

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "SMC", MUMBAI

BEFORE SHRI A.K. GARODIA, ACCOUNTANT MEMBER

ITA No. 3017/Mum/2018
Assessment Year : 2010-11

Smt. Ritu Kamal Singhal, 203A, A-Wing, Mithila Apartment, J.B. Nagar, Andheri-West, MUMBAI [PAN : AAKPB1532A]	Vs.	Income Tax Officer-24(3)(4), MUMBAI
(Appellant)		(Respondent)

Appellant By : Shri Vimal Punamiya, AR
Respondent By : Shri Vijay Kumar Soni, DR

Date of Hearing : 28-01-2019	Date of Pronouncement : 01-02-2019
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ORDER

This appeal is filed by the assessee, which is directed against the order of the Ld. Commissioner of Income Tax (Appeals)-36, Mumbai, dated 08-02-2018 for the A.Y.2010-11.

2. The grounds raised by the assessee are as under:

"1. The learned Commissioner of Income Tax (Appeal) has erred in adding genuine unsecured loan amounting to Rs. 20,00,000/- as unexplained fund and added in the income of the appellant.

2. The learned Commissioner of Income Tax Appeal erred in impugned addition and framing the impugned order without

considering the submission/documentary evidence provided to prove the genuineness of the transaction.

3. The appellant craves to add, amend or alter the grounds of appeal at the time of or before the hearing of appeal”.

3. Learned AR of the assessee submitted that on pages 10 to 13 of the paper book is the copy of reply of the assessee dated 02.02.2016 filed with the A.O. being reply to the show cause notice dated 02.02.2016. In particular, my attention was drawn to Para 9 of the same and it was pointed out that the assessee made a request to provide an opportunity of cross examination of any party whose statement was recorded at the back of the assessee. He placed reliance on the Judgment of Hon.ble apex court rendered in the case of Kishan chand Chellaram vs. CIT [125 ITR 713] in support of this contention that if an opportunity of cross examination of any party whose statement was recorded at the back of the assessee is not provided to the assessee, such statement cannot be used against the assessee. He submitted a copy of written submissions and made a request that the present appeal be decided after considering the arguments made by him and the written submissions. Ld. DR for the Revenue supported the order of the Ld. CIT (A).

4. First I reproduce the written submissions filed by the learned AR of the assessee. The same are as under:-

> *The Appellant has taken a unsecured Loan from M/s. Tanika Commodities Pvt. Ltd. amounting to Rs, 20,00,000/- during the assessment year 2010-11, Tine said unsecured loan was repaid in subsequent year.*

> *At the outset it is submitted that Learned Assessing Officer has ignored following vital facts which are outlined as under:*

o *The Unsecured Loan was received by the appellant through normal banking channels / account payee cheque's only. Following documents were submitted proving the Genuineness of the transaction, Identity of the lender and Creditworthiness of the investor at the time of assessment of the appellant, (please refer the said paper book)*

- *Copy of ITR Acknowledgement of lender M/s. Tanika Commodities Pvt. Ltd. for the A.Y. 2010-11 (Page No.27)*
- *Ledger Copy of Ritu Singhal in the books of M/s. Tanika Commodity (P) Ltd. for the A.Y.2010-11 (Page No.28)*
- *Loan Confirmation received from the lender M/s. Tanika Commodities Pvt., Ltd.(Page No. 29-30)*
- *Copy of Relevant Bank Statement of the lender M/s. Tanika Commodities Pvt. Ltd.(Page No.31-32A)*
- *The Learned Assessing Officer had heavily relied on the statement of Shri Bhanwarlal Jain. These statements were recorded at the back of the appellant. Further the learned assessing officer has not provided the statement of Shri Bhanwarlal Jain this statement has been made the basis of addition. The request to provide full statement of Shri Bhanwarlal Jain was not fulfilled by the Learned Assessing officer.*
- *Only on the basis of alleged statement recorded of the Third party it cannot be inferred that the Unsecured Loan taken by the Appellant was in the form of an accommodation entry.*

- *It was alleged that from various documents found during the search proceeding u/s. 132 in the case of Shri Bhanwarlal Jain or his so alleged associate companies. Thus on the basis of such allegation the Assessing Officer has made addition of unsecured Loan amounting to Rs. 20,00,000/- without verifying whether M/s. Tanika Commodities Pvt. Ltd. as associated with Shri Bhanwarlal Jain or his group and Verifying the vital facts and the documents submitted before him and also without considering the judicial pronouncement submitted before him.*
- *The Learned Assessing Officer could not controvert the factual material and documentary evidences placed by the appellant during the assessment proceeding and he could not bring anything contrary on record to negate the documentary evidences furnished by the appellant.*
- *Further the unsecured loan was confirmed by Lender M/s. Tanika Commodities Pvt. Ltd u/s. 133(6) to the Learned Assessing Officer.*
- *The appellant had received loan from the said lender which is a company managed by its directors. The Lender is a company which is duly registered under the Companies Act, 2013 and is regular in filing of returns.(Page No.27)*
- *The appellant had received a short term loan from Tanika Commodities Pvt Ltd and had repaid the same in the subsequent year, The entire transactions of receipts and payment were made by account payee cheque or through other banking channels.*
- *The appellant had also filed certified Balance Confirmation of Accounts of the said lender Company and also submitted the copy of the lender company's balance sheet*
- *The learned assessing officer has failed to appreciate the facts that appellant had obtained only temporary loan which has been repaid in subsequent year (Page No 31-32A). Thus what is required to be seen is as to whether the said company had sufficient funds to advance appellant. If for the sake of argument it is understood that the said company was a company of Mr. Bhanwarlal Jain and then in that case whether the said Mr. Bhanwarlal Jain was capable of advancing such amount even without receiving cash is a vital*

question which should have been asked and verified. On appreciation of the fact and as per statement of various persons recorded it is quite dear that even without receiving cash beforehand the said lender companies were always capable of advancing such amount which at a later could be recouped with such cash.

- *Further it must be noted that the Net worth (as per net asset method) of the lender Company M/s. Tanika Commodities Pvt. Ltd. was about Rs. 83.34 lacs (i.e. 0.83 crore) as per the Audited Balance Sheet for the Financial year ending 31st March 2010. The amount of loan received by the Appellant is Rs. 20 lakhs as against to its net worth of Rs. 83 lakhs (approx). Thus the creditworthiness of the lender is undoubtedly proved by the Appellant.*

This Appeal is directed against the order of Commissioner (Appeals)-36, Mumbai dated 08.02.2018 for the A.Y. 2010-11. The following grounds of appeal has been raised by the appellant:

- i.** *The Teamed Commissioner of Income Tax (Appeal) has erred in adding genuine unsecured loan amounting to Rs. 20,00,000/- as unexplained fund and added in the income of the appellant.*
- ii.** *The learned Commissioner of Income Tax Appeal erred in impugned addition and framing the impugned order without considering the submission/ documentary evidence provided to prove the genuineness of the transaction.*

Our submission is as under:

Section 68 of the Act reads as under:-

"Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year ."

It is settled position that to prove the genuineness of the transaction, the burden lies on the assessee and to discharge The onus, the assessee must prove the following –

- a. *Identity of the Creditor*
- b. *Capacity of the Creditor*
- c. *Genuineness of the Transaction*

Once the above conditions are proved prima facie by the assessee and the assessee has adduced evidence to established prima facie the aforesaid, the onus shifts on the department.

Three condition enshrined in section 68 are dearly proved by the documents submitted during the assessment proceeding as under :-

A. Identity

- i.** *Permanent Account Number (PAN)*
- ii.** *CIN No*
- iii.** *Income Tax Return Acknowledgment*

The above documents clearly prove the identity of the Lenders

B. Creditworthiness

- i.** *Copy of Audited Balance Sheet of the Lender Company*
- ii.** *Relevant Bank Statement*
- iii.** *Copy of Ledger Account*

The above documents clearly prove the creditworthiness of the Lenders

C. Genuineness

- i.** *Transaction through Account Payee Chq*
- ii.** *Bank Statement of the Appellant and Lender Companies*
- iii.** *Loan Confirmation*

*The above documents clearly prove the genuineness of the Lenders
Thus all the ingredients of S.68 of the Act were fully proved and established before the learned Assessing Officer.*

It is a settled law that 'it is mandatory for the Assessing Officer to confront the assessee with any material collected by the Assessing Officer at the back of the assessee, and in case of statement of Shri Bhawarlal Jain recorded at the back of the assesses, opportunity of cross examination has to be offered to the assessee, failing which the said material/statement etc. will be rendered unreliable and additions made on the basis of such material/statement etc. shall be

rendered illegal. Reference in this regard can be made from the decisions made In the following judiciary ruling:-

- *The Hon'ble Supreme Court in the case of Kishinchand Chellaram v. CIT [1930] 19 CTR (SC) 360/[1980] 125 ITR 713 (SC) has held that without allowing cross-examination to the party, adverse inference cannot be drawn though the evidence may be so strong. In that case certain deposits in the account of the assessee were found. Statements of certain persons were recorded that they have deposited the assessee's own money. The addition was made by the AO which was confirmed up to the stage of Hon'ble High Court. However, on further appeal, the Hon'ble Supreme Court has held that without allowing cross-examination to the assessee addition Cannot be made.*

Similar judgments are as under:-

- *R.B. Shreeram Durga Prasad 176 ITR 169 (SC),*
- *Jindal Vegetable (order of Hon'ble Delhi High Court in ITA no. 428 of 2007, 174 Taxmann 440 (Raj.)*
- * *Laxman Bhai Patel (order of Hon'ble Gujarat High Court dated 22.07.2005 in ITR no. 41/1997).*

Third Party i.e. Shri Bhanwarlal Jain was never a DIRECTOR as well as SHAREHOLDER of M/s. Tanika Commodities Pvt. Ltd. who had advanced loan to the Appellant Amounting Rs. 20,00,000/- during the F.Y. 2009-10 (A.Y. 2010-11).

Shri Bhanwarlal Jain, who is neither holding managerial berth in the Company M/s. Tanika Commodities Pvt. Ltd. nor holding any ownership right, cannot control the affairs of the Company.

Further M/s. Tanika Commodities Pvt. Ltd. have no link with Bhanwarlal Jain Group as alleged by the Learned Assessing Officer.

Further, following legal position/ judicial rulings on the subject under consideration must be considered before arriving at any conclusion:- ,

i. As held by Andhra Pradesh High Court in the case of R.B. Mittal v/s. CIT 246 1TR 283 (AF) in an enquiry u/s 68, the rule of audi alteram partem has to be observed and the assessee must be given a fair and reasonable hearing to discharge the burden cast on him

u/s 68 of the Act. Further, it is settled law that in the matter of cash credit, the initial onus lies on the assessee to prove the genuineness of the transaction along with the identity of the lender/investor and his credit worthiness. Having done so, the appellant in the instant case has discharged the onus cast upon it. Beyond this, for the charge of unexplained cash credit to stick, the onus lies on the Assessing Officer to disprove the claim of the assessee by establishing that the evidence filed by the assessee was false and by bringing new material on record and failure to do so would vitiate the addition made on this count.

ii. It was also held by the Apex court in the case of CIT v. Bedi & Co. P. Ltd. (1998) 230 ITR 580 (SC) that where prima-facie the inference on facts is that the assessee's explanation is probable, the onus will shift to the revenue to disprove it and the assessee's explanation in such case cannot be rejected on mere under :-

- *Khandelwal Constructions v. CIT (1997) 227 ITR 900 (Gau.)*
- *CIT v. Orissa Corporation Pvt. Ltd, 158 ITR 78 (SC)*
- *CIT v. Rohini Builders 256 ITR 360 (Guj.).*

iii. It is also settled law that where the assessee provides identity and details pertaining to the lenders/creditors investor of share application money and is unable to produce them and requests the AO to issue summons u/s 331 for their attendance, it is the duty of the AO to issue such summons, failing which the addition would get deleted. Reference in this regard can be made from [he decisions made in the folio wing judiciary ruling-

- *N.P. Garodia (order dated 13.01.2009 of Hon'ble P & H High Court in ITA no. 808 of 2008)*

- *Brij Pal Sharma (order dated 17.02.2009 in 1TA no. 685 of 2008 of Hon'ble P to H High Court)*

iv. CIT v. Orissa Corporation Pvt. Ltd. 158 ITR 78 (SC) and Anis Ahmed 297 ITR 441 (SC) that mere nonproduction of the lender/shareholder cannot be a ground for making addition u/s 68.

v. Similarly as held in the case of CIT v. Metachom Industries (2000) 245 ITR 160 [MP] where a credit is shown to have come from a person other than the assessee, there is no further responsibility of the assessee to show that it has come from accounted source of the lender, as long as the fact that he had made the advance and was capable of making the advance are established.

vi. It was held by the Hon'ble Madras High Court in *Hastimal (S) v. CIT (1963) 49 ITR 273* that after a lapse of decade, the assessee should not be placed upon the rack and called upon to explain not merely the origin and source of a capital contribution, but also the origin of origin and source of the source.

vii. Recently in a similar case that of the Assessee, The honorable ITAT Delhi in the case of *ITG, Ward 15 (2) vs. M/s. Rakara Money Matters P. Ltd.* has held that "AO has to bring on record any valid material or evidence to discredit the evidences and the explanation given by the assesses company and cannot rely only on statement of third parties recorded by the investigation wing.

Thus it is settled law that in the matter of cash credit, assesses needs to prove the genuineness of the transaction along with the identity of the lender/ investor and his credit worthiness. By submitting the following documents, Identity as well as the credit worthiness have been proved and hence the addition would not be justifiable and would be against the law.

viii. In another landmark judgment of Hon'ble Gujarat High Court in the case of *Varshaben S Patel vs. ITO, [2015] 64 taxmann.com 179 (Gujarat)* has also held in notice u/s 148 that the issue of notice u/s 148 pursuant] to direction by DG Investigation is bad in law as the satisfaction has to be on your own and not a borrowed satisfaction.

ix. Similar to above referred judgment, The Appellant would like to humbly submit to learned assessing officer a recent landmark decision given by Jurisdictional Hon'ble ITAT Mumbai in an identical case of *ITO -10 (2) (4) Vs. M/s. Superline Construction P. Ltd. (and many others in this consolidated order)* pronounced on 30.11.2015 ITA No. 3645/Mum/2014 the summary of the case is outlined as under:-

"The Revenue authority failed to appreciate that there is no documentary evidence against the assessee-company to support impugned additions made solely on the basis of statement of Shri Mukesh Chokshi. The Assessing Officer failed to appreciate that as against the statements of any person recorded u/s 143(3). r.w.s. 147, the asses see-company has fully discharged the burden of proof, onus of proof and explained the source of share capital and advances (Short Term/ Long Term Loans) received by established the identity, creditworthiness and genuineness of transaction by banking instruments with documentary evidences. The further stand of the assessee has been that the assessee substantiated the details with the documentary evidences as extracted from the website of Ministry

of Corporate Affairs, Government of India before the Assessing Officer. These facts have not been rebutted on behalf of the Revenue.

If the share application money / short/ long term loans received by the assessee company from alleged bogus share holders/ Lenders whose names are given to the AO then the department is free to proceed to reopen their individual assessments in accordance with law but it cannot be regarded as undisclosed income of assessee company.”

x. As held in the case of R.B. Mittal v. CIT 246 ITR 283 (AP) in an enquiry u/s. 68, the rule of audi alteram parterm has to be observed and the Assessee must be given a fair and reasonable hearing to discharge the burden cast on him u/s 68 of the Act. Further, it is settled law that in the matter of cash credit, the initial onus lies on the Assesses to prove the genuineness of the transaction along with the identity of the lender/investor and his creditworthiness. Having done so, the appellant in the instant case has discharged the onus cast upon it. Beyond this, for the charge of unexplained cash credit to stick, the onus lies on the AC to disprove the claim of the Assessee by establishing that the evidence filed by the assessee was false and by bringing new material on record and failure to do so would vitiate the addition made on this count.

xi. It was also held in the case of CIT v. Bedi & Co. p. Ltd. (1998) 230 ITR 530 (SC) that where prima-facie the inference on facts is that the assessee's explanation is probable, the onus will shift to the revenue to disprove it and the assessee's explanation in such case cannot be rejected on mere surmises. Other similar judiciary ruling are as under-

- Khandelwal Constructions v. CIT (1997) 227 ITR 900 (Gau.)*
- CIT v. Orisaa Corporation Pvt, Ltd. 158 ITR 78 (SC)*
CIT v. Rohini Builders 256 ITR 360 [Guj.).

xii. The Supreme Court held in the ease of CBI v/s. V.C. Shukla that there must be at least an iota of Independent evidence in support of accusation levelled against the party.

a. It was held in case of DCIT 12(1)(2) vs. Bairagra Builders P Ltd. [ITA No- 4691 & 4692/Mum/2015]-

a. We have gone through the orders relied upon by the learned DR. We noted that the decision] of the Delhi High Court in the case of

Bikrara Singh, the assessee could not discharge the onus as laid down by section 6S of the Act. Similarly, in the case of CIT vs. Jansampark Advertising & Marketing Pvt. Ltd. (supra), the additions have been made u/s. 68 in respect of the share capital received by the assessee from various companies and during the course of investigation, it was found that the share capital has been received from three entry operators, who are allegedly in the business of providing accommodation entries. Notices issued u/s. 131 to these parties were returned undelivered fry the postal authorities with the remark "left"/ "no such person". Under these circumstances, the Hon'ble High Court took a view that the assessee failed to discharge the burden to prove the credit worthiness as well as the genuineness of the transactions.

10. *But in the impugned case, we noted that the assessee has submitted all the evidences including the confirmation of the creditors. This is not a case where the creditors have not given confirmations rather they have duly confirmed to giving loan to the assessee, the loans were received and returned through banking channels. The assessee has also submitted copies of bank accounts. The lender has not deposited cash into bank account. The assessee has duly discharged the onus with regard to identity of the lender, creditworthiness of the party and all supporting evidences as required u/s. 68 of the IT. Act. Therefore, in our opinion the decisions relied upon by the DR does not assist the Revenue to the facts of the present case.*

11. *We have also gone through the decisions relied upon by the learned AR, We noted that this Tribunal in similar circumstances in the case of Kamal Agrotech Pvt. Ltd. vs. ITO in ITA No. 437/Hyd/2016 vide its order dated 25.11.2016 has held as under: A plain reading of the assessment order demonstrates that the AO merely went by the Investigation done by the office of D.G.I (Investigation), Mumbai. No enquiries or investigation was carried out. No evidence to controvert the claims of the Assessee was brought on the record by the AO. Even the statement of Shri Praveen Kumar was supplied. Nothing is on record about the result if investigations done by DGIT (inv) Mumbai, The papers filed by the assesses do demonstrate the identity, creditworthiness and genuineness of the transaction. The addition is made merely on surmises and conjectures. In view of the above, we hold that the addition made under section 68 of the Act is bad in law.*

We noted that in the Said case also loan had been received from Javda India. Impex Ltd.

12. Being consistent with the view taken by this co-ordinate Bench in case of Komal Agrotech Pvt. Ltd. (supra), and in view of the facts and circumstances, we do not find any illegality or infirmity in the orders of the CIT(A). It is accordingly, confirmed for both the years under appeal.

xii. Hon'ble ITAT Mumbai in an identical case of Asstt. Commissioner of Income Tax, Central Circle 18 and 39, Mumbai Vs. Nitin Fire Protection Ind. Ltd. pronounced on 09,02,2016 ITA No, 757/Mum/2015, has held that :-

".....where the assessee has discharged the initial burden of proof. Apparently the assessee in the instant case has discharged the said primary responsibility. Now, it is the turn of the AO to disprove the claim of the assessee. In this regard, the AO has placed reliance on the general statement given by Mr. MukeshChoksi. There is no dispute with regard to the fact that the said statement of Mr. MukeshChoksi does not contain anything against the loans taken by the assessee. Further, the Hon'ble Rajasthan High Court has held in the case of A.L. Lalpuria Construction Pvt Ltd (supra) that the addition u/s 68 of the Act cannot be made merely on the basis of statement given by somebody, whether assessee has otherwise discharged the initial burden of proof placed upon him u/s. 68 of the Act. Accordingly, we are of the view that the assessing officer has failed to discharge the burden shifted to his shoulders, in which case, the addition made by him u/s. 68 of the Act is liable to be deleted"

In view of the foregoing discussions, we set aside the order of Ld. CIT(A) and direct the AO to delete the impugned addition of Rs. 30.00 lakhs. In the result, the appeal filed by the assessee is allowed."

Hence as per the above mentioned judicial ruling, it's crystal clear that Appellant has discharged the initial burden of proof and thus the burden was shifted to the learned Assessing Officer to disapprove the documents/submissions submitted.

xiv. The Appellant would like to humbly submit to your honour a recent landmark decision by Hon'ble ITAT, Hyderabad in an identical case and having the same issue of Komal Agrotech Pvt. Ltd, Vs. The Income Tax Officer 2(1), Hyderabad pronounced on 25.11.2016 IT-66/2014-15, the summary of the case is outlined as under :-

"....A.O. merely went "by the investigation done by the office of D.G.I. (Investigation), Mumbai. No enquires or investigation was carried out. No evidence to controvert the claims of the assessee was brought on record by the A.O. Even the statement of Mr. Praveen Kumar was supplied. Nothing is on record about the result of investigations done by DGIT (Inv.) Mumbai. The papers filed by the assessee do demonstrate the identity, credit worthiness and genuineness of the transaction. The addition is made merely on surmises and conjectures. The statement recorded at the back of the appellant cannot be utilized ignoring other verifiable evidences. The Id. Assessing officer has made the addition of Rs. 75,00,000/- disregarding the evidences on record and without discharging her onus and without establishing anything contrary to the agreement of the Appellant and without verifying the Bank Account, existence of Investor and without making fruitful investigation, thus the demand was directed to be deleted."

xv. Jurisdictional Hon'ble 1TAT, Mumbai for an identical case i.e. Arceli Realty Limited Vs. The Income Tax Officer 15(1) (1), Mumbai pronounced on 21.04.2017 ITA-6492/Mum/2016-17, the summary of the case is outlined as under:-

".....A.O. merely relied upon the information provided by the office of DGIT(Inv), Mumbai and did not made any independent enquiry. The papers filed by the assessee do demonstrate the identity, credit worthiness, genuineness, Source of Source of the transaction, AO did not provide Opportunity to Cross Examine the concerned person and also the department has not provided authenticity of the information to the person against whom such information is used. The addition is made merely on surmises and conjectures. The statement recorded at the back of the appellant cannot be utilized ignoring other verifiable evidences. The Id. Assessing officer has made the addition of Rs. 20,00,000/- disregarding the evidences on record and without discharging her onus and without establishing anything contrary to the agreement of the Appellant and without verifying the Bank Account existence of Investor and without making fruitful investigation, thus the demand was directed to be deleted."

xvi. Hon'ble ITAT, Mumbai for an identical case i.e. Income Tax Officer, 12(2)(3) Vs. M/s. Shreedham Construction Pvt. Ltd. On 14.11.2017 ITA-3754/3755/3756/Mum/2017, the summary of the case is outlined as under:-

"We have considered the rival submissions of the parties and have gone through the material and the order of the authorities below. We have noted that the assessing officer passed the assessment order

on the similar lines as made for earlier year. The assessing officer has not given specific finding on the documentary evidences furnished by the assessee. The assessing officer while passing the assessment order has not given different finding though the facts for the year under consideration were at variance.

The assessee specifically contented that they have paid interest on the loan availed and deducted TDS. The Id Commissioner (Appeals) while considering the facts noted that the assessing officer has not correctly appreciated the loan amount from Raghuveer Sales nor its share capital and reserve funds. Similar, other discrepancies were pointed out about Viraj Merchantile P. Ltd Properties Ltd. Park Tools Ltd and (Utakantha Trading & Properties Ltd

In view of the above discussion we do not find any infirmity and illegality and we have already confirmed the order passed by Id CIT(A) for AY 2008-09 and 2009-10, hence, the appeal for the year consideration is also dismissed with similar observation."

xvii. Recent Judgment delivered by Jurisdictional Hon'ble ITAT, Mumbai for an identical case i.e. Income Tax Officer, M/s Shree Laxmi Estate Pvt. Ltd. V/s. 15(3)|3| On 29.12-2017 ITA-5954/Mum/2016, the summary of the case is outlined as under:-

"We have heard both the parties, perused the material available on record and gone through the orders of authorities below. The AO made addition towards unsecured loans received from Josh Trading Company Pvt. Ltd. and Viraj Mercantile Pvt. Ltd on the basis of information received from Investigation Wing which revealed that the assessee is beneficiary of bogus accommodation entries provided by Shri Praveen kumar Jain through his bogus companies..... The AO has brought out facts in the light of statement of Shri Pravinkumar Jain deposed before the Investigation Wing to make addition. Except this there is no contrary evidence in the possession of the AO to disprove the loan transaction from Josh Trading Company Pvt. Ltd. and Viraj Mercantile Pvt, Ltd. On the other hand, the assessee has furnished various details including confirmation letters from the parties, their bank statements along with their financial statements to prove identity, genuineness of transactions and creditworthiness of the parties. The assessee also furnished evidences to prove that the parties have responded to the notices issued u/s 133(6) by AO by filing various details"

"..... It is well settled legal position that the assessee has to discharge 3 main ingredients in order to discharge the initial burden of proof, i.e. the Identity of the creditor, the genuineness of

transaction and credit worthiness of the creditors. Once (he assessee discharges initial burden placed upon him, then the burden to disprove the said claim shifts upon the AO”

“Coming to the case laws relied upon the assessee, the assessee has relied upon the decision of Hon'ble Bombay High Court in the case of CIT vs Gagandeep Infrastructure Pvt. Ltd (2017) 394 ITR 680 (Bom). We have gone through the case laws relied upon by the assessee in the fight of facts of the present case and find that the Hon'ble High Court categorically observed that

“.....the three essential tests while confirming the proviso Section 68 of the Act laid down by the Courts namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was found satisfied. Further it was a submission on behalf of the Revenue that such large amount of share . premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are bogus. The Apex Court In Lovely Exports (P) Ltd. (supra) in the context to the pre-amended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for ,the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit.”

"The assessee has also relied up to the decision of Hon'ble Supreme Court in the case of CIT vs Lovely Exports Pvt Ltd (2008) 216 CTR 195 (SC). The Hon'ble Apex Court while deleting the addition made U/s. 68 observed that if the share application money is received by the assessee company from alleged bogus shareholders whose names are given to the AO then the department is free to proceed to reopen their individual assessments in accordance with law, but this amount of share application money cannot' be regarded as undisclosed income u/s. 68 of the Income-tax Act, 1961."

Further with the similar facts, similar judgments were pronounced and are hereby outlined as under :-

ITAT E Bench in M/s. SDB Estate Pvt Ltd vs. ITO-(5)(3)(2) in ITA No, 584/Mum/2015: AY 2008-09 has decided similar issue by observing as under:-

"In view of the above stated legal position and in the light of reliable evidences brought on record by asses see to substantiate identity,

genuineness and creditworthiness of shareholders/ lenders, which have not been controverted by the Revenue, the additions made solely on the basis of general statement of Shri Mukesh Chokshi cannot be held to be justified and the same are Accordingly ordered to be deleted.

In the result, appeal of the assesses is allowed in part, in terms indicated hereinabove.”

> Further ITAT-“D” Bench has decided the following cases in favour of the assesses on similar issues.

- a) ITO - 10(2)(1) vs. M/s. Peep Darshan Properties Pvt Ltd in ITA No. 2117/Mum/2014 ; AY 2006-07 and ITA No.2118/Mum/2014 ; AY 2007-08*
- b) ITO - 10(2)(3) vs. Aajivan Computes Pvt Ltd in ITA No. 2160/Mum/2014: AY 2006-07*
- c) ITO - 10(2)(3) vs. Dignity Securities Trading Pvt Ltd in ITA No. 2157/Mum/2014: AY 2006-07*
- d) ITO - 10(2)(1) vs. M/s. Blue Hill Properties Pvt Ltd in ITA No. 2119/Mum/2014 : AY 2006-07*

With the facts and various Judicial rulings as discussed above, it is crystal clear that the Unsecured Loan Received by the appellant was genuine and cannot be treated as Accommodation entry.

Jurisdictional Hon'ble ITAT, Mumbai for an identical case i.e., Arceli Realty Limited Vs. The Income Tax Officer 15(1)(1), Mumbai pronounced on 21.04.2017 ITA-6492/Mum/2016&17, the summary of the case is outlined as under-

“...,A.O. merely relied upon the information provided by the office of DGIT(Inv.), Mumbai and did not made any independent enquiry. The papers filed by the assess^ do demonstrate the identity, credit worthiness, genuineness, Source of Source of the transaction- AO did not provide Opportunity to Cross Examine the concerned person and also the department has not provided authenticity of the information to the person against whom such information is used. The addition is made merely on surmises and conjectures. The statement recorded at the back of the appellant cannot be utilized ignoring other verifiable evidences. The ld. Assessing officer has made the addition of Rs. 20,00,000/- disregarding the evidences on record and without discharging her onus and without establishing anything contrary to the agreement of the Appellant and without verifying the Bank

Account, existence of Investor and without making fruitful investigation- thus the demand was directed to be deleted.”

> It is not out of place to bring under your honour kind notice, that the Respondent has discharged the onus cast upon it u/s 68 of the Ac(by submitting the number of documentary evidences during the course of assessment proceedings. The Ld. AO has failed to demonstrate and establish that how the impugned addition of Rs. 20,00,000/- was treated as Unexplained Cash Credit. Hence, statement of a third party cannot be relied upon without any corroborative documentary evidence on record.

