

16. At the outset, we wish to state that undisputedly and admittedly, the details of the credits in the disclosed and undisclosed bank accounts of the respondent-assessee amounting to Rs.10,73,52,553/- were not furnished by the

respondent-assessee during the assessment proceedings. In our view, if the details of the credits appearing in the disclosed and undisclosed bank accounts of the respondent-assessee have not been explained, then we do not find any fault in the action of the Assessing Officer in making the addition. No submissions have been made that details of these credits are not available with the respondent-assessee. These credits have been extracted from the computer of the respondent assessee and copied on CD as per the statement recorded and reproduced above.

17. Section 68 requires an assessee to explain the credits by providing the identity, creditworthiness and genuineness of the credits. It was incumbent upon the respondent-assessee to give the details of these credits because unless the details of these credits are provided, it cannot be ascertained as to whether the credits appearing belong to the customer of the respondent-assessee. Merely because the respondent-assessee states that he is only an accommodation entry provider and therefore the credits in the respondent-assessee's bank accounts belong to the customers to whom the accommodation entries were given cannot absolve the respondent-assessee from its obligation to provide the details. It is one thing to boldly and even proudly admit that a racket for providing accommodation entries was being operated but quite another to evade statutory liability or taxes based upon such assertion.

18. In our view, even in the absence of provisions of Section 68 (the said section being only enabling provision), credits

appearing in the bank accounts of an assessee could be added as unexplained income of such an assessee if such assessee fails to explain the details of the source from where such deposits are made. The submission of the respondent-assessee that in case of many deposits, he does not know the customer who has deposited money in its bank account is a submission which has to be rejected at the outset. Any law does not support such a contention and cannot appeal to the conscience of the Court.

19. Before the Assessing Officer, the respondent-assessee has not made any submissions backed by any document to show that the credits appearing in the bank account for AY 2009-10 have been assessed in the hands of the beneficiaries and, therefore, no addition should be made. If that be the case, we cannot accept the submission of the respondent-assessee that the amount added is included in the assessment of the beneficiaries and, therefore, same cannot be added once again in the hands of the respondent-assessee. There is no basis for such a submission made by the respondent-assessee, nor is it stated so before the Assessing Officer or the Appellate Authorities. Such a factual submission for the first time before this Court in a third appeal by oral argument across the bar cannot be permitted.

20. The CIT(A) has adopted a fair approach by stating that if the respondent-assessee identifies the beneficiaries, then the rate of commission adopted should 0.37% of such identified beneficiaries and if the respondent-assessee fails to identify the beneficiaries, then in that case, the sum credited in the

bank accounts would stand confirmed under Section 68 of the Act. In our view, the Tribunal was not justified in directing 0.15% of the total deposits (explained and unexplained) appearing in the bank accounts as income. The Tribunal has not given any reason as to why the directions of the CIT (A) in para 4.3 of the CIT appeal's order are wrong or erroneous. In our view, the Tribunal did not consider the issue from the proper perspective. The addition is made by the AO and confirmed by CIT (A) under section 68 of the Act as 'income from other sources' and under section 68 the unexplained credit in books is treated as income.

21. Although it was the case of the respondent-assessee that they are only accommodation entry providers and only certain percentage should be taxed as income, in the assessment order the addition is made that since the respondent-assessee failed to explain the credits appearing in its bank account. The Assessing Officer never accepted in the assessment order that only certain percentage of such credit should be assessed as income. Even the CIT(A) directed to adopt commission rate only qua identified beneficiaries and not all the beneficiaries. In any case, taxation of commission income and taxation of unexplained credits are two different things. Therefore, the same cannot be mixed to contend that only commission income should be taxed, not unexplained cash credits.

22. The Tribunal has not given any reasons as to if the respondent-assessee does not explain the beneficiary's identity, then why the whole amount should not be added under Section 68, but only 0.15% of the said deposit. In our view,

therefore, the Tribunal has adopted a very casual approach to such a serious matter of rampant tax evasion by merely saying issue is covered. In our view, in such cases Tribunal should not go by the concession of the counsel before them but it was their duty to examine the issue in proper perspective since Tribunal is a final fact finding authority under the Act. We say so because of the admission made by the respondent-assessee in the statement of its director recorded under Section 131 of the Act on which heavy reliance is placed by the counsel for the respondent-assessee was not even considered by the Tribunal. We now propose to deal with that statement.

23. In question No.2, Shri. Mukesh Choksi has admitted that he is the director of the respondent-assessee, and therefore, the statement is made in that capacity. In the said question, the respondent-assessee has admitted that they are engaged in the business of providing accommodation entries by charging a commission of 0.15%. In answer to question No.7, the respondent-assessee admitted that in so far as 3321 cases are concerned, they do not have the details of the customers. Thereby, the respondent-assessee has admitted that they are not able to explain the source of credits appearing in its bank statements. It is important to note that the respondent-assessee has executed transactions of crores of rupees to accommodate various parties. Still, many of these beneficiaries' details are unknown to the respondent-assessee. This is something which this Court cannot accept.

24. In our view, such an explanation cannot be accepted more so from the respondent-assessee company who is

claiming to have been engaged in the business of providing accommodation entries where crores of rupees are deposited and withdrawn. If the respondent-assessee does not have the details of the beneficiaries, then we fail to understand how the money were deposited in the bank accounts of the respondent-assessee and withdrawn from such bank accounts without respondent assessee knowing the details of these beneficiaries. The only person who can operate these bank account would be the respondent-assessee, who, at least at the time of withdrawing, would know to whom the amount withdrawn is given. In the absence of any details of such beneficiaries, we cannot accept the submissions of the respondent-assessee that even if the credits are not explained or details are not given, still such credits cannot be added in the hands of the respondent-assessee.

25. Mr. Sharma learned counsel for the respondent-assessee relied upon the decision in the case of group concern of the respondent-assessee in the case of *Alag Securities Pvt. Ltd (Supra)* and defended the order of the Tribunal. In para 20 of the said order, the Co-ordinate Bench of this Court has recorded a finding that the amount deposited by the customers, i.e. beneficiaries, had been accounted for in the assessment orders of these beneficiaries and, therefore, the question of adding such cash credit to the income of the assessee does not arise.

26. In our view, this finding is absent in the present case before us, and no material has been shown to us by the respondent-assessee that the sum added by the Assessing

Officer in its case has been added in the assessment order of various beneficiaries. On the contrary, the respondent-assessee has failed to even identify the beneficiaries in the present case. Therefore, this decision cannot assist the respondent-assessee since the said is distinguishable on facts.

27. In fact, the CIT (A) in para 4.3 has given an express finding that, if the respondent-assessee identifies the beneficiaries, then same would not be added as income of the respondent-assessee but if the respondent fails to identify the beneficiaries, then same would be confirmed as unexplained cash credit. In the instant case before us, the respondent-assessee has not pleaded anywhere before the Assessing Officer and appellate authorities, nor any evidence has been laid to that effect that amount to Rs.10,73,52,550/- is added in the assessment of the beneficiaries. Therefore, this decision could not come to the rescue of the respondent-assessee.

28. The decision in the case of *Alag Securities Pvt. Ltd. (Supra)* was where the Co-ordinate Bench refused to admit the appeal on this factual finding, which is not the case before us. The Learned counsel for the respondent-assessee, during the hearing handed over an order giving effect to the ITAT's order for the AY 2003-04. We fail to understand how the said order giving effect for AY 2003-04 is of any assistance for considering the appeal for AY 2009-10 and more so when the same does not show that the sum added in the assessment has been assessed in the hands of the beneficiaries for AY 2009-10 with which we are concerned.

29. Mr. Sharma, learned counsel for the respondent-

assessee, thereafter relied upon the decision of the Co-ordinate Bench of this Court in the case of *Bhaichand H. Gandhi (Supra)* in support of his submission that bank statement would not constitute 'books of an assessee' and therefore, the provisions of Section 68 which requires the credits in the books of an assessee are not attracted in the present case and therefore, no addition is required to be made based on credits appearing in the bank statements. He submits that since the respondent-assessee is engaged in illegal business, he is not maintaining any books of account or any books for that matter and therefore, even if the provisions of some other Acts are violated, no addition could be made under Section 68 of the Income-tax Act.

30. In our view, the above submissions made by the learned counsel for the respondent-assessee are required to be rejected for more than one reason. In answer to question No.3 of the statement recorded of Shri. Choksi, respondent-assessee has admitted that books of accounts are maintained. The Assessing Officer in the assessment order has mentioned that the respondent-assessee has prepared the profit and loss account and has also obtained a tax audit report and shown a loss in the profit and loss account. Based on this profit and loss account and tax audit report, a return of income is filed. If the contention of Mr. Sharma is to be accepted that the respondent-assessee has not maintained any books of account or for that matter any books, then we fail to understand how the profit and loss account was prepared, and tax audit report and return of income based on such documents was filed. The

profit and loss account and tax audit report can only be prepared and filed if the respondent-assessee has maintained books of accounts or for that matter any books. In none of the pleadings before the assessing authority and appellant authorities, the respondent-assessee pleaded that no books of accounts are maintained for the assessment year under consideration i.e. AY 2009-10. Therefore, the submissions made by the learned counsel for the respondent-assessee have to be rejected that no books or books of accounts are maintained.

31. Section 68 of the Act was inserted in the 1961 Act and there was no corresponding provision in 1922 Act. The phrase 'books of an assessee' appearing in Section 68 has to be interpreted by adopting updated construction in accordance with the changes in technology. Legislature is presumed to anticipate the developments and to intend the Act to be applied to such future developments. After the advent of computers, the businessmen records its transaction in computers and not in the 'books' as traditionally understood. In the statement recorded of Mr. Choksi, director of the respondent-assessee, he has stated in answer to question No.3 **that the data appearing in 2 CDs are extracted by the investigating wing from books of account.** In answer to question No.7, once more, it is reiterated that the data is extracted from the CDs. In answer to question No.9, he has admitted that the contra entries appearing as entries in favour of beneficiaries. These contra entries are the entries which admittedly are prepared by Mr. Choksi, director of the

respondent-assessee. In answer to question No.19, the director of the respondent-assessee has further admitted that whatever details he has, the same, are reflected in the CDs and to the same effect is answer to question No.23.

32. On a reading of various answers given by Shri. Choksi, director of the respondent-assessee, it is admitted that books of accounts are maintained by the respondent-assessee and from those very books of accounts the revenue has extracted the data by copying the same on 2 CDs. This statement has been given on oath, and counsel for the respondent-assessee has heavily relied on this very statement in his submissions before this Court. In our view, based on above Shri. Choksi, director of respondent-assessee has admitted that the respondent-assessee has maintained the books of accounts. Therefore, in our view, the contention of the respondent-assessee that an addition cannot be made under Section 68 on the ground that the respondent-assessee has not maintained books and the bank statement cannot be treated as books is self-destructive in itself since, he has admitted that books of accounts are maintained and the data have been extracted from those very books of accounts and based on this data, addition has been made. Therefore, the decision relied upon in the case of *Bhaichand H. Gandhi (Supra)* is distinguishable on facts and not applicable to the present case.

33. Even otherwise, the phrase 'books of an assessee' should be construed to mean data fed by the assessee in its computer from which the contents are copied on CDs, which is based on the entries recorded in the computer. The definition of 'books

or books of account' in Section 2(12A) of the Act as existed for AY 2009-10 includes ledgers, day-books, cash books, account books and other books, whether kept in the written form or as printouts of data stored in a floppy, disc, tape or any other form of electromagnetic data storage device. In our view, based on this definition read with the answers to various questions in the statement, in the facts of the present case submission of the respondent-assessee that provisions of Section 68 are not attracted because no books are maintained is required to be rejected. The data extracted from the computer of the respondent-assessee in which these transactions are recorded would constitute 'books of an assessee' for the purpose of Section 68 of the Act. Our views on what constitutes 'books' are supported by decision of the Co-ordinate Bench of this Court in the case of *Sheraton Apparels Vs CIT*³ Therefore, Section 68 should be interpreted to mean books of an assessee to include the computer in which the business transactions are recorded and from which data was extracted on CD's.

34. We now test the submissions of the learned counsel for the respondent-assessee on the premise that assuming the respondent-assessee maintains no books, whether addition can be made under Section 68 of the Act. The respondent-assessee is a company formed under the Companies Act, 1956. As per Section 209 of the Companies Act 1956, books of accounts are required to be kept by the company. Corresponding Section of 2013 Act is Section 128. Section 44-AA of the Income-tax Act also requires a person carrying on

3 (2002) 256 ITR 20

business to maintain books of accounts and if the gross receipt or turnover exceeds prescribed limit, then the same are required to be audited under Section 44AB of the Act. In the present case in the assessment order it is stated that tax audit report is filed by the respondent-assessee.

35. In our view, the respondent-assessee cannot be heard to say that the provisions of Section 68 cannot be made applicable to its case because the respondent-assessee does not maintain the books. The person who is required to maintain the books of accounts and does not maintain books of account cannot turn around and contend that because he has not maintained books or books of accounts, provisions of Section 68 which requires credits in the books of an assessee cannot be made applicable. It is settled position that the person cannot take the benefit of its own wrong or violation. When it comes to provisions of Section 68 of the Act, such a contention which is self-defeating and which will make the provision of Section 68 otiose cannot be accepted. If the contentions of the counsel for the respondent-assessee are accepted, then it will amount to providing escape route to an assessee who is unable to explain the credits but still goes scot-free by arguing that since although he is required to maintain books, but because he has not maintained books, provisions of Section 68 of the Act cannot be made applicable. Indeed, this Court cannot accept such a submission and provide an escape route by making the provisions of section 68 redundant.

36. The Co-ordinate Bench of this Court in *Arunkumar J.*

Muchhala Vs The Commissioner of Income-Tax - 8⁴ needed to consider such a similar submission made by the assessee therein and the Court observed as under :

The facts as emerged before the Assessing Officer appears to be not in dispute. The appellant has not denied that he has received the said loan amount/cash deposits from those persons whose list has been given in the order of the Assessing Officer. He has revealed those names from the bank account of the appellant. Now, the appellant intends to say that he has not maintained the books of account and therefore, those amounts cannot be considered. When the appellant is doing business, then it was incumbent on him to maintain proper books and/or books of account. It may be in any form. Therefore, if he had not maintained it, then he cannot be allowed to take advantage of his own wrong. Burden lies on him to show from where he has received the amount and what is its nature. Unless this fact is explained he cannot claim or have deduction of the said amount from the Income-tax. Section 68 of the Income-tax Act provides that where the assessee offers no explanation about the nature and source of the credits in the books of account, all the amounts so credited or where the explanation offered by the assessee is not satisfactory in relation to the same then such credits may be charged to tax as income of the assessee for that particular previous year. It is to be noted here in this case that huge amounts have been credited in the account of the appellant and he has not explained the nature of the same. The source of the said amount has been discovered by the Assessing Officer from the bank pass book. It is to be noted that when the source and nature has been held to have been explained, the said amount has been deleted by the appellate forums. Now the dispute has remained in respect of an amount of Rs. 9,00,000 from M/s. Pooja Corporation, Rs. 7,00,000 from M/s. Pooja Enterprises, Rs. 24,00,000 from Shri. Ashok Mehta, Rs. 18,00,000 from Mr. Ajay Shah. No document was produced in respect of these transactions nor the amounts have been confirmed from those persons, who are shown to have lent them. The authorities below have therefore, rightly held that nature of the transaction has not been properly shown by the appellant.

[Emphasis supplied]

4 (2017) 399 ITR 256

37. We do not accept the submissions of the respondent-assessee that because he is engaged in the business of providing accommodation entry, revenue cannot assess the credits appearing in its bank account which are the money deposited by its customers. The respondent-assessee, to succeed in this submission, must give verifiable details of these customers; only then can the revenue verify whether the credits appearing belong to such customers. The CIT (A), therefore, gave the relief in para 4.3 by observing that an estimate of income will be made only in case of identified beneficiaries and balance credits would be assessed under Section 68 of the Act.

38. The respondent-assessee cannot contend that they will not give details of beneficiaries, but at the same time, credits cannot be assessed in its hands. We wonder how the revenue can find out to whom the credits belong to unearth unaccounted income. The respondent-assessee cannot act as a shield for beneficiaries by making such a submission and at the same time refuse to pay taxes for the unexplained amounts in its bank accounts.

39. If the submissions made by the counsel for the respondent-assessee that since they are engaged in providing accommodation entry and therefore, the credits appearing in the bank cannot be assessed in its hands has to be accepted without the respondent-assessee giving details of the beneficiaries which they have flatly refused as recorded in the statement referred to hereinabove then the consequence would be that such unaccounted sum can never be brought to

tax under the Act by the revenue authorities in the hands of none of the assessee/persons to whom such unaccounted sum belongs to. In the absence of any details provided by the respondent-assessee of the beneficiaries, the revenue will not be able to verify whether such credits really belong to those beneficiaries, in which case provisions of Section 68 get attracted in the hands of the respondent-assessee. Any interpretation which would make admitted unaccounted income tax free based on the denial by the assessee/persons to give details has to be rejected.

40. Before we conclude, we will be failing in our duty as a Court of law if we do not comment on the accommodation entry provider, Mr. Mukesh Choksi through his web of shell companies and various admissions made by the counsel for the respondent-assessee. It is also important to note that Mr Mukesh Choksi, director of the respondent-assessee in his answer to question No.14 of the statement has admitted that he was a practicing Chartered Accountant but has surrendered the Certificate of Practice (COP) in 1993 and thereafter is only engaged in the business of providing accommodation entries. He has also stated that search action has been taken against him/his companies more than once.

41. We are rather surprised that a Chartered Accountant who may not be holding a COP but, if involved in illegal activities, as to whether any action is or can be taken by the Institute of the Chartered Accountants of India against such a person. Suppose no action is taken against such a person. In that case, we hereby direct the Institute of Chartered

Accountants of India to inquire whether such a person is liable for any professional misconduct as per the Chartered Accountant's Act, 1949.

42. In answer to question no.15, Shri Mukesh Choksi through the respondent-assessee company has admitted that the bills/vouchers and other documents given for providing accommodation entries are not genuine. This would mean that Shri Choksi has admitted that he was engaged in the offence of commission of 'fraud'. If so, and based on such fraud, it is necessary to enquire whether he has committed an offence under the Indian Penal Code/BNS, 2023. We, therefore, direct that a necessary investigation be conducted by the concerned police station against Shri Mehul Choksi to ascertain the offence, if any, committed under Indian Penal Code and the consequent action.

43. Shri Choksi, in this statement, has also admitted that he has abetted in evasion of tax by various beneficiaries. He has also admitted that he cannot give details of the beneficiaries. Mr.Choksi has also admitted that by engaging in accommodation entry, he has engaged in the **laundering of money**. Therefore, in our view, the authorities under the Prevention of Money Laundering Act, 2002 should also investigate Shri Choksi on these activities.

44. This Court would also like to know from the Chief Commissioner of Income Tax in charge of Mumbai whether any prosecution is launched under the Income Tax Act and, if not, why it is not launched. If launched, what is the status of such prosecution and what steps the revenue has taken to

expedite the prosecution hearings?

The counsel for the respondent assessee informed us that no order giving effect to CIT (A)'s directions for AY 2009-10 has been passed. If that is correct, then we direct the CCIT to conduct an enquiry and fix the responsibility against the officer responsible for the same.

45. We are conscious of the fact that we are sitting in appeal under Section 260A of the Income Tax Act and not exercising our jurisdiction under Article 226 of the Constitution of India. However, we are still a Court of Law, formed under the Constitution of India, hearing the appeal, and we cannot shut our eyes to the admissions from the record buttressed by the assessee's counsel's submissions in the presence of Mr. Choksi. The Counsel boldly submitted that the activities may amount to violations or crimes, but still under the tax regime applicable, no tax was payable. The argument on tax regime is found untenable. Still since the record and submissions indicate prima facie commission of serious economic crimes, investigations must be undertaken by the law enforcement agencies.

46. By ignoring the material on record, we would be failing in our duty and our oath if the activities of such persons are not directed to be investigated into and taken to their logical conclusion. Inaction only encourage more persons to engage in illegal activities as admitted by the counsel for the respondent-assessee during hearing. As a Court of law, we cannot permit such a thing to happen in the future or at least this Court should ensure that action against persons involved

in such activities should be a deterrent for other persons to think on such line. Therefore, we have given the above directions for investigation.

47. This is a case where the low deterrent effect of the law has worked on a professional talent to become a habitual economic and financial offender, and this should be stopped in the larger interest of our country.

48. Insofar as question (b) is concerned, the CIT (A) in its order in paragraph 4.3 directed the AO to adopt the rate of commission at 0.37% if the beneficiaries are identified by the respondent-assessee. The revenue has not challenged the said rate of 0.37% by filing an appeal to the Tribunal. However, the respondent-assessee did challenge the adoption of this rate of 0.37%. It was the contention of the respondent-assessee that the appropriate rate should be 0.15%. The Tribunal followed its earlier order and opined 0.15% to be applied as commission.

49. In our view, what rate should be adopted as commission would be a pure question of fact and therefore, insofar as the rate of commission with respect to those credits which are identified by the respondent-assessee is concerned same should be taken at 0.15%.

50. To conclude, we answer question (a) in favour of the appellant-revenue and against the respondent-assessee. Insofar as question (b) is concerned, we answer the same against the appellant-revenue and in favour of the respondent-assessee. Consequently, we reverse the Tribunal's order and restore para 4.3 of the CIT (A)'s order dated 4 October 2012

subject to retaining the rate of commission at 0.15 % as adopted by the Tribunal.

51. The appeal is allowed in the above terms.

52. Registry is directed to forward copy of this order to ;

- i. Disciplinary Committee of the Institute of Chartered Accountants of India;
- ii. National Financial Reporting Authority;
- iii. The Commissioner of Police-Economic Offence Wing, Mumbai;
- iv. Enforcement Director under PMLA Act;
- v. The Chief Commissioner of Income-tax, Mumbai;
- vi. Ministry of Corporate Affairs.

(Jitendra Jain, J)

(M.S. Sonak, J)