

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES 'G', NEW DELHI**

**Before Sh. H. S. Sidhu, Judicial Member**

**Dr. B. R. R. Kumar, Accountant Member**

**ITA No. 1537/Del/2019 : Asstt. Year : 2015-16**

M/s SMG Estates (P) Ltd., E-42, Greater Kailash, Part-II, South Delhi, Delhi-110048	Vs	ACIT, Circle-24(1), New Delhi
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AAICS2351R</b>		

**Assessee by : Sh. Raj Kumar Gupta, CA**

**Revenue by : Ms. Ashima Neb, Sr. DR**

**Date of Hearing: 03.07.2019**

**Date of Pronouncement: 12.07.2019**

**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

The assessee has raised following grounds of appeal:

"1. That under the facts and circumstances and in view of the evidences placed on record, both the lower authorities erred in law as well as on merits by making an addition of Rs.1,00,00,000/- u/s.68 for unsecured loans taken from following 02 parties:-

M/s Awasthi Medi Equipments (P) Ltd. Rs.45,00,000/-

M/s Regal Infotech (P) Ltd. Rs.55.00,000/-

**Total Rs.1,00,00,000/-**

1.1 That **without prejudice**, the ITI report since do not satisfy the mandatory requirements of law and procedure for the same to be an admissible evidence and in the absence of confronting the same and for not providing the reasonable opportunity to rebut the same, no adverse view and cognize thereof can be taken.

2. That under the facts and circumstances the Ld. A.O. erred in law and on facts in not deducting the C.Y

*losses of Rs.1,24,13,900/- out of addition of Rs.1 Cr. for arriving at the figure of income assessed at special tax rate u/s. 115BBL."*

2. The assessee is engaged in the business of construction, selling and renting of residential & non-residential building and dwellings. During the year, the assessee has received unsecured loans from two parties, namely, M/s Regal Infotech Pvt. Ltd. to Rs.55,00,000/- and M/s Awasthi Medi Equipments Pvt. Ltd. of Rs.45,00,000/-. During the assessment proceedings, the Assessing Officer has issued notice u/s 133(6) of the Act to the Principal Officer of the Assessing Officer to the companies which have come back un served. Based on the non-service of notice, and the report of the Inspector indicating that the companies in question could not be found at the given address, and based on the returned income which is Rs.27,715/- in the case of M/s Awasthi Medi Equipments Pvt. Ltd. and based on the paid up capital of Rs.1,93,500/-, the Assessing Officer held that the loans obtained by the assessee are bogus in nature and brought the amounts to tax u/s 68 of the Act.

3. The Id. CIT(A) upheld the addition on the grounds that genuineness and creditworthiness of the loan charges has not been proved to the department. During the arguments, before us, the Id. AR argued that the company M/s Awasthi Medi Equipments Pvt. Ltd. had sufficient funds in his share capital reserves and surplus totaling to Rs.5.91crores and in addition to that it had short term borrowings of Rs.13.55 crores, the company shown revenue from operations including interest income of Rs.3,87,188/- He argued that the observation of the Assessing Officer that there was no replies to the notices issued u/s 133(6) of the Act was not correct as per record as all the details have been sent to the ACIT on 11.09.2017. Further, on 21.12.2017, the assessee has also filed copy of the audited account of the company showing business income at Rs.95.86 lakhs in net profit of Rs.10.56 lakhs. Hence, he argued that keeping in view the

business activities in the profits, the company cannot be treated as bogus and dummy company and since all the details have been filed as required by the Assessing Officer in order to prove identity, genuineness and creditworthiness the loan amount cannot be added to income u/s 68 of the Act. With regard to the loan received from M/s Regal Infotech Pvt. Ltd., it was argued that the amount received by the assessee is interest bearing @ 8% and the assessee has paid interest of Rs.1,04,548/- and also deposited TDS of Rs.10,455/- and hence, it cannot be treated as unexplained.

4. Regarding the M/s Regal Infotech Pvt. Ltd., it was argued that the loan received is interest bearing @ 8% and the assessee paid interest of Rs.376,219/- and deducted TDS of Rs.32,622/- thereon. It was argued that the summons were sent to wrong address and hence could not be served and the same cannot be treated as non-existing entity in view of non-service of summons.

5. The Id. DR, in addition to relying on the orders of the lower authorities argued based on the order of the Co-ordinate Bench of ITAT in the case of Synergy Finlease Pvt. Ltd. in ITA No. 4778/Del/2013. Further, she relied on the written submission which is as under:

*"In the above case, it is humbly submitted that the following decisions may kindly be considered with regard to addition made u/s 68 of I.T. Act:*

1. *PCIT Vs NRA Iron & Steel (P.) Ltd. [2019] 103 taxmann.com 48 (SC) (Copy Enclosed)*

*where Hon'ble Supreme Court reverse order of lower Authorities holding that where there was failure of assessee to establish credit worthiness of investor companies, Assessing Officer was justified in passing assessment order making additions under section 68 for share capital / premium received by assessee company. Merely because assessee company had filed all primary evidence, it could not be said that onus on assessee to establish credit worthiness of investor companies stood discharged*

2. *PCIT Vs NDR PROMOTERS PVT LTD (2019-TIQL-172-HC-DEL-IT)*

*where Hon'ble Delhi High Court held that a case involving make-believe paperwork to camouflage the bogus nature of the transactions is to be treated as unexplained credit u/s 68*

3. *ITO Vs Synergy Finlease Pvt. Ltd (ITA No.4778/Del/2013)*

where Hon'ble ITAT Delhi held that where investor of share application money had nominal income and cheques had been received just before issue of cheques for share application money, creditworthiness was not proved and addition u/s 68 was sustained.

4. Prem Castings (P.) Ltd. Vs CIT r20171 88 taxmann.com 189 (Allahabad) (Copy Enclosed)

where Hon'ble Allahabad High Court held that additions u/s 68 warrant being sustained where the identities & creditworthiness of investors in the assessee company are not established by the assessee & are also proved incorrect by the Department's Assessee Information System. In such circumstances, assessee cannot resist the additions on grounds that it did not have opportunity to cross-examine relevant witnesses. An assessee company cannot hide behind the shell of a corporate entity to feign ignorance regarding the identity of any person who invests in its share capital.

Prem Castings (P.) Ltd. Vs CIT 2018-TIQL-274-SC-IT (Copy Enclosed) where Hon'ble Supreme Court held as follows:

"We do not find any merit in this petition. The Special Leave Petition is accordingly dismissed."

5. CIT Vs MAF Academy (P.) Ltd (361 ITR 258) (Copy Enclosed)

where Hon'ble Delhi High Court held that where assessee, a private limited company, sold its shares to unrelated parties at a huge premium and thereupon within short span of time those shares were purchased back even at a loss, share transactions in question were to be regarded as bogus and, thus, amount received from said transactions was to be added to assessee's taxable income under section 68 It was held as follows:

"53. In contrast to the above judgments, in the present case, the Assessee is a private limited company and in the factual matrix, we have held that the Assessee has not been able to discharge the initial onus and has not been able to establish the identity, creditworthiness of the share applicants and the genuineness of the transaction. Though, in our considered opinion, none of the above judgments, referred to by the Assessee respondent, are applicable in the facts of the present case and in view of the findings recorded by us hereinabove.

54. In view of the above, we are of the view that the Assessee has not discharged the onus satisfactorily and the additions made by the Assessing Officer were justified and sustainable."

6. CIT Vs Navodaya Castle Pvt. Ltd T20141 367 ITR 306 (Del) (Copy Enclosed)

where Hon'ble Delhi High Court accepted that since the assessee was unable to produce the directors and the principal officers of the six shareholder companies and also that as per the information and details collected by the Assessing Officer from the concerned bank, the Assessing Officer had observed that there were genuine concerns about identity, creditworthiness of shareholders as well as genuineness of the transactions.

"20. Now, when we go to the order of the Tribunal in the present case, we notice that the Tribunal has merely reproduced the order of the Commissioner of Income-tax (Appeals) and upheld the deletion of the addition. In fact, they substantially relied upon and quoted the decision of its co-ordinate Bench in the case of MAF Academy P. Ltd., a decision which has been overturned by the Delhi High Court, vide its judgment in CIT v. MAF Academy P. Ltd. [2014] 206 DLT 277 ; [2014] 361 HR 25S (Delhi)). In the impugned order it is accepted that the assessee was unable to produce directors and principal officers of the six shareholder companies and also the fact that as per the information and details

*collected by the Assessing Officer from the concerned bank, the Assessing Officer has observed that there were genuine concerns about identity, creditworthiness of shareholders as well as genuineness of the transactions.*

*21. In view of the aforesaid discussion, we feel that the matter requires an order of remit to the Tribunal for fresh adjudication keeping in view the aforesaid case law."*

*Navodava Castle Pvt Ltd Vs CIT (T20151 56 taxmann.com 18 (SC)/r2015l 230 Taxman 268 (SC)) (Copy Enclosed)*

*LP of assessee dismissed by Hon'ble Supreme Court*

*7. Konark Structural Engineering (P.) Ltd. Vs DCIT T20181 96 taxmann.com 255 (SC) (Copy Enclosed)*

*where assessee-company received certain amount as share capital from various shareholders, in view of fact that summons to shareholders under section 131 could not be served as addresses were not available, and, moreover, those shareholders were first time assesseees and were not earning enough income to make deposits in question, addition made by Assessing Officer under section 68 was to be confirmed; SLP dismissed*

*Konark Structural Engineering (P.) Ltd. Vs DCIT T20181 90 taxmann.com 56 (Bombay) (Copy Enclosed)*

*where Hon'ble Bombay High Court held that where assessee-company received certain amount as share capital from various shareholders, in view of fact that summons served to shareholders under section 131 were unserved with remark that addressees were not available, and, moreover, those shareholders were first time assesseees and were not earning enough income to make deposits in question, impugned addition made by AO under sec. 68, was to be confirmed*

*8 Pratham Telecom India Pvt Ltd Vs DCIT (2018-TIQL-1983-HC-MUM-IT) (Copy Enclosed)*

*where Hon'ble Bombay High Court held that mere production of PAN numbers & bank statements is sufficient enough to discharge the burden on taxpayer to escape the realms of Section 68*

*9. CIT Vs Nipun Builders & Developers (P.) Ltd (30 taxmann.com 292. 214 Taxman 429, 350 ITR 407. 256 CTR 34) (Copy Enclosed)*

*where Hon'ble Delhi High Court held that where assessee failed to prove identity and capacity of subscriber companies to pay share application money, amount so received was liable to be taxed under section 68. It was held as follows:*

*"12. A perusal of the order of the Tribunal shows that it has gone on the basis of the documents submitted by the assessee before the AO and has held that in the light of those documents, it can be said that the assessee has established the identity of the parties. It has further been observed that the report of the investigation wing cannot conclusively prove that the assessee's own monies were brought back in the form of share application money. As noted in the earlier paragraph, it is not the burden of the AO to prove that connection. There has been no examination by the Tribunal of the assessment proceedings in any detail in order to demonstrate that the assessee has discharged its onus to prove not only the identity of the share applicants, but also their creditworthiness and the genuineness of the transactions. No attempt was made by the Tribunal to scratch the surface and probe the documentary evidence in some depth, in the light of the conduct of the assessee and other surrounding circumstances in order to see whether the assessee has discharged its onus under Section 68. With respect, it appears to us that there has only been a mechanical reference to the case-law on the subject without any serious*

*appraisal of the facts and circumstances of the case.*

*13. We, therefore, answer the substantial question of law framed by us in the negative, in favour of the revenue and against the assessee. The appeal of the revenue is allowed with no order as to costs."*

*10. CIT Vs Nova Promoters & Finlease (P) Ltd (18 taxmann.com 217. 206 Taxman 207. 342 ITR 169. 252 CTR 187) (Copy Enclosed)*

*where Hon'ble Delhi High Court held that amount received by assessee from accommodation entry providers in garb of share application money, was to be added to its taxable income under section 68. It Was held as follows:*

*"41. In the case before us, not only did the material before the Assessing Officer show the link between the entry providers and the assessee-company, but the Assessing Officer had also provided the statements of Mukesh Gupta and Rajan Jassal to the assessee in compliance with the rules of natural justice. Out of the 22 companies whose names figured in the information given by them to the investigation wing, 15 companies had provided the so-called "share subscription monies" to the assessee. There was thus specific involvement of the assessee-company in the modus operandi followed by Mukesh Gupta and Rajan Jassal. Thus, on crucial factual aspects the present case stands on a completely different footing from the case of Oasis Hospitalities (P.) Ltd. (supra).*

*42. In the light of the above discussion, we are unable to uphold the order of the Tribunal confirming the deletion of the addition of Rs. 1,18,50,000 made under section 68 of the Act as well as the consequential addition of Rs. 2,96,250. We accordingly answer the substantial questions of law in the negative and in favour of the department. The assessee shall pay costs which we assess at Rs. 30,000/-."*

*11 CIT Vs Ultra Modern Exports (P.) Ltd (40 taxmann.com 458, 220 Taxman 165) (Copy Enclosed)*

*where Hon'ble Delhi High Court held that where in order to ascertain genuineness of assessee's claim relating to receipt of share application money, Assessing Officer sent notices to share applicants which returned unserved, however, assessee still managed to secure documents such as their income tax returns as well as bank account particulars, in such circumstances, Assessing Officer was justified in drawing adverse inference and adding amount in question to assessee's taxable income under section 68. It was held as follows:*

*"9. As noticed previously, the CIT (A) was of the opinion that the assessee had discharged the basic onus which was cast upon it after considering the ruling in Lovely Exports (P.) Ltd. 's case (supra). The material and the records in this case show that notice issued to the 5 of the share applicants were returned unserved. The particulars of returns made available by the assessee and taken into consideration in paragraph 3.4 by the AO in this case would show that the said parties/applicants had disclosed very meager income. The AO also noticed that before issuing cheques to the assessee, huge amounts were transferred in the accounts of said share applicants. This discussion itself would reveal that even though the share applicants could not be accessed through notices, the assessee was in a position to obtain documents from them. While there can be no doubt that in Lovely Exports (P.) Ltd. (supra), the Court indicated the rule of "shifting onus" i.e. the responsibility of the Revenue to prove that Section 68 could be invoked once the basic burden stood discharged by furnishing relevant and material particulars, at the same time, that judgment cannot be said to limit the inferences that can be logically and legitimately drawn by the Revenue in the natural course of assessment proceedings. The information that assessee furnishes would have to be credible and at the same time verifiable. In this case, 5 share applicants could not be served as the notices were returned unserved.*

*In the backdrop of this circumstance, the assessee's ability to secure documents such as income tax returns of the share applicants as well as bank account particulars would itself give rise to a circumstance which the AO in this case proceeded to draw inferences from. Having regard to the totality of the facts, i.e., that the assessee commenced its business and immediately sought to infuse share capital at a premium ranging between Rs. 90-190 per share and was able to garner a colossal amount of Rs. 4.34 Crores, this Court is of the opinion that the CIT (Appeals) and the ITAT fell into error in holding that AO could not have added back the said amount under Section 68. The question of law consequently is answered in favour of the Revenue and against the assessee."*

12. *CIT Vs N R Portfolio Pvt Ltd T20141 42 taxmann.com 339 (Delhn/r2014l 222 Taxman 157 (Delhi)(MAG)/r2014l 264 CTR 258 (Delhi) (Copy Enclosed) where Hon'ble Delhi High Court held that if AO doubts the documents produced by assessee, the onus shifts on assessee to further substantiate the facts or produce the share applicant in proceeding. It was held as follows:*

*"30. What we perceive and regard as correct position of law is that the court or tribunal should be convinced about the identity, creditworthiness and genuineness of the transaction. The onus to prove the three factum is on the assessee as the facts are within the assessee's knowledge. Mere production of incorporation details, PAN Nos. or the fact that third persons or company had filed income tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up. These facts indicate and reflect proper paper work or documentation but genuineness, creditworthiness, identity are deeper and obtrusive. Companies no doubt are artificial or juristic persons but they are soulless and are dependent upon the individuals behind them who run and manage the said companies. It is the persons behind the company who take the decisions, controls and manage them."*

10 *PCIT Vs Bikram Singh [20171 85 taxmann.com 104 (Delhi)/r20171 250 Taxman 273 fDelhiVT20171 399 ITR 407 (Delhi) (Copy Enclosed) where Hon'ble Delhi High Court held that even if a transaction of loan is made through cheque, it cannot be presumed to be genuine in the absence of any agreement, security and interest payment. Mere submission of PAN Card of creditor does not establish the authenticity of a huge loan transaction particularly when the ITR does not inspire such confidence. Mere submission of ID proof and the fact that the loan transactions were through the banking channel, does not establish the genuineness of transactions. Loan entries are generally masked to pump in black money into banking channels and such practices continue to plague Indian economy."*

6. Heard the arguments of both the parties and perused the material available on record.

7. We find that – with regard to the loan received from Awasthi Medi Equipments Pvt. Ltd., it has been confirmed by the parties by the virtue of bank statements, ITR and audited account. The company had share capital of Rs.5.91 crores and Rs.13.55 crores of short term borrowings. The Revenue from operations including the interest received was of

Rs.3,87,188/-. For the year ending 31.03.2017, the lending company has shown business income of Rs.95.86 lakhs and a net profit of Rs.10.56 lakhs proving the activities of the company. Further, we find from the report of the Inspector who went to serve the summons has gone to the premises at A-41, Budh Vihar, Nera Mathura Road, Badarpur, New Delhi instead of 187, Ground Floor, Block-5, Sector-C, Bhagwati Vihar, Uttam Nagar, New Delhi which is shown in the confirmation letter filed by the assessee during the assessment proceedings. The Revenue has solely depended on non-service of summons for making the addition and also relied on the financials of the lender company. Whereas, we find from record that the lender company has been in regular business activity and earning a profit of Rs.10.56 lakhs. The loans were interest bearing, TDS was deducted on interest and hence, cannot be treated as accommodation entries as alleged by the Assessing Officer. Further, no investigation or enquiry has been conducted by the Revenue either through the Directors of the company or through any corroborative enquiries conducted by the Investigation Wing of the department. There is no evidence collected by the Revenue even to *prima facie* prove that the loan was bogus.. Hence, it cannot be treated as a fictitious loan. It is also a matter of record that the loan was also found to be repaid on 05.08.2017.

8. Regarding the loan received from M/s. Regal Infrastructure, we find that the assessee has paid interest of Rs.3,76,219/- and deducted TDS as per the Rules in-force. The lending company had a share capital of Rs.62,60,000/- and reserves in surplus of Rs.11.69 crores as on 31.03.2014. The company had gross revenues of Rs.19,81,107/- and returned income of Rs.2,88,486/-. Regarding the Inspector's enquiry, we find that the Inspector enquired at 62/11, Block-B, Phase-II, Narayana, New Delhi whereas the company has changed address to D-2, 46/10,

Second Floor, Laxmi Nagar, New Delhi. The change of address was also duly informed to the Assessing Officer.

9. We find that the case laws relied by the Revenue grossly pertains to the situations wherein the share application given by various parties was not proved conclusively as to their identity, genuineness and creditworthiness of the transactions. The facts of the instant case are different and are distinguishable. The assessee has discharged the onus of proving the creditors and the Revenue did not make required enquiries. The balance sheet and the business affairs clearly prove the financial capability of the lenders. Reliance is also placed on the judgment of Hon'ble High Court of Gujarat in the case of Apex Therm Packaging Pvt. Ltd. 222 Taxmann 125 wherein it was held that Section 68 of the Income-tax Act, 1961 - Cash credit (Unsecured loan) - Whether when full particulars, inclusive of confirmation with name, address and PAN Number, copy of income tax returns, balance sheet, profit and loss account and computation of total income in respect of all creditors/lenders were furnished and when it had been found that loans were furnished through cheques and loan account were duly reflected in balance sheet, Assessing Officer was not justified in making addition - Held, yes [Para 6]. Further, in the case of Vaibhav Cotton Pvt. Ltd. 217 Taxmann 140, the Hon'ble Court of Madhya Pradesh held that where the Tribunal on its independent analysis of the matter had reached the factual conclusion about genuineness of unsecured loan transaction and in this process Tribunal has taken note of fact that detailed account of concerned party were filed by the assessee and entries in account were through account payee cheques, source of deposit in the bank was not in dispute and identity of the parties was established and also creditworthiness of the creditors was established, it was right to hold that the loans taken cannot be assessed u/s 68 of the Act. Hence, keeping in view entire gamut of facts before us, and on going

through the judgments of the Hon'ble Courts filed by both the parties, we hereby delete the addition made on account of loans received by the assessee.

10. Regarding the ground no. 2 wherein it was pleaded that the Revenue has invoked the provisions of Section 115BBE of the Act, we find that the section has been amended w.e.f. 01.04.2017 which is prospective and hence not applicable to the year in question before us. Since, the additions have been deleted the applicability of the section to the case would be superfluous.

11. In the result, the appeal of the Revenue is dismissed.  
(Order Pronounced in the Open Court on 12/07/2019).

Sd/-

**(H. S. Sidhu)**  
**Judicial Member**

**Dated: 12/07/2019**

\*Subodh\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

**(B. R. R. Kumar)**  
**Accountant Member**

**ASSISTANT REGISTRAR**