

आयकर अपीलीय अधिकरण पुणे न्यायपीठ एक-सदस्य मामला पुणे में

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "SMC", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM

आयकर अपील सं. / ITA No.990/PUN/2016
निर्धारण वर्ष / Assessment Year : 2010-11

M/s Munoth Transport Co.,
Darshan Apartment,
V.K. High School Road,
Panvel, Raigad – 410206
PAN: AACFM1055D

.... अपीलार्थी/Appellant

Vs.

The Income Tax Officer,
Ward 2, Panvel

.... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri Nikhil Pathak
प्रत्यर्थी की ओर से / Respondent by : Shri Mukesh Jha

सुनवाई की तारीख / Date of Hearing : 18.04.2018	घोषणा की तारीख / Date of Pronouncement: 04.05.2018
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by the assessee is against the order of CIT(A)-2, Thane, dated 28.03.2016 relating to assessment year 2010-11 against order passed under section 143(3) of the Income-tax Act, 1961 (in short 'the Act').

2. The assessee has raised the following grounds of appeal:-

- 1] *The learned CIT(A) erred in confirming the addition of Rs.12 lakhs on account of loans u/s 68 of the Act.*
- 1.1] *The learned CIT(A) failed to appreciate that Shri Arshad Khot had confirmed having advanced Rs.10 lakhs to the appellant for purchase of plot and as the deal did not materialize, the appellant returned the amount.*

- 1.2] *The CIT(A) was not justified in making the addition on the basis of the fact that the appellant had not proved source of source of the amount given.*
- 1.3] *The CIT(A) failed to appreciate that the appellant had volunteered to produce the creditors but he was not given an opportunity to produce them.*
- 1.4] *The appellant requests for an opportunity to prove the genuineness of the above credits.*
- 2] *The learned CIT(A) erred in confirming the disallowance of rent of Rs.2,40,000/- and guarantee commission of Rs.5,46,000/- u/s 40A(2).*
- 2.1] *The learned CIT(A) failed to appreciate that the rent and the guarantee commission paid were reasonable considering the market rates.*
- 2.2] *The learned CIT(A) failed to appreciate that the payees had paid tax on this income from rent and commission and thus, the disallowance u/s 40A(2) was not warranted.*
- 3] *The Id CIT(A) was not justified in confirming the above additions without giving proper opportunity of hearing and without considering the facts of the case properly.*
- 4] *The appellant requests for admission of additional evidence if required in support of the above grounds of appeal.*

3. The first issue raised in the present appeal is against the addition of ₹ 12 lakhs made under section 68 of the Act. The second issue raised in the present appeal is against disallowance of rent of ₹ 2,40,000/- and guarantee commission of ₹ 5,46,000/- under section 40A(2) of the Act. The ground of appeal No.3 raised by the assessee is not pressed and hence, the same is dismissed as not pressed.

4. Briefly, in the facts of the case, the assessee was engaged in the business of transport and machinery hiring. For the year under consideration, the assessee had shown gross receipts of ₹ 1,34,37,089/-, on which net profit was declared at ₹ 6,50,210/-. The assessee had raised unsecured loans of ₹ 10 lakhs from Mr. Arshad Khot and ₹ 2 lakhs from Shri Divakar Bhanushali. The assessee filed the confirmation of loan from the said two persons. The

Assessing Officer issued summons to the said two parties. The statement of Shri Arshad Khot was recorded under section 131 of the Act. He pointed out that he had filed his return of income for assessment year 2011-12 for the first time. He also stated that he did his graduation in financial year 2009-10. He was asked whether he knew M/s. Munoth Transport Co. In reply, he stated that there was a proposal to purchase plot at Shil from M/s. Munoth Transport, for which he had issued cheque for ₹ 10 lakhs, dated 17.02.2010 as token amount. However, due to some reason, deal was cancelled and the said amount was returned by M/s. Munoth Transport by cheque on 27.07.2010. He further stated that no MOU/Sathe Karar was prepared to purchase the said plot. He also explained the source of advance given out of the amount received through his father to start his business. Cheque of ₹ 25 lakhs was deposited on 11.02.2010, which he pointed out was given by friend of his father, who was also partner in firm with his father. However, he did not remember the name of father's friend, who had given cheque of ₹ 25 lakhs. He further stated that the said amount of ₹ 25 lakhs was not returned by him to his father's friend. The Assessing Officer was of the view that Shri Arshad Khot was not a man of any means as he could not prove his creditworthiness. He further observed that entry was in the form of accommodation entry and was not loan. He referred to the confirmation letter filed, in which it was referred as loan. However, in the statement, he stated to be an advance given for purchase of plot. Hence, sum of ₹ 10 lakhs was added in the hands of assessee under section 68 of the Act.

