

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI

Before Shri D.T. Garasia (JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.3885/Mum/2012 - A.Y. 2006-07

I.T.A No.3886/Mum/2012 - A.Y. 2007-08

M/s Reymond Commodities (P) Ltd, Mohanlal Jain & Co. CAs, 10, Chartered House, Gr.Floor, Dr. C.H. Street, Marine Lines, Mumbai-2 PAN : AACCR4892C	vs	DCIT, Cent.Cir.44, Mumbai
APPELLANT		RESPONDEDNT

ITA No.4193/Mum/2012
(Assessment year : 2006-07)

ACIT, CC-44, Mumbai	vs	M/s Reymond Commodities (P) Ltd, Mumbai
APPELLANT		RESPONDEDNT

Assessee by	Shri Sanjay Kapadia
Revenue by	Shri B Pruseth

Date of hearing	03-10 -2017
Date of pronouncement	02-01-2018

ORDER

Per G Manjunatha, AM :

These cross appeals filed by the assessee as well as the revenue for the assessment year 2006-07 and another appeal filed by the assessee for the assessment yer 2007-08 are directed against common order passed by the

Commissioner of Income-tax(Appeals)-37, Mumbai dated 27-03-2012 and they pertain to assessment years 2006-07 and 2007-08. Since common facts and identical issues are involved, these appeals were heard together and are disposed of by this common order, for the sake of convenience.

2. The brief facts of the case are that the assessee company was promoted by two non resident Indian principals, engaged in the business of income from brokerage of commodities and currency trading. The assessee company was registered in July, 2003. The company was a member of MCX & NCDEX. To have a wider presence and a larger client-base, the company opened many offices directly and some by way of franchisees in major cities of India. Apart from doing brokerage in commodity futures in India, the company also started providing facilities to various persons for transacting in commodity and foreign exchange futures on international exchanges, an activity which was legally barred by the provisions of Forward Contracts (Regulation) Act, 1952 and the Foreign Exchange Management Act, 1999. For doing so, the assessee had to tie up with an Indonesian Company called Laju Investama Futures (presently known as P.T. Reymont Futures). The assessee, as a broker, would introduce Indian clients, who are interested in hedging and speculating in futures to its principal Laju Investama Futures, which is a member of the Indonesian Commodities & Currency Exchange at Jakarta. The customers would upload

their KYC details duly verified by the assessee electronically and obtain a client ID from Laju Investama Futures for conducting their online purchase and sale of futures on the foreign commodity exchanges. To enable to carry out its business, the assessee has entered into an agreement with its principal, Laju Investama Futures setting out terms and conditions of doing business for Indian customers. The remittances of money into India and from India to any foreign destination was controlled by Reserve Bank of India, as per the provisions of FEMA, the Indian clients could not transfer and receive monies from Laju Investama Futures for their Pay-ins and Pay-outs. In the circumstances, it became responsibility of the assessee as a broker to collect the margin money deposit from the Indian clients of Laju Investama Futures and also to receive and give them the monies of the Pay-ins and Pay-outs of their future transactions.

3. A search and seizure action u/s 132 of the Act, was carried out at the business premises of the assessee. During the course of search and seizure operations, it was noticed that the assessee is acting as a facilitator for Indian customers, who are dealing in commodity and currency futures for Laju Investama Futures, Indonesia and also collecting margin money from customers. During the course of search, it was further noticed that the assessee is showing client margin advance credit balance in its balance-sheet

to the extent of Rs.14,46,82,201. The assessee was called upon to explain the nature and source of credit appearing in its books of account under the head 'Client Margin Advance Credit Balances'. It was observed during the course of search that the assessee was unable to furnish the details of its so-called business of indenting and the names and addresses of the clients, who had allegedly carried out such activity. Accordingly the monies lying with the assessee in its books as 'Client Margin Advance Credit Balances' has been treated as unexplained credits u/s 68 of the Income-tax Act, 1961. During the course post search investigation, one of the directors of the company, Mr. K Sathyaprasad has submitted a letter of surrender declaring additional income of Rs.15 crores u/s 28 of the Income-tax Act, 1961 for the financial year 2007-08 relevant to AY 2008-09 which was comprised of Rs.14.47 lakhs on account of balance lying under the head 'Client Margin Advance Credit Balances' towards material indented as per the audited financial statements and Rs.53 lakhs to cover up other possible discrepancy in the seized materials. The assessee also furnished a bank guarantee for Rs.95 lakhs on 27-06-2007 issued by Federal Bank in favour of the I.T Department towards payment of taxes.

4. Consequent to search, notice u/s 153A of the Act was, issued calling for return of income. The assessee has filed return of income in response to notice issued u/s 153A. However, did not admit the income surrendered before the Investigation Wing. Thereafter notices u/s 143(2)

and 142(1) of the Act were issued. During the course of assessment proceedings, the AO called upon the assessee to explain why surrender made during the course of search shall not be assessed as its undisclosed income chargeable to tax u/s 68 of the Income-tax Act, 1961. In response, the assessee vide its letter dated 24-11-2009 submitted that it had sent a letter of retraction dated 28-04-2008 vide speed post receipt dated 21-08-2008 addressed to Additional DIT (Inv) retracting the earlier surrender made vide letter dated 06-07-2017 and also explained the reasons for such retraction. The assessee further submitted that the aforesaid letter of retraction was attempted to be filed in tapal on both the offices on three occasions by the director of the company, viz. D Srinivasa Rao and the acknowledgement of the aforesaid letter was refused at both the offices considering the contents of the same. The assessee further submitted that its surrender was taken under coercion and threat by the Investigation department, which resulted in freezing of its bank accounts and other associate companies' bank accounts because of which it did not have any option left but to yield to the pressure put by the department and accordingly filed an undated letter of surrender and agreed to disclose Rs.15 crores as income for the AY 2008-09. But the fact remains that its surrender is not supported by any seized materials or incriminating materials. Therefore, it did not offer surrendered income in its return of income filed u/s 153A of the Income-tax Act, 1961. As regards the 'Client Margin Advance Credit Balances' treated as unexplained credit u/s 68 of the Act, the assessee submitted that the amount represents

margin money collected from various customers, who directly dealt with its principal, of Laju Investama Futures, Indonesia for which necessary documentation to comply with KYC norms has been taken. It was further submitted that it is acting as a facilitator between its principal and the Indian customers but the Indian customers directly logged into the website of its principal by furnishing necessary documents to comply with KYC norms and got client ID. Therefore, the documents like ID proof, PAN and bank details of the creditors are not immediately available. The assessee further submitted that unless the customers complied with KYC norms they could not be able to generate client ID, therefore, it does not have any control over the ID proofs of customers, who had logged into the website of its principal. It was further submitted that because of certain restrictions, for transfer of money regarding transactions with its principal, it has collected margin money from the customers and such margin money is payable to its principal, Laju Investama Futures. Therefore, the same cannot be treated as unexplained credit to be taxed u/s 68 of the I.T. Act, 1961.

5. The AO, after considering the explanation of the assessee and also taking into account surrender made by the assessee at the time of search observed that as a result of legal point, it was legally barred from making such remittances. The peak of such non remittance during the period 2004-08 was

at Rs.14,46,82,201 which was surrendered by the assessee before the Investigation Wing. Since the search took place on 19-06-2007 and the surrender letter along with bank guarantee was furnished on 06-07-2007, the retraction letter dated 28-04-2008 which was after a gap of more than 10 months was merely an afterthought and judicial benediction could not be bestowed on it by accepting the same. The AO further observed that it is a fact that the assessee could not be able to prove the three ingredients provided u/s 68, therefore, opined that the amount lying in the 'Client Margin Advance Credit Balances' has been treated as unexplained credit chargeable to tax u/s 68 of the Income-tax Act, 1961. Accordingly, the AO made addition of Rs.14,46,82,201. In addition, the AO also disallowed the claim of depreciation of Rs.7,17,000 on account of Tibco Software as the same was not put to use during the relevant financial year.

6. Aggrieved by the assessment order, the assessee preferred an appeal before the CIT(A). Before the CIT(A), the assessee has reiterated its submissions made before the AO. The assessee further submitted that the AO has made addition towards 'Client Margin Advance Credit Balances' purely on the basis of admission made by the assessee by way of an undated letter of surrender during the course of post search investigation without any incriminating material found as a result of search which suggests the same is

unexplained income of the assessee. But facts remain that the assessee has filed a retraction and also filed an affidavit explaining the reasons for surrender of income and also retraction of such surrender before filing return of income. The assessee further submitted that the department has taken surrender by coercion which is evident from the fact that it has frozen its bank accounts and also associate companies' bank accounts because of which pay-ins and pay-outs of settlement of transaction with MCX & NCDEX could not be taken place from that day, which, in turn, resulted into stoppage of the consequent settlement of payment with the customers of the company despite request put before Investigation Wing to defreeze the bank accounts. In the course of follow up of defreezing the bank accounts, the assessee was told to surrender a sum of Rs.15 crores and furnish a bank guarantee of an amount equivalent to the balance lying in frozen bank accounts. Due to non availability of settlement clearance facility, MCX & NCDEX has suspended our trading rights on 30-06-2017 which resulted into unilateral squaring off of outstanding positions on that day in the client's account resulting into substantial loss to the clients and to the company. Considering all these facts and the obstinate behavior on the part of the investigation wing, the assessee had no option but to concede to the dictates of their office and accordingly made a surrender of Rs.15 crores without there being any materials found during the course of

search, which suggested impugned credits found in the books of account are unexplained credits, which are chargeable to tax u/s 68 of the Act.

7. The assessee further submitted that on the other hand, it has furnished all evidences to prove amounts standing in the names of customers as 'Client Margin Advance Credit Balances' are in fact payable to its principal, Laju Investama Futures, Indonesia. In this regard all evidences have been filed before the AO including agreement with its principals. The assessee further submitted that customers have directly logged into the website of its principal to get customer ID. Under these circumstances, it does not have any control over KYC compliance of its customers. Therefore, merely because the assessee was unable to furnish identity of the customers, its genuine business transactions cannot be considered as unexplained credits. It was further submitted that it was merely acting as business facilitator fastened with the task of introducing prospective customers to Laju Investama Futures for which it was earning commission and the same has been duly accounted for in the books of account and service tax liability has also been discharged in due course. The persons, who had paid money to the assessee for onward remittances to Laju Investama Futures is clearly identifiable from KYC norms sheet forming part of client agreement with Laju Investama Futures, the list of clients is also available in the seized material and also find reference in the

audit conducted by the firm of Chartered Accountants appointed by SEBI, market regulator. It had received money on behalf of Laju Investama Futures from their customers through account payee cheques only. It was further submitted that as the assessee has closed down its activities in December, 2005, after relationship with Laju Investama Futures was not in good condition, it had lost touch with the clients of Laju Investama Futures. The executives engaged by the assessee had also left after the closure of this activity. Notwithstanding it had been able to get confirmation from some of these people and get the details of corporate entities from the website of MCA. The AO was requested to issue commission to these persons and get the payments made by these persons to the assessee on behalf of Laju Investama Futures. The assessee further submitted that when all these evidences have been filed before the AO, the AO ought not have rejected all arguments put forth by the assessee to make addition only on the basis of letter of surrender even though the same has been retracted with valid grounds. In this regard, relied upon plethora of decisions to support its arguments and also the instruction issued by CBDT vide instruction No.286/2/2003 dated 10-03-2003 wherein it was instructed to the field formation devices that declaration cannot be taken without support of incriminating material found during the course of search. The same instruction further advises the AOs to rely upon the evidences /

materials gathered during the course of search operations or thereafter while framing the relevant assessment orders. The assessee also furnished certain additional evidences in the form of complete list of clients with their addresses, the list of clients having permanent account numbers, list of corporate clients who are in the web portal of MCA, list of clients, who have brought forward balances from the previous financial year, list of clients, who have furnished their valid ID proof and bank details.

8. During the course of appellate proceedings, the CIT(A) has forwarded additional evidences filed by the assessee to the AO for his verification and comments. In response, a remand report dated 13-04-2011 was furnished by the AO. The AO has accepted the additional evidences filed by the assessee with regard to the list of clients having PAN and corporate clients having master data sheet taken from the website of MCA and based on the evidences submitted by the assessee reported that these parties were genuine and are existing. However, further reported that the transactions of these parties with the assessee or with the principal, viz. Laju Investama Futures are not verifiable from these documents, nor the balance payable / receivable by the assessee or Laju Investama Futures from these entities is verifiable, the additional evidence filed by the assessee cannot be entertained at this juncture. Thereafter the assessee furnished certain PAN and other supporting evidence

in respect of creditors / debtors vide its letter dated 15-02-2012. The said request for admission of additional evidence u/s 46A was forwarded to the AO for his perusal / objections and report. Pursuant to the same remand report dated 09-03-2012 was received and the copy of the same was forwarded to the assessee in its rejoinder. In response to the remand report, the assessee vide letter dated 15-02-2012 submitted that additional evidence submitted is in the form of PAN and in some cases, bank account of the debtors / creditors which were subject matter of the additions made by the AO. From these additional evidences, the only inference that can be drawn is that these parties are genuine parties and are existing parties. The assessee filed one more letter on 26-03-2012 and made detailed rejoinder to the remand report, which is as under: _

"1. The appellant is involved in forex trading activities in India through 41/s. P T Laju Investama Futures an Indonesia based company.

1.1. The appellant is acting as a broker of 44/s. P T Laju Investama Futures.

1.2. for carrying out the forex trading activity the appellant has introduced various clients VIZ more than 800 clients.

1.3. The appellant collects and issue the cheques on behalf of 41/s. P T Laju Investama Futures in India due to FEA4A restriction in our country then the net balance payable or receivable is settled with 44/s. P T Laju Investama Futures,

1.4. There was a search and seizure operation at the appellant

premises on 19/06/2007 Pursuant to which books of a/c of the appellant were seized by the department.

1.5. Later on notices were issued u/s. 1534. of the IT act 1961 and the assessment was completed u/s. 143(3) r. ws. 1534 of the Act by making certain additions/disallowance to the returned income.

2 In connection with the additions/disallowance an appeal was filed before your honour and then after elaborate submission were filed o,,723.04.2010.

2.1 In respect of the addition made of Ps. 14.47 Crores on account of client Margin Advance credit balances payable to 44/s. P T Laju Investama Futures. The Ld. AO has mentioned the reasons in Para 3 of the assessment order.

2.2. In addition to the submission already filed we have to further submit as under:

2.3 During the course of assessment proceedings the Ld AO had asked for the details of the clients with evidences from whom money was received on behalf of M/s, P T Laju Investama Futures.

a) In response to the same we brought to the notice of the Ld AO that due to distress relation with 44/s. P T Laju. Investama we are unable to get these details in short span of f/me and asked for some time. Later on we provided confirmatory letter of around 100 clients on Test check basis which are on record with the Ld AO. We further submitted that in respect of the remaining clients we will provide the details in short span of time. However the Ld AO in the haste of completing the assessment passed the order without giving further opportunity and mainly harped on the surrender letter filed with the Investigation wing wherein a disclosure of Ps. 15Crores was made. It is pertinent to mention before your honour that the L AO did not pay any heed to the retraction letter filed thereafter.

2.4 During the course of appellate proceedings vide our earlier submission we have brought to your honour's notice the circumstances under which the disclosure was made and then after retracted Later on we collected the relevant details pertaining to

remaining clients and submitted as additional evidences before your honour under rule 46A of the IT Act. The summary of the clients which consists of old balance b/f, clients details supported by confirmation, details downloaded from /PICA site in respect of corporate clients, PAN details/Photo lb and Bank details of some of the clients to prove identity, genuineness and capability is submitted herewith as per Ex 'A' for your honour's perusal and consideration.

2.5 In view of the additional evidence submitted your honour remanded the matter back to the Id 40 for further verification and comments.

3 In reply to the said remand the Ld 40 has given its report in the remand report dated 0910312012.

3.1 In the remand report dated 0910312012 the Ld 40 has admitted that these creditors are genuine and existing parties. The said para is reproduced here under for your honour's perusal and consideration."

9. The CIT(A), after considering relevant submissions of the assessee, taken into account the remand report of the AO, rejoinder of the assessee and also by relying upon certain judicial precedents including the decision of Hon'ble Bombay High Court in the case of Smt. Prabhavati Shah vs CIT 231 ITR 1, observed that the facts narrated in the assessment order and brought before him during the appellate proceedings clearly indicated that the assessee was prevented by sufficient case from producing the evidence within the meaning of sub clauses (b) & (c) of sub Rule (1) of Rule 46A of I.T. Rules, 1967. Therefore, he admitted additional evidences as the AO has already been given an opportunity to furnish his objections to the additional evidences and also

have done so. With these observations the CIT(A) admitted additional evidence filed by the assessee and decided the issues on the grounds raised by the assessee. Insofar as additions made by the AO towards 'Client Margin Advance Credit Balances' of Rs.14,46,82,201, the CIT(A) observed that as evident from the detailed assessment order, remand report, comprehensive written submissions by the assessee, the assessee has furnished certain evidences in respect of 'Client Margin Advance Credit Balances' like KYC norms, confirmations from certain clients as also details of certain clients as available on the website of Ministry of Corporate Affairs. However, the AO did not take into account these details made available to him by the assessee. The CIT(A) further observed that it was the duty of the AO to investigate further, if he was not satisfied with the confirmations submitted during the course of assessment proceedings. It is also a fact that an addition cannot be made solely on the basis of letter of surrender without there being corroborative evidences. Had it been a case, where no evidence whatsoever was produced by the AO, the AO was well within his rights to proceed on circumstantial evidence to frame an assessment on the basis of material available on record. However, from the facts submitted before him, the CIT(A) found that the assessee has been able to produce some evidences in the forms of PAN, MCA details about which the Ld.AO was satisfied as he has stated in his remand report dated 09-03-2012

that from the additional evidences, the only inference that could be drawn was that those parties were genuine parties and are existing parties.

10. The CIT(A) further observed that as regards the assessee's assertion that the letter of surrender was not corroborated by any evidence, the facts emerge from the additional evidence filed by the assessee as far as the cases of clients, whose PAN, confirmation letters were present and the website of Ministry of Corporate Affairs are concerned, it could be said that the onus has been discharged by the assessee. However, in respect of such entities, where no details of PAN have been filed, it cannot be said with certainty that merely because they had a photo identity or one or more bank accounts, they were creditworthy of advancing credits to the assessee whether on its own behalf or on behalf of its principal. With these observations and also relying upon certain judicial precedents, CIT(A) directed the AO to delete the addition made towards 'Client Margin Advance Credit Balances' in respect of clients having PAN, clients from whom confirmations obtained and submitted before the AO and corporate clients having their PAN and also active in the web portal of Ministry of Corporate Affairs. The CIT(A) further observed that insofar as assessee's argument with regard to the opening balances brought forward from previous financial year amounting to Rs.97,22,584, the outstanding balances as on 01-04-2005 cannot be added u/s 68 of the Act, in the

assessment year 2006-07. Therefore, he directed the AO to verify the fact and allow credit for opening balances outstanding as on 01-04-2005 amounting to Rs.97,22,584. However, in respect of the other two categories, whereas the assessee has enclosed photo ID and bank account details., it cannot be said that they were capable to establish genuine transaction has been made as the photo IDs did not speak anything about the business transactions. Whereas in the case of an existing assessee with PAN, it can be said that onus was on AO to bring on record that they were not genuine parties in respect of the clients with photo IDs and other details, the onus cannot be said to have been discharged by the assessee to the satisfaction of the AO and hence, no benediction can be granted in respect of these entities where additional evidences representing Rs.14,46,82,201 and Rs.40,00,496 respectively are involved. With these observations, the CIT(A) directed the AO to delete additions of Rs.7,21,96,034, out of total addition of Rs.14.47 crores and the balance amount of Rs.6,27,63,582 has been confirmed. The relevant discussions and extract of list furnished by the assessee has been recorded in paragraph 2.7.16 to 2.7.18 of CIT(A)'s order on pages 65 to 85. Insofar as additions made towards disallowance of depreciation on Tibco Software, the CIT(A) confirmed the AOs action in disallowing depreciation on the ground that the assessee has failed to establish installation and use of software in its business. With these

observations, the CIT(A) partly allowed appeal filed by the assessee. Aggrieved by the order of CIT(A), the assessee as well as the revenue are in appeal before us.

11. The Ld.AR for the assessee submitted that the Ld.CIT(A) was erred in confirming part of the additions made by the AO u/s 68, towards 'Client Margin Advance Credit Balances' when he had accepted remaining part of the addition on the ground that the assessee has furnished necessary evidence in the form of PAN of the creditors and master data of corporate clients from the website of MCA. The Ld.AR further submitted that the AO had made additions merely on the basis of admission of the assessee during the post search investigation by way of an undated letter which has been subsequently retracted by the assessee. Therefore, the AO was erred in making additions only on the basis of admission without there being any material during the course of search which suggests undisclosed income. The Ld.AR further submitted that the assessee has retracted its statement recorded u/s 132(4) and also explained the reasons for giving such admission. The department has taken admission by using coercive methods by freezing bank accounts of the company as well as its associate companies which resulted in closure of its clients' accounts by MCX & NCDEX which caused huge loss to the company as well as its clients. Under these circumstances, the director of the company, Shri Sathya Prasad had

submitted a letter of surrender declaring additional income of Rs.15 crores which were comprised of Rs.14.47 lakhs on account of balance lying under the head 'advance towards material indented as per audited financial statements for the year ended 31-03-2006 and Rs.53 lakhs to cover up other possible discrepancies in seized materials. Except surrender of income during post search investigation, the AO does not have any material found as a result of search which suggests undisclosed income. On the other hand, assessee has furnished all evidences before the AO as well as the CIT(A) to prove the credits appearing under the head 'Client Margin Advance Credit Balances' or business receipts, which are collected during normal business purposes. The assessee also explained the manner and method of conducting the business with its principal, Laju Investama Futures alongwith KYC documents of all customers which is evident from the fact that the CIT(A) has recorded a categorical finding in his order while allowing partial relief to the assessee in respect of credits, which are having PAN, corporate clients with MCA master data and credits brought forward from previous financial year. The CIT(A) also recorded a clear finding in respect of other credits that the assessee has furnished valid photo ID proof and bank accounts of creditors; however, confirmed the credits on the ground that mere furnishing of photo ID proof and bank accounts does not tantamount to furnishing of identity of the creditors. The Ld.AR further

submitted that all these credits are arising out of business transactions with its principal Laju Investama Futures for which the assessee has furnished notarized copy of facilitation MOU with Laju Investama Futures and 100 agreements with customers alongwith their KYC norms documents. The assessee further submitted that it has discontinued its business with its principal because of legal issues. However, the fact remains that the amount standing in the credit of customers 'Client Margin Advance Credit Balances' is payable to its principal, Laju Investama Futures as the principal has filed an arbitration before the Arbitrators and the Arbitrators in Malaysia have delivered their award as per which the assessee is required to pay amount to its principals. The Ld.AR further submitted that the Ld.CIT(A) factually accepting that the assessee has furnished necessary evidences to prove the identity and also the transactions are normal business transactions with its customers erred in confirming part of the credits only on the ground that the PAN details of the creditors have not been furnished. In this regard, he relied upon plethora of judgements including the decision of Hon'ble Supreme Court in the case of Pullangode Rubber Produce Co. Ltd vs State of Kerala (1973) 91 ITR 18 (SC) and Nagubai Ammal vs B Sharma Rao AIR 1956 SC 593. The assessee also relied upon the decision of Hon'ble Madras High Court in the case of CIT vs Khader Khan & Sons (2008) 300 ITR 157 (Mad).

12. The Ld.DR, on the other hand, submitted that the Ld.CIT(A) was factually incorrect in deleting the addition made by the AO towards 'Client Margin Advance Credit Balances' on the basis of additional evidence filed by the assessee during the course of appellate proceedings including their KYC documents ignoring the fact that the AO has made addition on the basis of admission of the assessee during the post search investigation. The Ld.DR further submitted that though the assessee has retracted its admission, such retraction has been filed after 10 months gap, that too, without any valid and cogent reasons. Therefore, the AO was right in making addition u/s 68 of the Act towards 'Client Margin Advance Credit Balances' as the assessee has failed to prove 3 ingredients provided u/s 68, i.e. identity, genuineness and creditworthiness of the creditor. The Ld.DR further submitted that the assessee has discontinued its business with its principal, Laju Investama Futures which means the credits shown in its books of account is not at all payable to its principal. Though the assessee has furnished KYC details before the CIT(A), in the backdrop of clear admission by the assessee during post search investigation, subsequent documents filed is only an afterthought, therefore, the CIT(A) ought not to have admitted additional evidences filed by the assessee to delete addition made by the AO. The CIT(A) further erred in deleting addition merely on the basis of identity of the creditors ignoring other

ingredients of section 68, i.e. genuineness of transactions and creditworthiness of the parties, as to escape from the clutches of section 68 of the Act, three ingredients should be collectively discharged by the assessee. The AO has brought out clear facts in his order and also given ample reasons for making addition towards 'Client Margin Advance Credit Balances' and his order should be upheld.

13. We have heard both the parties, perused the material available on record and gone through the orders of authorities below. We have also carefully considered the case laws relied upon by the assessee as well as the AO. The factual matrix of the case which leads to the impugned addition are that there was a search & seizure action u/s 132 in the case of the assessee on 19-06-2007. During the course of search, the assessee was asked to explain the nature and source of credits appearing in its books of account under the head 'Client Margin Advance Credit Balances'. In the statement recorded u/s 132(4), Shri K Sathya Prasad, while answering to questions No.8 & 9 stated that credits appearing under the head 'Client Margin Advance Credit Balances' pertain to the business dealings of the assessee with Laju Investama Futures and the monies collected in the course of its business from its customers. He further stated that he will ensure that all the 3 conditions required for not attracting provisions of section 68 are fulfilled within a week's time. During the post

search investigation, Shri K Sathya Prasad, the director of the company had submitted an undated letter to the Investigation Wing on 06-07-2007 and surrendered a sum of Rs.15 crores and also submitted a bank guarantee dated 27-06-2007 issued by Federal Bank in favour of I.T. Department towards payment of taxes. In the said letter of surrender, he stated that the peak of unremitted amount during the period 2004 to 2008 was Rs.14,46,82,201 which was surrendered alongwith additional amount of Rs. 53 lakhs to cover up any other possible discrepancy in the seized material. Thereafter, the assessee company had sent a letter of retraction dated 20-04-2008 explaining the circumstances under the aforesaid declaration letter was filed before the Investigation Wing. The letter of retraction has been sent by speed post vide receipt dated 21-05-2008. According to the assessee, the aforesaid letter of retraction was attempted to be filed in tapal of both the offices on three occasions by the director of the company, viz. Shri B Srinivasa Rao and the acknowledgement of the aforesaid letter was refused by both the officers considering the contents of the same. In he said retraction letter, the assessee stated that the Investigation Department had frozen its bank accounts on 26-06-2007 without an authority under law consequently, pay ins and pay outs of the settlement of transactions with MCX & NCDEX could not take place, which in turn, resulted into stoppage of the settlement payment with the customers

of the company. The assessee further stated that due to non availability of settlement clearance facility, said MCX & NCDEX had suspended their trading rights on 30-06-2007 which resulted into unilateral squaring off of outstanding positions on that day in the clients' accounts resulting into substantial loss to the clients of the company. Under these circumstances and also to defreeze bank accounts, assessee surrendered a sum of Rs.15 crores and furnished a bank guarantee of an amount equivalent to the balance lying in frozen bank accounts. Considering all these facts and the behavior on the part of the department, the assessee had no option but to concede, has filed a letter of surrender and also furnished bank guarantee for Rs.95 lakhs. But the facts remain that such admission has been retracted with valid and cogent reasons, which has been narrated by filing an affidavit dated 13-11-2009, sworn by Shri Sathya Prasad, the then director, who had signed the letter of surrender explaining the circumstances under which he had to deliver the impugned letter of declaration / surrender.

14. The AO has made addition on the basis of letter of surrender filed by the assessee. According to the AO, the surrender made by the assessee is voluntary, but not taken on coercive or undue influence and the assessee himself has filed letter of surrender and agreed to pay taxes. The AO further observed that though the assessee has filed retraction, such retraction letter

has been filed after a gap of 10 months, that too, without any valid and cogent reasons. The AO, further observed that information gathered during the course of search coupled with further enquiries conducted during the course of post search investigation brought out clear facts with regard to the advance towards material indented as per which the assessee was unable to prove the credits to the satisfaction of the AO by filing necessary evidences. The AO further observed that during the course of search and assessment proceedings, the assessee was unable to file any kind of evidence with regard to the credits appearing under the head 'Client Margin Advance Credit Balances'. Therefore, he opined that the assessee has failed to prove the identity, creditworthiness and genuineness of transactions and accordingly made addition u/s 68 of the Income-tax Act, 1961. The AO further observed that though the assessee has filed a retraction letter, such retraction is not based on any material evidence, therefore, there is no reason to consider the retraction filed by the assessee.

15. It is an admitted fact that the assessee has filed a letter of surrender on 06-07-2007 admitting undisclosed income of Rs.15 crores, which was comprised of 'Client Margin Advance Credit Balances' of Rs.14.47 crores and further amount of Rs.53 lakhs to cover up any other possible discrepancies in the seized material. It is also an admitted fact that the assessee has filed a letter of retraction dated 20-04-2008 explaining the circumstances under which

aforesaid declaration letter was filed before the Investigation Wing. These two facts were not disputed by the revenue authorities. Therefore, the question whether the AO was right in making addition towards unexplained credits only on the basis of admission of the assessee, even though the assessee has filed retraction letter explaining the reasons for such a retraction. In this case, the additional income surrendered by the assessee is on account of unexplained credits appearing in its books of account as on 31-03-2006. At the time of search, such credit balances were appearing in the audited balance-sheet of the assessee for the year ending 31-03-2006. Though the assessee has not been able to furnish the nature and source of credit under the head 'Client Margin Advance Credit Balances' immediately, the assessee has explained the reasons for non furnishing of details before the search parties. According to the assessee, as per the business module with its principal, Laju Investama Futures, the clients have directly logged into the website of the principal to obtain a client ID by submitting KYC documents, as prescribed in the agreement and such KYC documents are available with its principals, Laju Investama Futures. The assessee further submitted that because of its strained relationship with its principals, due to the adverse business conditions and also the fact that it has closed down its business from December, 2005 onwards it could not gathered the required information to be produced before the

authorities. However, the facts remain that the assessee has obtained information from the clients and also furnished a list of such creditors before the CIT(A). The CIT(A) has admitted additional evidences filed by the assessee and also given an opportunity to the AO to verify and comment on the admissibility of additional evidences. The AO, in his remand report dated 09-03-2012 had commented that from those additional evidences, the only inference that can be drawn was that those parties were genuine parties and were existing parties. The only issue with which the AO was not satisfied was that from the transactions of those parties with the assessee or with its principals are not verifiable from the documents. The CIT(A), after considering relevant evidences filed by the assessee in the form of PAN, master data details of corporate clients from MCA website has recorded a categorical finding that the assessee has been able to prove the identity of the creditors as per the list provided which has been extracted in his order. Insofar as other creditors for which the CIT(A) though confirmed addition made by the AO, recorded a clear finding that the assessee has been able to file valid photo ID and bank account details of creditors. From these findings of the CIT(A), it is abundantly clear that the assessee was able to explain the credits appearing under the head 'Client Margin Advance Credit Balances' and as such credits are normal business transactions with its principal, Laju Investama Futures.

16. Having said so, let us examine whether the AO was right in making addition towards unexplained credits appearing under the head 'Client Margin Advance Credit Balances' only on the basis of admission of the assessee, even though such admission has been retracted by the assessee before filing return of income. The Hon'ble Supreme Court in the case of Pullangode Rubber Produce Co Ltd vs State of Kerala (supra) held that an admission is an extremely important piece of evidence, but it cannot be said that it is conclusive. It is open to the assessee, who made the admission to say that it is incorrect. In the case of Nagubai Ammal vs B Sharma Rao (supra) it was held that an admission is not conclusive as to the dealth of the matter stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue. The Hon'ble Madras High Court in the case of CIT vs Khader Khan & Sons (supra) observed that where assessee has admitted suppressed income, but there was no documentary evidence in possession of the department, no addition can be made on the basis of such statement. The Hon'ble High Court reviewed all the available judgements on the point alongwith CBDT instructions dated 10th March, 2003 and went on to the extent of holding that section 133A does not empower any I.T. authorities to examine any person on oath and hence, such statement has no evidentiary value and any admission made

during such statement cannot by itself be made the basis for addition. Later, the judgement of Hon'ble Madras High Court has been affirmed by the Hon'ble Supreme Court in 254 CTR 228(SC) and held that section 133A does not empower any ITO to examine any person on oath. In the case of Kasat Paper & Pulp Ltd vs ACIT (2000) 74 ITD 455 (Pune), it was held that there cannot be estoppels against legal principles and therefore, if the income does not accrue to the assessee, the same cannot be taxed merely on the ground that it was offered for taxation. The assessee can always retract, if the amount offered cannot be taxed under the law. The sum and substance of the ratio laid down by the Hon'ble Supreme Court and High Courts are that additions cannot be made only on the basis of admission of the assessee unless the AO brought on record cogent material evidences to justify the addition. In this case, admittedly, addition made by the AO is only on the basis of admission of the assessee and also on the basis of credits appearing in the audited books of the assessee. Therefore, we are of the view that the AO was incorrect in making additions only on the basis of admission of the assessee, more so, when the assessee has retracted from his admission with valid and cogent reasons.

17. Having said so, let us examine the issue on merits. The AO made additions towards 'Client Margin Advance Credit Balances' u/s 68 of the Income-tax Act, 1961 on the ground that the assessee failed to discharge its onus cast upon it

u/s 68 by filing identity, genuineness of transactions and creditworthiness of the parties. According to the AO, the credits appearing in the books of account of the assessee are unexplained cash credits, which are taxable u/s 68 of the Act, as the assessee failed to prove three ingredients provided u/s 68 of the Act. It is the contention of the assessee that credits appearing under the head, 'Client Margin Advance Credit Balances' are collected from its customers in relation to business transactions with its principals, Laju Investama Futures, which is payable to its principals. The assessee further contended that it is only a custodian of the amounts collected from customers as under the prevalent laws, its principal directly cannot transfer funds from India and to India on its own. The assessee further contended that it has entered into a MOU with its principals as per which it is acting as a facilitator between its principal and Indian customers, who were directly dealing with its principals in commodity and currency markets. It has collected margin money from its customers under the instructions from its principals and also pays to its customer as per the instructions of its principals, therefore, the margin money collected from customers kept in its books of account is payable to its principals for which necessary evidences has been filed. In this regard the assessee has filed copy of MOU and also KYC documents of customers before the CIT(A). The assessee also filed complete list of customers with their addresses and also filed PAN in

cases where customers have furnished their PAN. The assessee also filed master data details of corporate clients from MCA website of the Department of Corporate Affairs. In case of remaining customers it has filed valid photo ID proof and bank account details. All these evidences have been furnished before the CIT(A), which have been duly admitted by the CIT(A), after affording opportunity to the AO to comment on the additional evidences filed by the assessee. The AO, in his remand report dated 09-03-2012 stated that from these additional evidences, the only inference that can be drawn is that these parties are genuine parties and are existing parties. The CIT(A), after considering relevant additional evidences in the form of confirmations / PAN, MCA details of corporate clients, a part of which was also produced before AO during the assessment proceedings observed that the assessee has discharged its onus of establishing the identity, creditworthiness as well as genuineness of the transactions in respect of the entities as per the chart extracted in his order at paragraphs 2.7.16 to 2.7.17 on pages 66 to 84 of his order. We further observe that the CIT(A) has given a categorical finding in respect of clients having income-tax PAN as per which there are 321 clients, who have furnished their PAN. The CIT(A) further observed that there are about 49 clients, who have filed their confirmations, which have been furnished before the AO with valid PAN. He has also given details of 35 corporate clients and their PAN

details. As regards opening balances brought forward from 01-04-2005, considering the fact that the assessee has placed on record KYC agreements and confirmations from the clients, directed the AO to verify the fact and allow credit for the opening outstanding balance as on 01-04-2005 amounting to Rs.97,22,584. The facts remain unchanged. The revenue has failed to bring on record any evidences to prove the findings of fact recorded by the Ld.CIT(A) is incorrect. The Ld.CIT(A) has taken into account the additional evidences filed by the assessee, remand report of the AO and rejoinder filed by the assessee to come to the conclusion that the assessee has discharged its onus cast upon it u/s 68 of the Act, therefore, no addition is called for in respect of creditors having filed their PAN, confirmation letters and corporate clients with their master data as per MCA website. Therefore, we are of the considered view that the CIT(A) was rightly in deleting addition made by the AO towards 'Client Margin Advance Credit Balances'. We do not find any error or infirmity in the findings of the CIT(A). Hence, we are inclined to uphold the findings of the CIT(A) and reject the appeal filed by the revenue.

18. Coming to the assessee's appeal. The assessee has challenged the addition sustained by the Ld.CIT(A) in respect of credits, where photo ID and bank account details have not been furnished, but PAN details has been filed before CIT(A). The CIT(A) observed that in the cases of credits where photo ID

and bank account Nos are furnished, the onus cannot be said to have been discharged by the assessee to the satisfaction of the AO. Accordingly, he confirmed addition to the extent of Rs.6,27,63,582. It is the contention of the assessee that all credits appearing under the head 'Client Margin Advance Credit Balances' arose out of its business transactions with its principal, Laju Investama Futures for which KYC documents have been furnished. The assessee further contended that the CIT(A) having accepted the facts that all these credits are genuine parties and are existing parties, erred in confirming the addition only on the basis of non furnishing of PAN, despite furnishing valid ID proof and bank accounts. The assessee further contended that all these creditors are genuine parties and these credits are arising in the course of its business, which needs to be paid back to its principal, Laju Investama Futures. The Ld.AR referring to the paper book filed, submitted that the principal, Laju Investama Futures has initiated arbitration proceedings and the Arbitrator has passed his award as per which the 'Client Margin Advance Credit Balances' have to be paid to its principals. The assessee further contended that even otherwise it has proved all the three ingredients provided u/s 68 to prove the credits to the satisfaction of the AO either in the form of photo ID or bank account and merely because PAN details were not furnished, addition cannot be made to the genuine transactions. In this regard, he relied upon the

decision of ITAT Delhi Bench in the case of Sahara India Financial Corporation Ltd vs DCIT in ITA No.3199/Del/2013.

19. Having heard both the sides and considered material available on record, we find that the Ld.CIT(A) when factually accepted that all these credits are genuine and are existing parties was erred in confirming the credits supported by valid photo ID and bank accounts for non furnishing of PAN. As per the provisions of section 68, the assessee has to prima facie provide documents to prove the identity of the creditor as well as genuineness of the transactions. The identity stands established if information regarding PAN or other identity / document of the creditor is provided. In this case, there is no dispute with regard to the genuineness of the transactions as it was accepted by lower authorities that all these parties are genuine and are existing parties. The only dispute is with regard to the proving identity of the parties. The CIT(A) confirmed addition merely because of non availability of PAN despite furnishing photo ID and bank account details. We further observe that the details filed by the assessee with regard to the list of creditors, all the credits are having small balances ranging from few hundreds to few thousands. Therefore, we are of the view that once the authorities accepted the fact that the parties are genuine, addition cannot be made merely for the reason that no PAN details have been furnished. In this case, the assessee has filed valid photo ID and

bank account details of the creditors. The assessee further confirmed all these creditors are arising in its normal business activities with its principals. The assessee further proved that such credits are payable to its principals, Laju Investama Futures. Therefore, we are of the considered view that the Ld.CIT(A) was incorrect in sustaining additions of the balance in 'Client Margin Advance Credit Balances' where the assessee has not furnished PAN. In our considered view, the assessee has proved the identity of the creditors by filing valid photo ID and bank account details and also proved the genuineness of transactions and creditworthiness of the parties in view of the clear facts recorded by the AO in his remand proceedings and the CIT(A) in his order. Hence, we direct the AO to delete addition sustained by the CIT(A) towards 'Client Margin Advance Credit Balances'.

20. The next issue that came up for our consideration from assessee's appeal is addition towards disallowance of depreciation of Rs.7,17,000 on Tibco Software on the ground that the assessee has failed to bring sufficient evidence on record to prove that Tibco software was put to use for its own business. The assessee's plea that it was already put to use software in its business was also cannot be entertained because as per assessee's own admission, the agreement with Laju Investama Futures was terminated on 31-12-2005. It is the contention of the assessee that the software was installed on 14-12-2005 in

the server of Laju Investama Futures on a beta testing basis. The confirmation from Laju Investama Futures to the effect was filed during the course of assessment proceedings. Shortly thereafter the facilitation agreement with Laju Investama Futures was terminated on 31-12-2005 and the assessee could not make use of the same thereafter. The assessee further contended that the software was put to use and was ready for use, therefore, depreciation cannot be disallowed merely on the ground that the assessee was discontinued its business operations within a span of short period.

21. Having heard both the sides and considered material available on record, we find that the assessee company had purchased one multiware commonly known as 'Tibco Software' in the month of October, 2005 and installed in the server of Laju Investama Futures and this fact has been confirmed by Laju Investama Futures. It is also an admitted fact that the assessee's business operations were discontinued because of strained relations with its principal, Laju Investama Futures. However, the fact remains that the asset was installed in the server of the principal, Laju Investama Futures, was not disputed by the lower authorities. Once the asset is ready for put to use, then depreciation on such asset cannot be disallowed. This legal position was further strengthened by the decision of Hon'ble Kerala High Court in the case of CIT vs Geotech Construction Corporation (2000) 244 ITR 452 (Ker) wherein it was held that an

asset which is kept ready for use is also eligible for depreciation. In yet another case, the Hon'ble Bombay High Court in the case of CIT vs Associated Cement Company Ltd (1968) 68 ITR 3478 (Bom) observed that where the asset belongs to the assessee and are used by it in the carrying on of its business through its sales managers it was entitled for depreciation. In the present case, the assessee claims that the asset was actually put to use, briefly in the relevant financial year having installed on the server of Laju Investama Futures, thereafter the same was available to use and was capable of being used in view of the fact tht the understanding between the assessee and Laju Investama Futures. In fact, the asset was put to use for the period from October, 2005 to 14-12-2005. This fact was confirmed by Laju Investama Futures. Therefore, we are of the view that the assessee is eligible for depreciation on asset which was put to use in the relevant financial year. Therefore, we direct the AO to allow depreciation as claimed by the assessee on the Tibco software.

22. The assessee raised another ground pertaining to charging of interest u/s 234B of the Act. Charging of interest u/s 234B is consequential. The assessing officer is directed to allow consequential relief to the assessee.

23. In the result, appeal filed by the revenue in ITA No.4193 /Mum/2012 for AY 20056-07 is dismissed and appeal filed by the assessee in ITA No3885/Mum/2012 is allowed.

ITA No.3886/Mum/2012 – AY 2007-08

24. The assessee raised the following grounds of appeal, in this appeal:-

“1.On the facts and in the circumstances of the case and in law the Hon'bte CIT (A) erred in upholding the addition of Rs. 26,50,000/- made by the Ld AO by treating the amount of share application money received as unexplained cash credit u/s. 68 of the IT Act and the reason assigned for doing so are wrong and contrary to the provision of Income Tax Act and rules made there under.

2.On the facts and in the circumstances of the case and in law the Hon'ble CIT(A) erred in upholding interest charged u/s. 234B of the IT Act 1961 and the reason assigned for doing so are wrong and contrary to the provisions of Income Tax Act and the rules made there under.”

25. From these grounds of appeal, the assessee has challenged the issue of addition made by the AO towards share application money for Rs.26,50,000 u/s 68 of the Act. During the course of assessment proceedings, the AO noticed that the assessee has received share application money of Rs.26,50,000 from six persons, in cash, who were family members of the shareholders. The AO further observed that the assessee was unable to explain share application money with necessary evidences. According to the AO, the assessee could not prove the transaction as genuine and the identity and creditworthiness of the contributors has also not been established and, therefore, treated the above sum as unexplained cash credit u/s 68 of the I.T. Act. During the course of appellate proceedings before CIT(A), the assessee has stated that investments in share application money was made in cash by

six persons, who are family members of the dominant shareholders and also filed necessary identity, genuineness of transactions and creditworthiness of the transactions. Assessee further submitted that this amount was paid by those persons out of their agricultural income from the family land holdings and complete details of which were filed in the course of assessment proceedings of Shri PV Faisal which was also taking place with the AO at the time of assessment. The assessee, further contended that in the assessment of PV Fansal, the AO has accepted agricultural income declared by the assessee. Since the assessee has proved creditworthiness of the creditors there is no reason for the AO to make addition towards share application money u/s 68 of the Act.

26. Having heard both the sides, we do not find any merit in the argument of the assessee for the reason that merely filing an assessment order of one of the subscribers cannot discharge its onus u/s 68 of the I.T. Act, 1961. To escape from the clutches of section 68, the assessee has to prove the identity, genuineness of transactions and creditworthiness of the creditors, collectively. In this case, admittedly, share application money has been received from individuals in cash, who does not have any means to explain amount of share application money. It is also an admitted fact that such share application money has been paid in cash. Therefore, we are of the considered view that

the assessee has failed to discharge its onus of proving the share application money received from six individuals. The CIT(A), after considering relevant provisions has rightly confirmed addition made by the AO. We do not find any error in the order of CIT(A); hence, we are inclined to uphold the order of CIT(A) and dismiss the ground raised by the assessee.

27. The next issue that came up for our consideration is interest charged u/s 234B. Levy of interest u/s 234B is consequential in nature. The assessing officer is directed to allow consequential relief to the assessee.

28. In the result, appeal filed by the assessee in ITA No.3886/Mum/2012 is dismissed.

29. As a result, appeal filed by the revenue is dismissed; appeal filed by the assessee for AY 2006-07 is allowed; and the appeal filed by the assessee for AY 2007-08 is dismissed.

Order pronounced in the open court on 02nd January, 2018.

Sd/- (D.T. Garasia)	sd/- (G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 02nd January, 2018

Pk/-

Copy to :

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

/True copy/

By order

Asstt. Registrar, ITAT, Mumbai