

**IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA,AM AND SHRI RAVISH SOOD, JM**

ITA No(s). 3763/Mum/2016 & 3764/Mum/2016
(निर्धारण वर्ष / Assessment Year:2005-06 & 2006-07)

M/s Vesta (India) Ltd., 201, New Bharat Building, Ghorupdeo Cross Lane No.1, Off Rambhau Bhogle Marg, Byculla (E), Mumbai 400 020.	बनाम/ Vs.	ITO,-2(3)(4), Mumbai-400 020.
स्थायी लेखा सं./जीआइआर सं./PAN No. AABCV3880B		
(अपीलार्थी / Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	None
प्रत्यर्थी की ओर से / Respondent by	:	Sh. M.C. Omi Ningshen, D.R

सुनवाई की तारीख / Date of Hearing	:	05.04.2018
घोषणा की तारीख / Date of Pronouncement	:	25.05.2018

आदेश / O R D E R

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeals filed by the assessee for A.Y(s). 2005-06 and 2006-07 are directed against the respective orders passed by the Commissioner of Income Tax (Appeals)-6, Mumbai, each dated 29.02.2016, which in itself arises from the respective orders passed by the A.O under Sec. 143(3) r.w.s 147 of the Income-tax act, 1961 (for short 'Act'), both dated 28.03.2013. As certain common issues are involved in the aforementioned appeals, therefore, the same are being

taken up and disposed off by way of a common order. We shall first advert to the appeal of the assessee for A.Y. 2005-06. The assessee assailing the order of the CIT(A) had raised before us the following grounds of appeal:-

“Being aggrieved by the order of the Commissioner of Income-tax (Appeals)-6, Mumbai (hereinafter referred to as the CIT(A)) had erred in upholding the action of the Assessing Officer, Wd 2(3)(4), this appeal petition is being submitted on the following grounds, which it is prayed may be considered without prejudice to one another.

1. *The Commissioner of Income-tax (Appeals)-6, Mumbai (hereinafter referred to as the CIT(A)) has erred in upholding the action of the Assessing Officer by making an addition of Rs. 7,53,25,000/- on the ground that following sums paid by the following two parties on behalf of the Appellant to LKM Trust, were not recorded in their books of account of the appellant and therefore the sum of Rs. 7,53,25,000/- was unexplained income of the Appellant u/s 69A of the Income Tax Act, 1961 :*

Sr. No.	Party	Amount
1	Vivita Ltd	5,96,25,000/-
2	Bonito Impex Private Ltd.	1,57,00,000/-
	Total	7,53,25,000/-

When

- a) Sec. 69A of the Income Tax Act, 1961 reads as under :

“Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income and the assessee offers no explanation about the nature and source of acquisition of the money, bullion jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year.”

For invoking provisions of Sec. 69A for making an addition on account of explained investments following conditions should be satisfied:

- i) *The assess should found to be owner of any money, bullion, jewellery or other valuable articles.*

AND

- ii) *Such money, bullion, jewellery or valuable article is not recorded in the books of account.*

AND

- iii) *The assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article.*

Or

- iv) *The explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory.*

The case of the appellant does not fall within the criteria mentioned herein above so far as :

- i) *The assessee was never found to be the owner of any money, bullion, jewellery or other valuable articles.
In fact, the addition has been made on the ground that M/s Vivita Ltd., and M/s Bonito Impex Private Ltd., made payment totalling to Rs. 7,53,25,000/- to M/s LKM Trust on behalf of the appellant.*
- (ii) *In fact, these payments were recorded in the books of account of the appellant and confirmed by M/s Vivita Ltd. and M/s Bonito Impex Pvt. Ltd.*
- (iii) *It was never the case of the Assessing Officer that no explanation was offered and in the assessment order he has not established as to why the explanations offered by the Appellant were found to be satisfaction.*

In the view of the above, the appellant contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the impugned addition made by the Assessing Officer was not at all justified in invoking the provisions of 69A of the Income Tax Act, 1961.

It was consistent plea of the appellant that the amounts paid by M/s Vivita Ltd., and Bonito Impex Private Ltd. On behalf of the appellant to M/s LKM Trust, by no stretch of imagination can be income of the appellant u/s. 2(24) of the Income Tax Act, 1961.

Such an addition made by the Assessing Officer in the Assessment Year 2007-08 was deleted by the CIT Appeal-6 vide his order dtd. 17.04.2012.

Thus, the onus that lay upon the Assessing Officer, while making such a huge addition was not at all discharged by him and therefore the addition needs to be deleted.

2. *The Appellant craves, leave to add, alter, amend or delete any of the grounds of this appeal at the time of hearing or at any other time as the circumstances of this appeal may require.”*

2. We may herein observe that the appeals filed by the assessee involves a delay of one day. The assessee had in his letter dated 31.05.2016 stated that the delay in filing of the appeals had occasioned due to non-availability of funds for paying the appeal fees and absence of staff for obtaining the details. We are of the considered view that though an appellant is expected to be vigilant as regards filing of an appeal within the stipulated time period, however, keeping in view the delay of one day in filing of the appeal in the backdrop of the facts leading to the same, we condone the same.

3. Briefly stated, the facts of the case are that the assessee company which is engaged in the business of trading of A.C. sheets had failed to file its return of income for A.Y 2005-06 under Sec. 139(1) of the Act. During the course of assessment proceedings in the case of the assessee for A.Y. 2007-08, it emerged that the assessee had admitted that three concerns, viz. (i) M/s Vivita Ltd.; (ii) M/s Bonito Impex Pvt. Ltd.; and (iii) Shell Mercantile Corporation Ltd. had made payments aggregating to Rs. 9,26,35,000/- on its behalf to five concerns, viz. (i) M/s Arihant Enterprises; (ii) M/s Vishal Enterprises; (iii) M/s Roots Trading; (iv) M/s Varun Corporation; and (v) M/s Rajguru Impex India Pvt. Ltd., either by cheques or by way of bearer instruments. On a perusal of the details, it stood revealed that out of the aggregate payments of Rs. 9,26,35,000/- an amount of Rs. 7,53,25,000/- pertained to the year under consideration, i.e. A.Y. 2005-06, as under :

Period	Vivita Ltd.	Bonito Impex Pvt. Ltd.	Total
April, 04-Mar,05	Rs. 5,96,25,000/-	Rs. 1,57,00,000/-	Rs. 7,53,25,000/-

The A.O on the basis of the aforesaid information reopened the case of the assessee and issued a notice under Sec. 148 of the Act. The assessee in response to the notice issued under Sec. 148 did not file any return of income, but on 18.03.2013 filed a letter along with a copy of its annual accounts for the period 01.04.2004 to 31.03.2005. It was claimed by the assessee that in view of loss suffered by it during the year under consideration, it had not filed its original return of income. The assessee further requested that the annual accounts which were being filed may be considered as those filed in response to notice under Sec. 148 of the Act.

4. The issue involved in the present appeal lies in a narrow compass. On the basis of the information that had surfaced during the course of the assessment proceedings for A.Y. 2007-08, the A.O called upon the assessee company to furnish details and documentary evidence with regard to payments made by M/s Vivita Ltd. (Rs. 5,96,25,000/-) and M/s Bonito Impex Pvt. Ltd. (Rs. 1,57,00,000/-) on its behalf. The assessee in its reply submitted that it had received amounts aggregating to Rs. 11,41,38,988/- from Lilavati Kirtilal Medical Trust (for short 'LKM' Trust) during the period spread over Financial Years 2001-02 to 2003-04 for procurement of medical equipments. The said amounts were thereafter advanced by the assessee to its associated companies for procuring the material. The assessee in order to drive home its contention that it was in receipt of the funds from LKM trust, as well as had advanced the same to its associate concerns in the preceding years, submitted before the A.O that an amount of Rs. 11,41,38,988/- formed part of the liabilities under the head 'Other Liabilities' as on 01.04.2004, as under :

Sr. No.	Party	Amount
1.	S U Radhakrishnani	2,100/-
2.	LKM Trust	11,41,38,988/-
	Total	11,41,41,088/-

It was further submitted by the assessee that the aforesaid amounts were advanced to its associate concerns in the preceding years, which stood reflected on the assets side under the head 'Loans and Advances' as on 01.04.2004, as under :

Sr. No.	Party	Amount
1.	Vivita Limited	6,58,85,000/-
2.	Sun Earth Ceramics Ltd.	1,57,00,000/-
3.	Nestler Limited	9,71,040/-
4.	Roofit Industries Ltd.	2,98,87,543/-
	Total	11,24,43,583/-

It was thus the claim of the assessee that the amount aggregating to Rs. 7,53,25,000/-, was as per its directions returned by its associate concerns to LKM trust or their nominees, as under :

Sr. No.	Party	Amount
1.	Vivita Limited	5,96,25,000/-
2.	Bonita Impex Pvt. Ltd.	1,57,00,000/-
	Total	7,53,25,000/-

5. The assessee in order to fortify the veracity of its aforesaid claim, took support of the fact that M/s Vivita Ltd, in the course of the assessment proceedings in the case of the assessee for A.Y. 2008-09, had in its reply dated 16.12.2009 furnished in response to a notice issued under Sec. 133(6) of the Act by the ITO-2(3)(4), confirmed the fact of making the above mentioned payment of Rs. 5,96,25,000/-

during the Financial Year 2004-05. On a similar footing, it was submitted by the assessee that a similar confirmation by M/s Bonito Impex Pvt. Ltd. (who had made the payments on behalf of M/s Sun Earth Ceramics Ltd.), dated 16.12.2009 confirming the fact of making such payment, was furnished in response to a notice under Sec. 133(6) issued by the ITO-2(3)(4) in the course of the assessment proceedings in the case of the assessee for the A.Y. 2008-09. It was thus the claim of the assessee that the amounts received as advance from LKM trust and further advanced to its associate concerns during the preceding years, as per the directions of the assessee were during the year under consideration directly repaid by the said associate concerns, viz. (i) M/s Vivita Ltd; and (ii) M/s Sun Earth Ceramics Ltd. (through its customer M/s Bonito Impex Pvt. Ltd.) to M/s LKM trust or its nominees and beneficiaries.

6. The A.O after deliberating on the contentions advanced by the assessee, was however not persuaded to subscribe to the same. It was observed by the A.O that it was only in the course of the assessment proceeding for A.Y. 2007-08, that it was noticed for the very first time that though certain payments were made by other entities on behalf of the assessee, but the said transactions had not been reflected in the books of account of the assessee company. Accordingly, such amounts were brought to tax in the hands of the assessee during the A.Y. 2007-08. It was observed by the A.O that though the CIT(A) while disposing the appeal of the assessee for A.Y. 2007-08 had upheld the view of the A.O that the said amounts were nothing but the income of the assessee company, but considering the fact that the said transactions did not take place in the previous year relevant to A.Y. 2007-08, had deleted the said additions. The A.O. being guided by the aforesaid observations of the CIT(A) recorded while disposing off the appeal of the assessee for A.Y. 2007-08, and further taking cognizance of the

fact that the payments made by M/s Vivita Ltd. (Rs. 5,96,25,000/-) and M/s Bonito Impex Pvt. Ltd. (Rs. 1,57,00,000/-) on behalf of the assessee were not recorded in the books of account of the assessee for the year under consideration i.e. A.Y. 2005-06, characterized the aggregate of the aforesaid payments of Rs. 7,53,25,000/- as the unexplained income of the assessee under Sec. 69A of the Act.

7. Aggrieved, the assessee assailed the order passed by the A.O before the CIT(A). The CIT(A) after deliberating on the facts of the case, keeping in view the fact that the genesis of the additions made in the hands of the assessee during the year under consideration i.e. A.Y. 2005-06, found its root in the assessment proceedings in the case of the assessee for A.Y. 2007-08, therefore, carefully perused the order of the A.O and that of his predecessor while disposing off the appeal of the assessee for the said year i.e. A.Y. 2007-08. It was gathered by the CIT(A) that in the course of the assessment proceedings for A.Y. 2007-08, the assessee though had shown 'Current Liabilities' of Rs. 1.75 crore from LKM trust, however, the latter had shown a balance of Rs. 13,43,93,988/- as recoverable from the assessee in its books of account. Since the balances did not tally, the A.O had called upon the assessee to reconcile the same. It was at this stage that though the assessee submitted before the A.O that it had made payments to various parties on behalf of LKM trust, as so advised, but could not substantiate its claim that the payments made to the various third parties were as per the advise/direction of the LKM trust. It was further gathered by the A.O that even LKM trust had also not confirmed of having issued any such direction or instruction to the assessee. The A.O in the backdrop of the aforesaid facts called upon the assessee to explain utilization of the money received from LKM trust. The assessee in its reply submitted that it had received an

amount of Rs. 14,21,93,988/- from LKM trust, which was utilized/paid to (i) Lilavati account; (ii) Nestler account; and (iii) Roofit account. However, the assessee could neither explain why the money was paid to the aforementioned three parties nor had it given any evidence to support the reason for making the payments. On further verifications made by the A.O during the assessment proceedings for A.Y. 2007-08, it stood revealed that the assessee had issued bearer cheques of Rs. 81,00,000/- and Rs. 1,01,50,000/- in the name of LKM trust. It was further gathered by the A.O that bearer cheques had been issued for all payments other than what had been confirmed by LKM trust. The A.O carried out necessary verifications and gathered that the bank statements of the assessee and the copies of cheques of Rs. 2,32,05,000/- issued by the assessee revealed that all the cheques were self cheques and monies had been withdrawn in cash. It was observed by the A.O that the payments made by the assessee could be broadly classified in three categories, viz. (1) payments made to unrelated parties; (2) payments made through bearer cheques; and (3) payments made in cash. The assessee denied any relationship with the various parties to whom the cheques were issued purportedly on behalf or at the behest of LKM trust, as well as failed to identify the genuineness and existence of the said entities. Interestingly, LKM trust also denied any connection with the entities to whom the assessee claimed to have made payments on behalf or at the behest of trust. The A.O in the backdrop of the aforesaid facts concluded that the payments to the tune of Rs. 2,80,55,000/- made by M/s Vesta Ltd. to the aforesaid unrelated parties was nothing but an attempt of the assessee to withdraw money through bank channels by using dubious tactics and means. As the assessee had not shown that it was possessing the cash balance to the extent of the amounts given to these parties or withdrawn by bearer cheques, therefore, the A.O

treated the said amount as unexplained cash holding/expenses not reflected in the books of account of the assessee and added the same to the latter's income for the year under consideration. Similar treatment was also accorded by the A.O to the money withdrawn by bearer cheques or claimed by the assessee to have been made in cash, either on behalf or at the behest of LKM trust. Alternatively, the A.O while framing the assessment for A.Y. 2007-08 was also of the view that the said amounts could also be added to the income of the assessee under Sec. 41(1) of the Act. It was thus in the backdrop of the aforesaid facts that the A.O while framing the assessment for AY. 2007-08 had made an addition of an amount of Rs. 9,26,35,000/- which was claimed by the assessee to have been paid by its associate concerns, viz. (i) M/s Vivita Ltd. (Rs. 6,58,85,000/-); (ii) M/s Bonito Impex Pvt. Ltd. (Rs. 1,57,00,000/-); and (iii) M/s Shell Mercantile Corporation Ltd. (Rs. 1,10,50,000/-), but not proved by the assessee, to the returned income of the assessee for A.Y. 2007-08.

8. The CIT(A) after deliberating at length on the aforesaid facts, as well as the facts as had emerged from the order of the A.O and that of the CIT(A) for A.Y. 2007-08, observed that though it was the claim of the assessee that it had directed M/s Vivita Ltd and M/s Sun Earth Ceramics Ltd. to make the payments to the nominees or beneficiaries of LKM trust at the latter's instance, however, no evidence could be placed on record regarding the instructions which were given by LKM trust to the assessee to repay the outstanding advance to the nominees of LKM trust, nor the complete details of the nominees, including the amount and mode of payment to the nominees was furnished either before him or the lower authorities. The CIT(A) further noticed that though it was claimed by the assessee that it had made payments to the nominees or beneficiaries of LKM trust, but LKM

trust had neither confirmed the repayment nor reduced the amount from the account of the assessee as appearing in its books of account. It was thus, in the backdrop of the aforesaid facts that the CIT(A) concluded that in the absence of any instruction or confirmation from LKM trust or its nominees, it was difficult to accept the contention of the assessee that the said amounts were towards repayment of the outstanding advance to LKM trust. Be that as it may, it was observed by the CIT(A) that the payments claimed by the assessee to have been made to certain unrelated parties on behalf of LKM trust were not supported by any evidence or supporting documents. The CIT(A) observed that neither the copy of the instruction of LKM trust nor confirmation of the nominees were at any stage submitted by the assessee. It was further gathered by the CIT(A) that the assessee had also not furnished the bank statements to show the mode of payments made to various parties, and how the said recipients made further payments to the alleged nominees or beneficiaries of LKM trust. It was thus observed by the CIT(A) that not only the assessee in compliance to the notice under Sec. 148 had failed to file its return of income, but rather, had also failed to place on record any supporting evidence/documents, therefore, no infirmity did emerge from the action of the A.O in treating the unsubstantiated payments of Rs. 7,53,25,000/- made by M/s Vivita Ltd. and M/s Bonito Impex Pvt. Ltd., which could not be proved to have been made to the nominees or beneficiaries of LKM trust and had in reality neither reached LKM trust or its nominees, as the undisclosed receipts of the assessee for the year under consideration. Rather, it was observed by the CIT(A) that not only the information given by the assessee of having made the payments to LKM trust or its nominees or beneficiaries was found to be false and unsubstantiated in the backdrop of the denial by LKM trust of having received any such amount, the concession of the

assessee that it was willing to reverse the entry in its books of account further fortified the fact that the assessee had raised a wrong claim of having made the payments in the account of LKM trust. It was further observed by the CIT(A) that as the payment of Rs. 7,53,25,000/- had not been recorded in the books of account of the assessee, nor the receipt of the said payments were confirmed by LKM trust, which as a matter of fact had declined that it had ever instructed or directed the assessee to make the payments to its beneficiaries or nominees, therefore, proved that it was the assessee who was the actual recipient of the money, and as such the additions were rightly made by the A.O in its hands under Sec. 69A of the Act. The CIT(A) also affirmed the applicability of the provisions of Sec. 41(1), for the reason that as the amounts received by the assessee was not a simpliciter loan, but a 'trading liability', which in the backdrop of the willingness of the assessee to reverse the entry proved that the liability did no longer existed during the year under considerations. The CIT(A) on the basis of his aforesaid observations dismissed the appeal of the assessee.

9. The assessee being aggrieved with the order of CIT(A) had carried the matter in appeal before us. We find that though the assessee was duly intimated of the date of hearing of the appeal, but the latter had neither put up an appearance, nor any application seeking an adjournment had been filed before us. We thus in the backdrop of the aforesaid facts are constrained to dispose off the appeal in terms of Rule 24 of the Appellate Tribunal Rules, 1963, after hearing the respondent revenue and perusing the orders of the lower authorities.

10. The Learned Departmental Representative (for short 'D.R.') relied on the orders of the lower authorities. It was submitted by the Ld. D.R. that as the claim of the assessee of having made the payments to the beneficiaries or nominees of LKM trust was disproved, therefore, the

lower authorities had rightly concluded that as the assessee was the actual beneficiary of the amounts under consideration, the same was liable to be assessed as its income under Sec. 69A of Act.

11. We have heard the Ld. D.R. and perused the orders of the lower authorities. We find that it is a matter of an undisputed fact borne from the records, that the assessee had claimed that an amount of Rs. 7,53,25,000/- was paid to the beneficiaries or nominees of LKM trust, as per the latter's instructions and directions. We may herein observe that though at the first blush, taking cognizance of the fact that the assessee had received an amount aggregating to Rs. 11,41,38,988/- from LKM trust not during the year under consideration, but in the preceding year/years, which during the said preceding years was advanced by the assessee to its associate concerns, viz. (i) M/s Vivita Ltd. (Rs. 6,58,85,000/-); (ii) M/s Sun Earth Ceramics Ltd. (Rs. 1,57,00,000/-); (iii) M/s Nestler Ltd. (Rs. 9,71,040/-); and (iv) M/s Roofit Industries Ltd. (Rs. 2,98,87,453/-), therefore, on making of a direct repayment of part of the amount by two of the said concerns, viz. (i) M/s Vivita Ltd. (Rs. 5,96,25,000/-); and (ii) M/s Sun Earth Ceramics Ltd. (Rs. 1,57,00,000/-) (through its customers M/s Bonito Impex Pvt. Ltd.), as per the instructions of the assessee company to the beneficiaries or nominees of LKM trust, as per the latter's behest, no infirmity did emerge from the transaction which appeared to be a simple transaction of repayment of an outstanding advance to a party, through the associate concerns. However, as the facts of the case unfolded both in the course of the proceedings for A.Y. 2007-08 and that for the year under consideration, i.e. A.Y. 2005-06, it emerged that no payments to the unrelated concerns were made at the instance or behest of LKM trust. We find that not only LKM trust had not credited the account of the assessee in its books of account and reduced the amount claimed by the assessee to have been paid to the

beneficiaries or nominees of LKM trust, but rather, no documentary evidence substantiating the claim of the assessee that the payments to the said unrelated concerns were made at the directions or behest of LKM trust had been placed on record, till date. Rather, most surprisingly the assessee had failed to substantiate the genuineness and existence of the unrelated parties to whom the substantial payments were claimed by it to have been made on behalf of or at the behest of LKM trust. The assessee as a matter of fact had even failed to give the complete details of the nominees or beneficiaries along with the amount and mode of payments made to them. We may herein observe that the aforesaid facts and the conduct of the assessee clearly reveals the falsity of its claim that the payments had been made by the associate concerns, viz. (i) M/s Vivita Ltd. ; and (ii) Sun Earth Ceramics Ltd. (through its customer M/s Bonito Impex Pvt. Ltd.), to the beneficiaries or nominees of LKM trust. We are of the considered view that it can safely be concluded that the payments made by the said concerns had been appropriated/diverted by the assessee for its own use, in the guise of the aforesaid alleged transactions. Our aforesaid conviction is further supported from the observations of the A.O recorded in the course of the assessment proceedings in the case of the assessee for A.Y. 2007-08. We find that in the period relevant to A.Y. 2007-08, as observed by the A.O, the assessee had not only restricted its claim of having made payments to certain unrelated parties as payments to the beneficiaries or nominees of LKM trust, but rather, had gone a step further and in the garb of having made payments to beneficiaries or nominees of LKM trust, had also claimed to have made certain payments through bearer cheques and in cash to the beneficiaries or nominees of LKM trust. We find that LKM trust had also clearly declined of having received any such payments through bearer cheques or in cash from the assessee. It was

thus, in the backdrop of the aforesaid facts that the A.O observed that the money withdrawn by bearer cheques or claimed by the assessee to have been paid in cash, was as a matter of fact an attempt by the assessee to withdraw money through bank channels by using dubious tactics and means, as the same in reality had neither ever been paid to LKM trust or its beneficiaries or nominees. We may herein observe that the claim of the assessee that M/s Vivita Ltd. and M/s Bonito Impex Pvt. Ltd. had vide their respective replies, dated 16.12.2009, filed in response to the notices issued to them under Sec. 133(6) in the course of the assessment proceedings for A.Y. 2008-09, confirmed the fact of having made the payments as per the instructions of the assessee company, would not come to the rescue of the assessee in context of the issue under consideration. We find that the factum that the aforesaid concerns i.e. M/s Vivita Ltd. and M/s Bonito Impex Pvt. Ltd. had made payments to certain unrelated parties is not in doubt, but rather, the fact that the payments to the said unrelated parties which are claimed by the assessee as payments made to the beneficiaries or nominees of LKM trust, had not only been declined by the latter, but also could not be proved by the assessee on the basis of any independent material. We may further observe that the claim of the assessee that LKM trust due to a dispute with the assessee had declined that the payments to the said unrelated parties were made at its behest or on its behalf, could have advanced the case of the assessee, but however, we are afraid to observe that now when the assessee had failed to place on record any material which could evidence the fact that the payments to the said concerns were made as per the instructions or dictates of LKM trust, therefore, the said claim of the assessee cannot be accepted. Rather, we are also not impressed by the claim of the assessee that now when LKM trust has declined that the payments were made to its beneficiaries or nominees, the

entries in the books of accounts may be reversed, which would increase the liability side as well as the assets side by the said amount. We are unable to comprehend that how such a contention could have been advanced by the assessee, if factually payments to the unrelated parties were made at the behest or on the behalf of LKM trust to its beneficiaries or nominees. We are of the considered view that the CIT(A) had rightly concluded that the assessee in the garb of having made payments to beneficiaries or nominees of LKM trust, had as a matter of fact diverted/appropriated the amounts outside its books of accounts for its own benefit. We are of the considered view that in the backdrop of the aforesaid facts, now when it can safely or rather inescapably be concluded that the monies from the aforementioned parties, viz. (i) M/s Vivita Ltd.; and (ii) M/s Bonito Impex Pvt. Ltd. aggregating to Rs. 7,53,25,000/- had been received by the assessee in the garb of the aforesaid unrelated parties and the same is not found recorded in its books of account, therefore, the A.O had rightly concluded that as the assessee was found to be the 'Owner' of 'money' to the said extent, thus the said amount was liable to be assessed as unexplained income in the hands of the assessee under Sec. 69A of the Act. We thus finding ourselves persuaded to be in agreement with the view taken by the CIT(A), uphold his order and sustain the addition of Rs. 7,53,25,000/- made in the hands of the assessee.

12. The appeal of the assessee is dismissed in terms of our aforesaid observations.

ITA No. 3764/Mum/2016
A.Y. 2006-07

13. We shall now advert to the appeal filed by the assessee company for AY. 2006-07. The assessee assailing the order of the CIT(A) had raised before us the following grounds of appeal:

“Being aggrieved by the order of the Commissioner of Income-tax (Appeals)-6, Mumbai (hereinafter referred to as the CIT(A)) had erred in upholding the action of the Assessing Officer, Wd 2(3)(4), this appeal petition is being submitted on the following grounds, which it is prayed may be considered without prejudice to one another.

- 1. The Commissioner of Income-tax (Appeals)-6, Mumbai (hereinafter referred to as the CIT(A)) has erred in upholding the action of the Assessing Officer by making an addition of Rs. 1,73,10,000/- on the ground that following sums paid by the following two parties on behalf of the Appellant to LKM Trust, were not recorded in their books of account of the appellant and therefore the sum of Rs. 1,73,10,000/- was unexplained income of the Appellant u/s 69A of the Income Tax Act, 1961 :*

Sr. No.	Party	Amount
1	Vivita Ltd	62,60,000/-
2	Bonito Impex Private Ltd.	1,10,50,000/-
	Total	1,73,10,000/-

When

- b) Sec. 69A of the Income Tax Act, 1961 reads as under :

“Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income and the assessee offers no explanation about the nature and source of acquisition of the money, bullion jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year.”

For invoking provisions of Sec. 69A for making an addition on account of explained investments following conditions should be satisfied:

- i) The assess should found to be owner of any money, bullion, jewellery or other valuable articles.*

AND

- ii) *Such money, bullion, jewellery or valuable article is not recorded in the books of account.*

AND

- iii) *The assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article.*

Or

- iv) *The explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory.*

The case of the appellant does not fall within the criteria mentioned herein above so far as :

- i) *The assessee was never found to be the owner of any money, bullion, jewellery or other valuable articles.*

In fact, the addition has been made on the ground that M/s Vivita Ltd., and M/s Shell Mercantile Corporation Ltd., made payment totalling to Rs. 1,73,10,000/- to M/s LKM Trust on behalf of the appellant.

- (ii) *In fact, these payments were recorded in the books of account of the appellant and confirmed by M/s Vivita Ltd. and M/s Mercantile Corporation.*

- (iii) *It was never the case of the Assessing Officer that no explanation was offered and in the assessment order he has not established as to why the explanations offered by the Appellant were found to be satisfaction.*

In the view of the above, the appellant contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the impugned addition made by the Assessing Officer was not at all justified in invoking the provisions of 69A of the Income Tax Act, 1961.

It was consistent plea of the appellant that the amounts paid by M/s Vivita Ltd., and M/s Shell Mercantile Corporation Ltd. On behalf of the appellant to M/s LKM Trust, by no stretch of imagination can be income of the appellant u/s. 2(24) of the Income Tax Act, 1961.

Such an addition made by the Assessing Officer in the Assessment Year 2007-08 was deleted by the CIT Appeal-6 vide his order dtd. 17.04.2012.

Thus, the onus that lay upon the Assessing Officer, while making such a huge addition was not at all discharged by him and therefore the addition needs to be deleted.

2. *The Appellant craves, leave to add, alter, amend or delete any of the grounds of this appeal at the time of hearing or at any other time as the circumstances of this appeal may require.”*

14. Briefly stated, the facts of the case are that the assessee had e-filed its return of income on 25.10.2007, declaring loss of Rs. 7,786/-. The return of income filed by the assessee was processed as such under Sec. 143(1) of the Act. After recording the reasons to believe a notice under Sec. 148 of the Act was issued to the assessee company on 28.03.2012, calling upon it to furnish its return of income in response to the same. The assessee in compliance to the notice under Sec. 148 requested that its original return of income filed on 25.10.2007 be treated as the return filed in response to notice under Sec. 148.

15. During the course of the assessment proceedings in the case of the assessee for A.Y. 2007-08, it emerged that an amount of Rs. 1,73,10,000/- pertaining to A.Y. 2006-07 was paid by two concerns, viz. (i) M/s Vivita Ltd. (Rs. 62,60,000/-); and (ii) M/s Shell Mercantile Corporation Ltd. (Rs. 1,10,50,000/-). The A.O observed that the aforesaid payments had not been recorded in the books of account of the assessee. It was further gathered by the A.O that the said payments made on behalf of the assessee by the aforesaid entities were earlier brought to tax in the hands of the assessee during the A.Y. 2007-08. The additions made by the A.O in A.Y. 2007-08 were principally upheld by the CIT(A), who concluded that the said amounts were nothing but the income of the assessee company. However, as the said transactions had not taken place during the year relevant to A.Y. 2007-08, therefore, the same were deleted by the CIT(A) while

disposing off the appeal of the assessee for A.Y. 2007-08. The A.O on the basis of his aforesaid observations made an addition of Rs. 1,73,10,000/- as the unexplained income of the assessee under Sec. 69A of the Act.

16. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) did not find favour with the contentions advanced by the assessee and upheld the additions made by the A.O.

17. The assessee being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. We find that as the facts and the issue involved in the present appeal remains the same, as were there before us in the appeal of the assessee for A.Y. 2005-06, therefore, our order passed in context of the issue under consideration while disposing off the appeal of the assessee for A.Y. 2005-06 in ITA No. 3763/Mum/2016, shall apply *mutatis mutandis* to the appeal of the assessee for the year under consideration i.e. ITA No. 3764/Mum/2016 for A.Y. 2006-07. The appeal of the assessee for A.Y. 2006-07 is dismissed in terms of our aforesaid observations.

18. The appeal of the assessee is dismissed.

19. The appeals of the assessee for A.Y. 2005-06 in ITA No. 3763/Mum/2016 and for A.Y. 2006-07 in ITA No. 3764/Mum/2016 are dismissed in terms of our aforesaid observations.

Order pronounced in the open court on 25/05/2018

Sd/-

(Shamim Yahya)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक 25.05.2018

Ps. Rohit

Sd/-

(Ravish Sood)

JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

**आयकर अपीलीय अधिकरण, मुंबई / ITAT,
Mumbai**