5. In respect of loan of ₹ 2 lakhs, confirmation was filed. However, the assessee could not produce the said person. Hence, in the absence of identity, genuineness and creditworthiness of loan creditor not being proved, sum of ₹ 2 lakhs was added under section 68 of the Act. Further, the Assessing Officer

noted that the assessee had paid plot rent of ₹ 7,20,000/- and bank guarantee commission. The Assessing Officer noted that cost of plot to the owner was just ₹ 18 lakhs. Since the assessee had made payment to relatives i.e. wives of partners, the Assessing Officer invoked the provisions of section 40A(2)(b) of the Act and disallowed the amount. The cost of plot which was given as collateral security was ₹ 18 lakhs, against which the assessee had paid the rent of ₹ 7,20,000/- and commission of ₹ 6 lakhs, totaling ₹ 13,20,000/-. The Assessing Officer restricted bank guarantee commission to 3% of asset value of ₹ 18 lakhs i.e. ₹ 54,000/-, which was allowed in the hands of assessee and the balance sum of ₹ 5,46,000/- was disallowed. Similarly, plot rent expenses were restricted to 50% i.e. ₹ 3,60,000/-, which was allowed in the hands of assessee and balance claim of ₹ 3,60,000/- was disallowed.

6. The CIT(A) confirmed the addition made under section 68 of the Act and also disallowance of expenses made by invoking provisions of section 40A(2)(b) of the Act.

7. The assessee is in appeal against the order of CIT(A).

8. The learned Authorized Representative for the assessee referred to the confirmation filed by Shri Arshad Khot and pointed out that he had received sum of ₹ 25 lakhs, out of which sum of ₹ 10 lakhs was advanced to the assessee. The statement of Shri Arshad Khot was recorded and he admitted to have advanced the said sum of ₹ 10 lakhs. The learned Authorized Representative for the assessee stressed that it was an advance and not loan and hence, the provisions of section 68 of the Act were not attracted. He admitted that no document for transaction of advancing loan was available.

9. In respect of second loan of ₹ 2 lakhs, the learned Authorized Representative for the assessee pointed out that confirmation of parties was filed and the said person was being assessed in Panvel, he further pointed out that request was made to the Assessing Officer to summon the said person as the assessee could not produce him. The learned Authorized Representative for the assessee further pointed out that the return of income filed by Shri Divakar Bhanushali, was later traced by him along with Balance Sheet, which are being submitted as additional evidence at page 62 of Paper Book. In the said return of income, the said person declared interest income received from the assessee and in the Balance Sheet, the loan of ₹ 2 lakhs was also shown. He also referred to the confirmation of loan account placed at page 58 of the Paper Book and tax deduction at source at page 59 of Paper Book.

10. In respect of second ground of appeal i.e. payment made to wives of partners, against which the authorities below had invoked the provisions of section 40A(2)(b) of the Act. He stated that he had allowed 50% of rent and the CIT(A) allowed ₹ 2,40,000/- + ₹ 2,40,000/-. However, the Assessing Officer has not brought on record any evidence to prove the rent paid was in excess. He referred to the assessment order for assessment year 2012-13, wherein rent of ₹ 6 lakhs each was allowed as deduction vide order passed under section 143(3) of the Act. The learned Authorized Representative for the assessee further pointed out that the assessee had taken loan and wives of partners had given the plot of land against the said loan as guarantee, against which the assessee paid ₹ 3 lakhs each as guarantee commission. The Assessing Officer / CIT(A) allowed ₹ 54,000/- being 3% of total cost of plot of land of ₹ 18 lakhs. However, the market value of property needs to be considered in case any disallowance is to be made in the hands of assessee.

11. The learned Departmental Representative for the Revenue pointed out that from the statement of Shri Arshad Khot recorded by the Assessing Officer/assessee, it was not clear what was the mode of payment, further, whether it was advance or not. There was no evidence filed by the assessee. The Assessing Officer had also recorded statement that loan taken by Shri Arshad Khot of ₹ 25 lakhs, against which it is claimed that ₹ 10 lakhs was paid as advance to the assessee, but the said loan of ₹ 25 lakhs has not been returned by Shri Arshad Khot, hence it was case of accommodation entry.

12. On perusal of record and after hearing both the learned Authorized Representatives, the first issue which arises in the present appeal is against invoking of provisions of section 68 of the Act. The requirement of said section is that where the loan has been received by the assessee, then the identity and creditworthiness of person giving loan and genuineness of transaction needs to be established by the assessee. The assessee during the year under consideration had received sum of ₹ 10 lakhs from Shri Arshad Khot. The assessee filed confirmation from the said party. Summons under section 131 of the Act were issued to the said party, who, in turn appeared before the Assessing Officer and whose statement was recorded during the course of assessment proceedings. The said person explained that source of loan of ₹ 10 lakhs was out of loan of ₹ 25 lakhs received by the said person from the friend of his father. Undoubtedly, the said person could not give complete details while statement was recorded under section 131 of the Act. However, the transaction has been explained by the said person. The statement of Shri Arshad Khot was recorded by the Assessing Officer, who has reiterated the position. Hence, where the assessee has furnished basic details proving the identity of said person and also the capacity to lend the said loan, so it could

not be said that the assessee has failed to establish the identity and creditworthiness of person and also not proved the genuineness of transaction. The assessee has placed confirmation letters on record. The Assessing Officer has reproduced the statement recorded during the course of assessment proceedings, in which the said person admitted to have advanced the said loan. He has also explained the source of said loan. However, he could not give complete evidence in respect of source of source. The Courts have time and again have laid down the proposition that "source of source is not required to be proved by the assessee". Accordingly, I hold that there is no merit in the order of CIT(A) in this regard, where the assessee has filed necessary details in respect of loan received by it, then the same merits to be accepted without going into source of source.

13. Now, coming to the next loan of ₹ 2 lakhs received from Shri Divakar Bhanushali, wherein during the course of assessment proceedings, the assessee could only file the confirmation. The assessee was unable to produce the said party and hence, addition in the hands of assessee.

14. Now, before the Tribunal, the assessee has filed the copy of return of income in which the said party has declared income received as interest on loan advanced to M/s. Munoth Transport Company. Further, it has also filed the copy of Balance Sheet in which the said loan is duly reflected. In view of the above said evidence being available, it could not be doubted that the assessee had advanced sum of ₹ 2 lakhs to Shri Divakar Bhanushali. Accordingly, the Assessing Officer is directed to delete the addition of ₹ 2 lakhs.

15. Now, coming to the disallowance of expenses, wherein the assessee had paid ₹ 3,60,000/- each to the two wives of directors for use of plot of area. Further, guarantee commission was paid to the wives of directors. The Assessing Officer had disallowed the said expenditure invoking provisions of section 40A(2)(a) of the Act. Under section 40A(2)(a) of the Act, the requirement of section is that the assessee has to prove that expenditure incurred by it vis-à-vis payments to its related parties was as per market price. In the absence of the same, part of expenditure can be disallowed in the hands of assessee, if the expenditure was incurred at a rate which was higher than the market rate. In the facts of the present case, wives of partners of assessee had bought the plot of land for total cost of ₹ 18 lakhs. The assessee had utilized the said plot of land for parking its vehicles, etc. and had agreed to pay rent of ₹ 3,60,000/- each to the wives of directors. Thus, expenditure of ₹ 7,20,000/- was debited to Profit and Loss Account. Further, the said wives had pledged and stood as guarantor against the loans availed by the assessee company, for which guarantee commission of ₹ 6 lakhs was paid. The Assessing Officer allowed 3% of asset value i.e. ₹ 54,000/- and disallowed sum of ₹ 5,46,000/- out of guarantee commission. Out of rent account, 50% of expenditure was allowed i.e. ₹ 3,60,000/- and the balance sum of ₹ 3,60,000/- was disallowed. The CIT(A) however, allowed rent @ ₹ 40,000/- per month i.e. ₹ 4,80,000/- as against ₹ 7,20,000/- claimed by the assessee. The CIT(A) however, upheld the disallowance made on account of guarantee commission of ₹ 5,46,000/-. The provisions of section 40A(2)(a) of the Act envisage that where expenditure has been claimed by the assessee, which in turn, is paid to related parties, then the Assessing Officer may disallow any part of said expenditure in case the same is above the market rate. The Assessing Officer has to determine the market rate of expenditure incurred by the assessee and

in case it is found to be in excess, then part of said excess expenditure is to be disallowed in the hands of assessee.

16. Coming to the first expenditure of rent, wherein the assessee during the year under consideration had paid ₹ 7,20,000/- i.e. ₹ 3,60,000/- each to the relatives of directors, which has been allowed to the extent of ₹ 4,80,000/- by the CIT(A). The assessee in this regard has pointed out that the year under appeal is assessment year 2010-11, whereas in assessment year 2012-13, rent of ₹ 6 lakhs each paid to related parties has been allowed in the hands of assessee. The copy of the order passed by Assessing Officer under section 143(3) of the Act, dated 27.03.2015 is placed on record. The perusal of assessment order reflects the Assessing Officer to have commented upon the payment of ₹ 12 lakhs on account of rent and further ₹ 6,10,000/- on account of commission expenses. The said payments were made to the wives of directors and the assessee was asked to justify the same. The Assessing Officer allowed rent expenses in totality. However, commission expenses of ₹ 6 lakhs was found to be excessive and the same was disallowed in the hands of assessee. In view thereof, where rent of ₹ 6 lakhs each paid to wives of directors has been found to be reasonable, then there is no merit in disallowance of rent expenses in the hands of assessee, which in the year under consideration is @ ₹ 3,60,000/- each.

17. However, coming to guarantee commission of ₹ 6 lakhs, wherein the Assessing Officer has only allowed ₹ 54,000/- and disallowed ₹ 5,46,000/-. We find no merit in the claim of assessee. The assessee has failed to establish the necessity of paying guarantee commission at ₹ 6 lakhs to the wives of directors. However, in order to meet the ends of justice, the disallowance is

restricted to 50% of total expenses i.e. ₹ 3 lakhs. The ground of appeal No.1 raised by the assessee is thus allowed and ground of appeal No.2 is partly allowed.

18. In the result, appeal of assessee is partly allowed.

Order pronounced on this 4th day of May, 2018.

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / **JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 4th May, 2018.
GCVSR

आदेश की प्रतिलिपि अग्रहित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-2, Thane;
4. The Pr.CIT-2, Thane;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे, एक-सदस्य मामला / DR 'SMC', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune