

आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

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

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.3291/Mum/2017

(निर्धारण वर्ष / Assessment Year : 2011-12)

Income-tax Officer Ward 1(1) 1 st Floor, Mohan Plaza Wayale Nagar, Khadakpada Kalyan(West) Kalyan-421302	<u>बनाम/</u> v.	M/s Avdharna Trading Private Limited A9/A10, Addl. Kalyan-Bhiwandi, Industrial Area Village:Kon Bhiwandi-421302
स्थायी		लेखा सं./PAN: AAICA8411G
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.3293/Mum/2017

(निर्धारण वर्ष / Assessment Year : 2011-12)

Income-tax Officer Ward 1(1) 1 st Floor, Mohan Plaza Wayale Nagar, Khadakpada Kalyan(West) Kalyan-421302	<u>बनाम/</u> v.	M/s Abhiroop Trading Private Limited A1/A2, Addl. Kalyan-Bhiwandi, Industrial Area Village:Kon Bhiwandi-421302
स्थायी		लेखा सं./PAN: AAICA4813E
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.3338/Mum/2017

(निर्धारण वर्ष / Assessment Year : 2011-12)

Income-tax Officer Ward 1(1)	<u>बनाम/</u>	M/s Agarsen Mercantile Trading Private Limited
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1 st Floor, Mohan Plaza Wayale Nagar, Khadakpada Kalyan(West) Kalyan-421302	v.	A4, Addl. Kalyan-Bhiwandi, Industrial Area Village:Kon Bhiwandi-421302
स्थायी		लेखा सं./PAN: AAICA4812F
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Revenue by:	Shri.Vidhyadhar V. (DR)	
Assessee by:	Shri. Viral Doshi	

सुनवाई की तारीख /**Date of Hearing** : 18.04.2019

घोषणा की तारीख /**Date of Pronouncement** : 18.04.2019

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member:

These three appeals are filed by Revenue for assessment year 2011-12 for three different assessee and raises similar issues to be decided by the tribunal with respect to all these three different assessee. We will first take up appeal in ITA no. 3291/Mum/2017 for AY 2011-12 and since similar issues are involved in other two appeals viz. ITA no. 3293/Mum/2017 and 3338/Mum/2017 for AY 2012-13, our decision in ITA no. 3291/Mum/2017 will apply mutatis mutandis to the other two appeals in ITA no. 3293/Mum/2017 and 3338/Mum/2017 both for AY 2011-12 as similar facts are there in these two appeals

2. The revised grounds of appeal raised by Revenue in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") in ITA no. 3291/Mum/2017 for AY 2011-12 read as under:-

"1. On the facts and in the circumstances of the case, and in law, the Hon'ble CIT(A) erred in not appreciating the fact that, the transactions executed by the companies namely 1. Kanchan Developers Pvt. Ltd. , 2. Shri Manav Shah, 3. M/s Hubtown Limited (formerly known as

Akruti City limited), 4. M/s Bhimrao Mercantile Pvt. Ltd. are not free from doubt and are clearly just to legalise the unaccounted money.

2. The Hon'ble CIT(A) erred in not appreciating the facts that, though the financial statement of M/s Bhimrao Mercantile Pvt. Ltd. reflected the loan advanced to the assessee, the source of loan was not beyond the shadow of doubt as during the relevant period the lender company has not carried out any business activities and that the lender company is closely related to the assessee company.

3. The Hon'ble CIT(A), erred in not appreciating the facts that the sundry creditors claimed by the assessee company are towards purchase of shares and that no adequate evidence had come before the AO to substantiate the transactions.

4. The order of the CIT(A) may be vacated and that of the Assessing Officer may be restored.

5. The appellant craves to leave to add, amend , alter or delete any ground of appeal."

3. The brief facts of the case are that the assessee filed its return of income for AY 2011-12 declaring Nil income on 27.09.2012. The return of the assessee was processed u/s 143(1) of the 1961 Act. The case of the assessee was the selected through CASS for framing scrutiny assessment and notice dated 16.08.2013 u/s 143(2) of the 1961 Act was issued to the assessee. The AO also issued notices u/s 142(1) of the 1961 Act from time to time. The assessee did not participated in the assessment proceedings conducted by the AO u/s 143(2) read with Section 143(3) of the 1961 Act which led to framing of an best judgment against the assessee by the AO u/s 144 of the 1961 Act vide assessment order dated 19.03.2014 , wherein income assessed was Rs. 2,70,12,330/- as against Nil income declared by the assessee in return of income filed with the tribunal. The AO had made two additions to the income vide assessment framed u/s 144 of the 1961 Act , firstly an addition of Rs. 1,15,06,840/- towards unsecured

loans raised by the assessee by invoking provision of Section 68 of the 1961 Act as no details or explanation regarding nature and source of the unsecured loans were furnished by the assessee and the genuineness of the loans taken remained unexplained and secondly an addition of Rs. 1,55,27,426/- towards sundry creditors as shown in the balance sheet were made. The opening creditors were Rs. 26,003/- while closing creditors were Rs. 1,55,53,429/- which led to the additions to the tune of Rs. 1,55,27,426/- u/s 68 of the 1961 Act, vide assessment order dated 19.03.2014 passed by the AO u/s 144 of the 1961 Act. Thus, in nutshell the assessee did not co-operated during assessment proceedings before the AO as it did not entered appearance before the AO despite notices being served on the assessee. This led to aforesaid additions and so much so the AO has to write that the business of the assessee is 'Not known' in the title sheet of the assessment order.

4. Aggrieved by an ex-parte best judgment framed by the AO against the assessee vide assessment order dated 19.03.2014 u/s 144 of the 1961 Act, the assessee has filed first appeal with learned CIT(A). The appeal was filed late by 85 days beyond period of limitation prescribed u/s 249(2) read with Section 249(3) of the 1961 Act . The learned CIT(A) was pleased to condone the aforesaid delay. Revenue is not aggrieved by such condonation of delay by leaned CIT(A) as no ground of appeal challenging condonation of delay is filed by Revenue in its appeal before tribunal.

4.2 On merits, the learned CIT(A) was pleased to allow the appeal of the assessee by deleting both the aforesaid additions as were made by the AO to the income of the assessee vide best judgment assessment u/s 144. The assessee filed replies before the learned CIT(A) as to both the additions along with additional evidences and request was made by the assessee before learned CIT(A) to admit these additional evidences under Rule 46A of the Income-tax Rules, 1962. These

additional evidences were forwarded by learned CIT(A) to the AO for submitting remand report.

4.3 The AO in its remand report objected to the submission of these additional evidences before the learned CIT(A) during appellant proceedings which were not earlier submitted by the assessee before the AO during assessment proceedings as in the opinion of the AO there was no reasonable cause shown by the assessee for not producing these additional evidences before the AO during assessment proceedings despite being available with assessee at assessment stage.

4.4 Without prejudice to the stand taken by the AO objecting to admission of these additional evidences in its remand report , the AO verified these additional evidences in remand proceedings . Notices u/s 133(6) were issued by the AO to these parties who replied to the said notices and furnished details. The AO in its remand report stated that the assessee had purchased 2300 equity shares of M/s Asmeeta Infratech Private Limited , on 21.09.2010 for Rs. 1,89,40,500/- from Kanchan Developers Private Limited . Out of which Rs. 81,19,000/- was paid by M/s Bhimrao Mercantile Private Limited , on behalf of the assessee to M/s Kanchan Developers Private Limited . The assessee and M/s Bhimrao Mercantile Private Limited are related parties. The AO noted that M/s Bhimrao Mercantile Private Limited was amalgamated with Majboot Trading Private Limited with effect from 19.12.2014. The balance amount of Rs. 1,08,21,500/- was therefore shown under the head creditors as on 31.03.2011, in the books of the assessee company.

4.5. The AO also noted in its remand report that the assessee had purchased 960 equity shares of M/s Asmeeta Infratech Private Limited, on 21.09.2010 for Rs. 79,05,600/- from Shri Malav Shah. Out of this amount of Rs. 79,05,600/- , an amount of Rs. 33,87,840/- was paid by M/s Bhimrao Mercantile Private Limited , on behalf of the assessee to Shri Malav Shah . The assessee and M/s Bhimrao

Mercantile Private Limited are related parties. The AO noted that M/s Bhimrao Mercantile Private Limited was amalgamated with Majboot Trading Private Limited with effect from 19.12.2014. The balance amount of Rs. 45,17,760/- was therefore shown under the head creditors as on 31.03.2011, in the books of the assessee company.

4.6 In addition, the assessee also received an amount of Rs. 1,96,154/- from M/s Hubtown Limited (formerly known as Ackurti City Limited) as debentures which were yet to be issued and the same was shown under the head sundry creditors, being a liability, in the balance sheet of the assessee company.

4.7 The payments aggregating to Rs. 1,15,06,840/- made by M/s Bhimrao Mercantile Private Limited on behalf of the assessee to M/s Kanchan Developers Private Limited and Shri Malav Shah on behalf of the assessee for acquisition of equity shares of M/s Asmeeta Infratech Private Limited as detailed in para 4.4 and 4.5, were reflected under the head other liabilities in the books of accounts of the assessee. The assessee and M/s Bhimrao Mercantile Private Limited are related parties. The AO noted that M/s Bhimrao Mercantile Private Limited was amalgamated with Majboot Trading Private Limited with effect from 19.12.2014. **The AO also noted that the said M/s Bhimrao Mercantile Private Limited had raised loans from other parties to advance loans to the assessee. The AO also noted that said M/s Bhimrao Mercantile Private Limited has shown loss of Rs. 55,149/- and has not carried on any business activities during the year under consideration.**

4.8. The AO also submitted second remand report wherein the AO submitted that the assessee had acquired shares of M/s Asmeeta Infratech Private Limited from M/s Kanchan Developers Private Limited and Mr. Malav Shah, but no valuation report was submitted by the assessee to substantiate fair market value of the shares so acquired. The AO required learned CIT(A) to verify whether any income

arose to the assessee keeping in view provisions of Section 56(2)(viiia) of the 1961 Act with respect to these share transactions as the same could not be verified by the AO.

4.9 The learned CIT(A) decided the issue in favour of the assessee by holding that the AO has accepted genuineness of creditors and unsecured loans. So far as the AO's second remand report intimating learned CIT(A) that in the absence of valuation report and other details, it could not be ascertained whether any income arose to the assessee u/s 56(2)(viiia) of the 1961 Act, the learned CIT(A) refused to look into this issue as the AO has not made any enquiry into the fair market value of the shares of M/s Asmeeta Infratech Private Limited and had not indicated in any manner as to how the assessee had obtained any benefit out of the purchase of shares of M/s Asmeeta Infratech Private Limited. The learned CIT(A) passed the appellate order dated 24.02.2017 deleting both the additions as were made by the AO in its assessment order dated 19.03.2014 passed u/s 144 of the 1961 Act.

5. Now, the Revenue is before us. The learned DR made elaborate arguments before the Bench. The learned DR explained that the assessee did not co-operated in assessment proceedings before the AO. It was explained that the AO made additions based on data available in the return of income while framing assessment. The assessment framed by the AO is an ex-parte best judgment assessment u/s 144 of the 1961 Act. The learned DR would explain the factual matrix of the case and explained that learned CIT(A) should have made necessary enquiries to satisfy that the transactions are genuine. It was explained that learned CIT(A) erred in not enquiring as to the applicability of provisions of Section 56(2)(viiia) of the 1961 Act. It was explained that valuation report for valuing the shares of M/s Asmeeta Infratech Private Limited which were acquired during the year by the assessee was not submitted by the assessee even in appellate / remand proceedings. It was explained that powers

of learned CIT(A) are co-terminus with the powers of the AO and the learned CIT(A) should have made necessary verifications to compute income of the assessee chargeable to tax.

5.2. On the other hand learned counsel for the assessee submitted that the details and evidences were furnished during appellate proceedings before learned CIT(A) and remand proceedings before the AO. It was explained that the AO made necessary verifications during remand proceedings and thereafter remand report was submitted by the AO before learned CIT(A) accepting genuineness of the transactions. It was explained that second remand report submitted by the AO before learned CIT(A) asking learned CIT(A) to look into applicability of Section 56(2)(viia) was never forwarded to the assessee for rebuttal. It was fairly accepted by learned counsel for the assessee that learned CIT(A) did not look into applicability of provision of Section 56(2)(viia) of the 1961 Act.

6. We have considered rival contentions and perused the material on record. We have observed that the assessee filed its return of income for AY 2011-12 declaring Nil income on 27.09.2012. The return of income of the assessee was processed by Revenue u/s 143(1) of the 1961 Act. The case of the assessee was selected through CASS for framing scrutiny assessment and notices both u/s 143(2) and 142(1) of the 1961 Act were issued and served by the AO on the assessee but the assessee chose not to co-operate with the AO and no details were furnished before the AO as the assessee never entered appearance before the AO. Even the AO is not aware of the business carried on by the assessee. Left with no alternative, the AO proceeded to frame an ex-parte best judgment assessment u/s 144 of the 1961 Act, wherein two additions were made by the AO after looking into whatever material available on record including return of income filed by the assessee, in the absence of the assessee. This led to framing of an best judgment assessment against the assessee by the AO u/s 144 of the 1961 Act vide assessment order dated 19.03.2014 wherein income

assessed was Rs. 2,70,12,330/- as against Nil Income declared by the assessee. The AO had made two additions to the income , firstly an addition of Rs. 1,15,06,840/- towards unsecured loans raised by the assessee by invoking provision of Section 68 of the 1961 Act as no details or explanation regarding nature and source of the unsecured loans was furnished by the assessee and the genuineness of the loans taken remained unexplained and secondly an addition of Rs. 1,55,27,426/- towards sundry creditors as shown in the Balance Sheet. The opening creditors were Rs. 26,003/- while closing creditors were Rs. 1,55,53,429/- which led to the additions to the tune of Rs. 1,55,27,426/- u/s 68 of the 1961 Act, vide assessment order dated 19.03.2014 passed by the AO u/s 144 of the 1961 Act. The assessee came forward and entered appearance before learned CIT(A) and filed additional evidences. These additional evidences were admitted by learned CIT(A) and forwarded to the AO for comments and verification. The AO objected to admission of these additional evidences as no reasonable cause as is required u/r 46A of the Income-Tax Rules, 1962 was presented by the assessee for non producing of these additional evidences by the assessee before the AO during assessment proceedings. However, without prejudice verifications were made by the AO as to genuineness of these unsecured loans and creditors which were added to the income in an assessment order, by sending notices u/s 133(6) and these parties sent their replies along with their balance sheet etc. The AO forwarded these documents so received from lenders of unsecured loans and creditors to learned CIT(A) and gave its comments to the AO and also asked learned CIT(A) to look into applicability of Section 56(2)(viiia) to the transaction of purchase of equity shares of M/s Asmeeta Infratech Private Limited from Kanchan Developers Private Limited and Malav Shah. The AO also specified in remand report that valuation report to determine fair market value of shares of M/s Asmeeta Infratech Private Limited was not submitted by the assessee. The facts concerning investments made in shares of M/s Asmeeta Infratech Private Limited by the

assessee and its sources are narrated in preceding para's of this order which are undisputed. It is undisputed that powers of learned CIT(A) is co-terminus with the powers of learned AO , including power of enhancement of assessment keeping in view provisions of Section 251 of the 1961 Act. The learned CIT(A) deleted the additions without applying his independent mind and without addressing the comments of the AO. The learned CIT(A) did not appreciated that the assessee did not co-operated during assessment proceedings and the AO was left to frame best judgment assessment u/s 144 of the 1961 Act in the absence of the assessee. The additions were made by the AO based on material available on record while framing assessment u/s 144 originally. It was incumbent on the part of learned CIT(A) to have made proper enquiries and to satisfy independently as to the satisfaction of the ingredients of Section 68 of the 1961 Act wrt these unsecured loans and sundry creditors. It was also incumbent on the part of learned CIT(A) to have looked into applicability of provisions of Section 56(2)(viiia) to transaction for purchase of equity shares of M/s M/s Asmeeta Infratech Private Limited by the assessee from M/s Kanchan Developers Private Limited and Malav Shah, to verify whether any income chargeable to income-tax within provisions of the 1961 Act has arisen which needed to be brought to tax. The learned CIT(A) in the instant case keeping in view circumstances of the case ought to have stepped into shoes of the AO to compute income chargeable to tax keeping in view conduct of the assessee during the course of assessment proceedings of non co-operating with the AO or should have directed the AO to do the same. The decision of Hon'ble Delhi High Court in the case of CIT v. Jansampark Advertising and Marketing Private Limited (2015) 375 ITR 373(Delhi) is relevant. Under these circumstances, we are of the view that the appellate order of learned CIT(A) is clearly not sustainable in the eyes of law which we are inclined to set aside. We are of the considered view keeping in view facts and circumstances of the case that the matter need to be set aside to the file of the AO for framing fresh assessment denovo . All

the issues are kept open in denovo assessment including issues for which additions were made by the AO in original assessment vide orders dated 19.03.2014 u/s 144 of the 1961 Act, issue concerning applicability of Section 56(2)(viia) of the 1961 Act and any other issue which may arise during denovo assessment. The AO is directed to admit evidences/explanations furnished by the assessee in denovo assessment proceedings. Needless to say that proper and adequate opportunity of being heard shall be provided by the AO to the assessee in denovo assessment proceedings in accordance with principles of natural justice in accordance with law. The appeal of the Revenue is allowed for statistical purposes. We order accordingly.

7. In the result, the appeal of the Revenue in ITA no. 3291/Mum/2017 for AY 2011-12 is allowed for statistical purposes.

8. Our decision in ITA No. 3291/Mum/2017 for AY 2011-12 shall apply mutatis mutandis to the appeal filed by the Revenue in ITA no. 3293/Mum/2017 and 3338/Mum/2017 for AY 2011-12, as the facts are similar in all these appeals.

9. In the result, the appeal of the Revenue in ITA no. 3291/Mum/2017, ITA no. 3293/Mum/2017 and 3338/Mum/2017 for AY 2011-12 are allowed for statistical purposes.

Order pronounced in the open court on 18.04.2019.

आदेश की घोषणा खुले न्यायालय में दिनांक: 18 .04.2019 को की गई

Sd/-

(SAKTIJIT DEY)

JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)

ACCOUNTANT MEMBER

Mumbai, dated: 18 .04.2019

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

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BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI