

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI
BEFORE SHRI G.S.PANNU, AM AND SHRI RAVISH SOOD, JM**

ITA No.3624/Mum/2013
(निर्धारण वर्ष / Assessment Years:2009-10)

M/s Alaska India Marketing Kesar Shopping Centre, Shop No. 58, Ground Floor, Sector-3, Charkop, Kandivali (West), Mumbai-400 067	बनाम/ Vs.	Income Tax Officer, Ward 25(3)(3), C-11, 3 rd Floor, Pratyaksh Kar Bhavan, Bandra Kurla Complex, Bandra (East), Mumbai - 400 051
स्थायी लेखा सं./जीआइआर सं./PAN No. AAPFA2927B		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri B.V. Jhaveri, A.R
प्रत्यर्थी की ओर से/ Respondent by	:	Shri Rajesh Kumar Yadav, D.R

सुनवाई की तारीख / Date of Hearing	:	15.03.2018
घोषणा की तारीख / Date of Pronouncement	:	30.05.2018

आदेश / O R D E R

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-35, Mumbai, dated 07.03.2013, which in itself arises from the order passed by the A.O under Sec. 143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 26.12.2011 for AY. 2009-10. The assessee assailing the order of the CIT(A) had raised before us the following grounds of appeal :

- “1) *The Commissioner (Appeals) erred in confirming the addition of Rs.4,91,83,074/- to the income of the assessee firm u/s. 41(1) of the Act on the ground that the assessee firm has failed to prove the genuineness of the creditors shown in its balance sheet and therefore, the said liability has ceased to exist.*
- 2) *The Commissioner (Appeals) erred in observing as following:
“It may further be stated that onus is cast on the appellant to prove that all the sundry creditors claimed by it in the balance sheet were genuine and not fictitious; their transactions were the real and not a make belief story. From this angle the appellant has miserably failed to substantiate the claim of genuine sundry creditors reflected in the balance sheet and therefore this also attracts section 41(1) of the I.T. Act, 1961 according to which, such liabilities, which cannot be prove by the appellant to be genuine, can be treated as ceased liability and liable to be taxed. Accordingly, I would like to invoke section 41(1) of the I.T. Act, 1961 and uphold the addition by the AO amounting to Rs.4,25,39,142/-, because certain expenses which the AO has allowed is not being interfered with.”*
- 3) *The Commissioner (Appeals) failed to appreciate that the assessee firm had received 25% of the consideration of the product packet as a part consideration for selling the products and the products have been sold to most of the parties in the next previous year relevant to A.Y. 2010-11 and therefore, the said part consideration being the booking amount cannot be taxed as an income of the assessee firm of the year under consideration more so when the assessee firm had sold the products and recorded both purchase and sale of the products in its books of account for the year ended 31st March, 2010.*
- 4) *The Commissioner (Appeals) failed to appreciate that though the booking amount was shown as ‘non refundable’ in the brochure but in fact the assessee firm has refunded the said booking amount to various parties who could not arrange the balance funds or for any reason in the year ended 31st March, 2010 and therefore, the term of ‘non refundable booking amount’ was not adhered to by the assessee firm.*
- 5) *The order of the Commissioner (Appeals) is bad-in-law and without jurisdiction.*
- 6) *Your appellant craves leave to add, amend, delete and alter the aforesaid ground of appeal.”*

2. Briefly stated, the facts of the case are that the assessee firm which is stated to be in the business of Multi Level Marketing (for short 'MLM') had filed a belated return of income for AY. 2009-10 on 25.03.2010, declaring total income at Rs. nil. The case of the assessee was thereafter selected for scrutiny assessment under Sec. 143(2).

3. During the course of the assessment proceedings, it stood revealed that the assessee firm which had commenced its business w.e.f 29.09.2008 was dissolved during AY. 2010-11. The assessee was taken over by a company i.e Alaska Ideal Marketing Pvt. Ltd., in which all the partners of the erstwhile firm were the only shareholders/directors. A perusal of the balance sheet of the assessee firm revealed negative balance of Rs.1,43,00,127/- in the partners capital account; sundry creditors of Rs.4,91,83,074/- and outstanding liabilities of Rs.3,94,284/- on the liability side, while for fixed assets: Rs.5,43,605/-; loans and advances: Rs.63,94,585/-; and cash and bank balance of Rs.3,47,33,625/- stood reflected on the asset side. The A.O noticed that a person aspiring to be a member of the MLM business of the assessee firm had to purchase a product package, the minimum of which was priced at Rs.20,000/- (and higher versions in multiples eg. Regular Rs.20,000/-, Classic Rs.40,000/-, Premium Rs.80,000/-, Silver Rs.1,60,000/-, Gold Rs.3,20,000/- and Platinum Rs.6,40,000/-). A person aspiring to be a member of the MLM business had an option to pay 25% of the total package as booking amount. Thus, a person who had opted for a product package of Rs.20,000/- was required to pay a booking amount of Rs.5000/- i.e. 25% of the total package price. The A.O further gathered from a perusal of the prospectus that the aforesaid initial amount received by the assessee was a non-refundable advance towards booking of the product package, while for the balance 75% was payable at the time of product purchase. The assessee during the course of the assessment proceedings placed on record a list of the members, a perusal of which revealed that all the contributions received by the assessee were towards initial contributions [totalling to creditors balance of Rs.4.91 crores shown in the balance sheet]. As the assessee during the

year under consideration had not procured any products, hence it was quite likely that neither of the member would have paid an amount more than the initial booking amount i.e 25% of the type of package. The assessee also produced before the A.O some of the purchase bills in respect of the goods which were procured by it in the immediately succeeding year i.e AY. 2010-11, as well as self-supporting vouchers substantiating delivery of goods in the succeeding year. However, the A.O was unable to comprehend that as to why the amount of Rs.4.91 crores which represented non-refundable booking amounts, was shown by the assessee as creditors/or advances received. The A.O further observed, that the profit and loss account of the assessee also revealed a contrasting picture. It was noticed by him that as against the total credits in the Profit and loss account of Rs.2,62,961/- towards stationary charges recovered, the assessee had booked huge expenses aggregating to Rs.96,06,893/-, resulting in claim of loss of Rs.66,43,932/-. The A.O noticed that as admitted by the assessee, the margin on the products in its MLM business was very high, as under:-

Rings	49%	[Margin on selling price]
Ear rings	51%	
Pendants	51%	
Bangles	57%	
Necklace	47%	

4. On the basis of his aforesaid deliberations, the A.O held a conviction that as the assessee firm in its MLM business had to pay commission to various members, hence the initial contributions received from the members could not be characterised as advances, but were to be credited as its income in the Profit and loss account. The A.O observed that every time when a new member joined in lower chain, he would bring in more contribution, out of which only a fraction of the same had to be shelled out by the assessee towards commission. Thus, the A.O was of the view that the logic of characterising the initial contributions of Rs.4,91,83,074/- received by the assessee as creditors, did not merit acceptance. The A.O after perusing the capital accounts of the partners observed that the partners had substantially overdrawn their respective accounts. On the basis of his aforesaid deliberations, the A.O concluded that in the backdrop of the

aforesaid facts, the assessee remained under a statutory obligation to have recognized the initial contributions of Rs. 4,91,83,074/- as its revenue receipts in its profit and loss account for the year under consideration.

5. During the course of the assessment proceedings, it was further observed by the A.O that the shareholders in the company, viz. Alaska Ideal Marketing Pvt. Ltd., which as claimed by the assessee had taken over the business of the assessee firm with all its liabilities in the year A.Y. 2010-11, comprised of the same persons who were the partners in the assessee firm, viz. M/s Alaska India Marketing, as under:

Sr. No.	Alaska India Marketing (assessee)		Alaska Ideal Marketing Pvt. Ltd	
1.	Pradeep Kr. Sahu	14%	1400 shares of Rs.10 each	14%
2.	Himmat R. Singh	30%	2900 shares of Rs.10 each	29%
3.	Anand Kr. Baranwal	14%	1400 shares of Rs.10 each	14%
4.	Dinanath Kumar	14%	1400 shares of Rs. 10 each	14%
5.	Tajinder Singh	14%	1400 shares of Rs.10 each	14%
6.	Surendra Kumar Pandey	14%	1400 shares of Rs. 10 each	14%
7.	Shri Mayur K. Mody	0%	100 shares of Rs.10 each	1%

Still further, as admitted by the major stake holder in the assessee firm i.e. Shri Himmat Singh, it was noticed by the A.O that neither the company i.e. Alaska Ideal Marketing Pvt. Ltd. nor the assessee firm, had for A.Y 2010-11, either filed its return of income or got its accounts audited. On the basis of his aforesaid deliberations, the A.O revised the Profit and loss account of the assessee firm under consideration and after crediting the non-refundable booking amount of Rs.4,91,83,074/-, viz. 25% of the product package which was stated by the assessee to have been received from its customers during the year under consideration, worked out the net profit income of the assessee at Rs.4,25,39,142/-.

6. Aggrieved, the assessee assailed the order passed by the A.O in appeal before the CIT(A). The CIT(A) during the course of the appellate proceedings admitted certain additional documents which were furnished by the assessee before him under Rule 46A of the Income Tax Rules, 1963. As the documents were for the very first time filed with the CIT(A), he therefore called for a remand report from the A.O. The AO was directed to verify the

genuineness of the parties and the transactions under consideration by examining the parties from whom amounts as low as Rs.5000/- to quite a few thousands/ lacs were claimed by the assessee to have been received. In order to facilitate the aforesaid verifications, the A.O was directed to issue notices under Sec. 131 to the relevant parties or gather information and confirmations from them under Sec. 133(6) of the Act. The A.O was also directed to obtain the orders passed by the VAT authorities in the case of the assessee.

7. The A.O in his remand report filed with the CIT(A), brought to his notice that the assessee who was directed to furnish certain specific details had deliberately delayed filing of the same. It was brought to the notice of the CIT(A) that a perusal of the huge booklet submitted by the assessee, revealed the names and addresses of about 7000 to 8000 members and the amount received by the assessee from them during the year under consideration, viz. A.Y 2009-10. The A.O keeping in view the time constraint, carried out test check verifications and issued 143 notices under Sec. 133(6) to various investors (out of the list given by the assessee). Out of total 143 notices issued under Sec. 133(6), 42 notices were returned unserved. In 16 cases replies were received from the investors, out of which 7 persons had stated to have received the due benefits from the assessee company. The A.O stated in his report that the replies from the remaining 9 persons revealed varying replies, viz. (i).they had received part of the amount out of the amount invested; (ii). neither received any money nor any product; and (iii). that no person by the said name was available at the said address. As regards obtaining of the copies of the VAT order as directed by the CIT(A), it was stated by the A.O that though a letter was filed with the competent authority, but no reply was received till date.

8. The CIT(A) made available a copy of the remand report to the assessee. The assessee in his rejoinder to the aforesaid report filed by the A.O, submitted that a perusal of the same revealed that the investors were genuine and the amounts were received by it for promoting its products and creating a marketing chain. The assessee taking support of the replies filed

by certain investors that they had received the products in the succeeding year, submitted that the same duly proved that the sales of the product in context of the moneys collected during the year under consideration, could not be related to the year under consideration. Still further, it was the claim of the assessee that the replies filed by the investors clearly revealed that the assessee firm was pursuing the marketing chain and providing returns to its members. The assessee further took support of the fact that neither of the members had denied of having deposited money to become members in the MLM business of the assessee. It was further stated by the assessee that the VAT returns filed by the company, viz. Alaska Ideal Marketing Pvt. Ltd. which had taken over the business of the firm, proved to the hilt that sales had taken place in the immediately succeeding year. As regards the observations recorded by the A.O that certain persons had not furnished any reply to the letter issued to them under Sec.133(6), it was stated by the assessee that the A.O had whimsically restricted his verifications in respect of a limited number of investors. The assessee further rebutting the observations of the A.O, submitted that the reason for no response on the part of the investors could also safely be related to the fact that not only the language used in the letters issued by the A.O under Sec. 133(6) was vague, but also the fact that as majority of the members who were residing in rural areas dreaded letters received from the income tax department, thus for the said reason might not have replied back.

9. The CIT(A) after deliberating on the facts of the case in the backdrop of the remand report filed by the A.O and the contentions advanced by the assessee, observed that the assessee had miserably failed to substantiate the genuineness of the sundry creditors reflected in its balance sheet. The CIT(A) while concluding as hereinabove, was of a firm conviction that the onus to prove that sundry creditors shown by the assessee in its balance sheet were genuine and the transactions carried out with them were real and not an eyewash, however, had failed to discharge the said onus. The CIT(A) on the basis of his aforesaid observations upheld the addition of Rs.4,25,39,142/- made by the A.O by characterising the amounts received

from the investors as the income of the assessee. Alternatively, the CIT(A) was also of the view that as the existence of the liability in respect of the said investors could not be proved by the assessee, hence the said amount could also be brought to tax as a ceased liability under Sec.41(1) of the Act. On the basis of his aforesaid observations the CIT(A) dismissed the appeal of the assessee.

10. The assessee being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The assessee had filed an application seeking admission of certain documents compiled as 'Volume II', as additional evidence. It was submitted by the Id. Authorized Representative (for short 'A.R') for the assessee that the said documentary evidence, viz. the details of sale of goods, description of the goods, date of sale, invoice number, commission paid to each of the members, details of jewellery purchased along with invoices of the supplier parties, copies of VAT returns for the period June 2009 to 31st March, 2010 and sample copies of the sale invoices issued to the members of delivery of the jewellery as per MLM scheme had a strong bearing on the issue under consideration and established beyond any scope of doubt the genuineness of the investors and the transactions carried out by the assessee with them during the year under consideration. It was submitted by the Id. A.R that as the said documents could not be furnished during the course of the proceedings before the lower authorities, hence liberty was sought for placing on record the same by way of additional evidence. The Id. A.R explaining the reasons as to why the said documents could not be filed with the lower authorities, submitted that due to financial crisis in the business of the assessee firm/company, certain bickering had emerged between one of the directors of M/s Alaska Idea Multi Marketing Pvt. Ltd., namely Mr. Mayur Mody who was in charge of the jewellery business and was in possession of the office premises at Wadala, and the other director i.e. Mr. Himmat Singh. It is stated by the assessee that as Mr. Mayur Mody had withheld all the aforesaid papers and documents on the basis of which it could be proved that products were sold by the company in the subsequent period and referral commission was paid to the members,

therefore, the same could not be filed before the lower authorities. It was further submitted by the Id. A.R that only after the culmination of the proceeding before the lower authorities that Mr. Himmat Singh after lots of persuasion was able to convince Mr. Mayur Mody to part with the aforesaid documents, so that the case of the assessee firm could be properly placed before the Tribunal. The Id. A.R submitted that as the aforesaid documents which goes to the very root of the issue under consideration, were only after lots of persuasion received from Mr. Mayur Mody in the month of November, 2017, hence the same had been compiled as Volume II comprising of Pages 36 to 329 and had been filed by way of additional evidence before the Tribunal. It was stated by the Id. A.R that as the documents placed on record by way of additional evidence proves to the hilt certain material aspects which will have a strong bearing on the issue under consideration, viz. (i) that substantial number of members had purchased the products of the assessee firm and had earned referral commission and other rewards in the succeeding year; (ii) purchase of jewellery was made by the assessee from M/s Josh Jewellers (India) Pvt. Ltd. for an amount of more than Rs.4 crore in the succeeding year; and (iii) the products were delivered to the members by the firm/company in the said subsequent period, therefore, the same in all fairness be admitted. The Id. A.R further submitted that as the said documents which had been filed before the Tribunal by way of additional evidence was never there before the A.O, thus the matter may be restored to the A.O for fresh adjudication after considering the same. Per contra, the Id. Departmental Representative (for short 'D.R') objected to the admission of the additional evidence.

11. We have heard the authorized representatives for both the parties, in context of the issue of admission of the aforesaid additional evidence filed by the assessee before us for the very first time. We have deliberated at length on the issue under consideration and find that our indulgence in the present appeal had been sought as regards adjudicating the genuineness of the investors and the transactions carried out by the assessee with them during the year under consideration. We have perused the documentary

evidence which have been furnished by the assessee during the course of hearing of the appeal before us, which comprises of the following documents:

Sr. No.	Particulars	Page No.
1.	Details of sundry creditors furnished in the course of the assessment proceedings to which further details of sale of goods, description of the goods sold, date of sale, invoice number and the commission paid to each of the member is audited and hence information is given for the first time before the Hon'ble Tribunal.	36-263
2.	Details of TDS paid on commission during the period from January to March, 2009, April to June, 2009 and July to September, 2009 along with the TDS Returns in Form 26Q filed for the period from January to March, 2009	264-272
3.	Copies of proof of filing the TDS Returns for the period from April to June, 2009 and July to September, 2009	273-290
4.	Details of jewellery purchases along with the ledger account and tax invoices issued by M/s Joss Jewels (India) Pvt. Ltd.	291-308
5.	Details of VAT Returns filed enclosing copies of the Returns for the period from June, 2009 to 31 st March, 2010	309-316
6.	Details of purchase of suit lengths along with the purchase bills which were sold to the members in the subsequent period.	317-320
7.	Challan of receipt of jewellery from M/s Josh Jewels (I) P. Ltd. by Mr. Mayur Mody.	321-325
8.	Sample copies of the sales invoice issued to the members on delivery of the jewellery as per the scheme.	326-329

We have given a thoughtful consideration and are of the view that the aforesaid documents placed on record before us by the assessee as additional evidence will have a bearing on the adjudication of the issue under consideration. We are further persuaded to be in agreement with the ld. A.R that there were sufficient reasons beyond the control of the assessee, due to which the said documents could not be filed before the lower authorities. We thus, admit the additional evidence filed by the assessee before us. However, as these documents were not there before the A.O, therefore, in all fairness we restore the matter to the file of the A.O for fresh adjudication after considering the same. Needless to say, the A.O shall during the course of the set aside proceedings afford reasonable opportunity of being heard to the assessee. The matter is thus set aside to the file of the A.O for fresh adjudication in terms of our aforesaid observations.

13. The appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 30.05.2018

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER
मुंबई Mumbai; दिनांक 30.05.2018
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