In view of the above, the appeal of the revenue deserves to be rejected.”

5. I have considered the rival submissions. I find that in the present case, the assessee has made a request to the A. O. to provide an opportunity to cross examine the person whose statement is recorded at the back of the assessee and the AO wants to use such statement against the assessee. On page 2 of the assessment order, the AO has stated that during the course of search in the case of Shri Bhanwarlal Jain and group, various incriminating documents were found as per which, this group has formed various dummy companies with dummy directors and business of these dummy companies was operated from the place which were in the name of Shri Bhanwarlal Jain. He further noted that in course of search, statements were recorded u/s 132 (4)/131 of dummy directors who had admitted that they are mere dummy directors. In

Para 5 of the assessment order, the AO noted that the assessee has taken unsecured loan in the form of accommodation entries from M/s Tanika Commodities Pvt. Ltd., the company which was formed by Shri Bhanwarlal Jain and group to provide accommodation entries. He further noted that notice u/s 133 (6) was issued to this company for details of transactions made by it with the present assessee in order to examine the genuineness of the loans. He also noted that reply from the said party has been received. Thereafter, he noted about the statement of Shri Bhanwarlal Jain recorded during search proceedings and observed that in this statement, he has explained the modus operandi of the accommodation entries. Based on these observations, the AO came to the conclusion that the claim of the assessee about taking of loan of Rs. 20 Lacs from M/s Tanika Commodities Pvt. Ltd. is merely an accommodation entry under the guise of unsecured loan and made addition. There is no whisper about the assessee's request for providing the opportunity of cross examination. In the light of these facts, I examine the applicability of the Judgment of Hon'ble apex court rendered in the case of Kishan chand Chellaram vs. CIT (Supra). In this case, the addition was made on the basis of the statement of

the manager of PNB, through which, money was sent by one branch of the assessee by way of TT to another branch of the assessee. The copy of this letter was not given to the assessee. It is observed on page 720 of 125 ITR that before the I. T. authorities could rely upon the letters of the bank manager, they were bound to produce it before the assessee so that the assessee could controvert the statement contained in it by asking to cross examine the manager of the bank with reference to the statement made by him. In my considered opinion, this is the Ratio decidendi of this judgment that no statement obtained behind the back of the assessee can be used against the assessee without providing to the assessee an opportunity of cross examination.

6. In the present case, the assessee has brought on record, PAN of the loan creditor and evidence of filing of Income Tax return. The AO has also noted that notice u/s 133(6) was issued to the lender company and reply is also received. Hence, in my considered opinion, the assessee has established the identity of the loan creditor in question. In respect of creditworthiness of the said loan creditor, the assessee has brought on record, the audited balance Sheet of the said

company, relevant bank statement and as per this balance sheet, the net worth of this company is Rs. 83.34 lacs and the loan amount in question is only Rs.20 lacs. In the light of the same, it has to be accepted that the creditworthiness of the said loan creditor is also established at least prima facie. Regarding genuineness of the transaction in question, the assessee has brought on record bank statement and loan confirmation to establish that the loan was received by account payee cheque and it was returned in the next year by account payee cheque. Hence, genuineness of the transaction in question is also established at least prima facie. The AO has come to a different conclusion mainly on the basis of the statement of Shri Bhanwarlal Jain Group without providing to the assessee an opportunity of cross examination. Hence, it is seen that except the statement of Shri Bhanwarlal Jain Group, there is no adverse material brought on record by the AO. No shortcoming is pointed out in various documents brought on record by the assessee to establish the identity and credit worthiness of the loan creditor and genuineness of the transaction as noted above. Since, the AO has not provided an opportunity of cross examination of Shri Bhanwarlal Jain Group, the adverse statements of that group

cannot be used against the assessee. I hold so by respectfully following this Judgment of Hon.ble apex court rendered in the case of Kishan chand Chellaram vs. CIT (Supra). Once, I exclude the same, the addition made by the AO cannot be sustained in the facts of the present case as discussed above. Hence, I delete the same.

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 1st day of February, 2019

Sd/-
(A.K. GARODIA)
लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/Mumbai; दिनांक/Dated : 1st February, 2019

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), Mumbai
4. आयकर आयुक्त / CIT, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asst. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai