

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F', NEW DELHI
BEFORE SH. H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA No. 4354/Del/2015
Assessment Year: 2012-13

INCOME TAX OFFICER, WARD 3(1), ROOM NO. 381, C.R. BUILDING, I.P. ESTATE, NEW DELHI- 110 0002	Vs.	M/S APPLE GREEN POWER LTD., T-1, 3 RD ANUPAM PLAZA, NEAR IIT CROSSING, KALU SARAI, HAUZ KHAS, NEW DELHI – 110 016 (PAN: AAICA2112N)
(Appellant)		(Respondent)

Department by	Smt. Sulekha Verma, CIT(DR)
Assessee by	Sh. Amit Goel, CA

ORDER

PER H.S. SIDHU, JM

This appeal is filed by the Revenue against the Order dated 29.5.2015 passed by the Ld. CIT(A)-I, New Delhi relating to assessment year 2012-13 on the following grounds:-

1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 18,48,00,000/- made by disallowing unsecured loan and added back by the AO u/s. 68 when the assessee had failed to discharge its onus or proving the genuineness of the transaction in the following manner:-
 - a) M/s Shirin Exports Pvt. Ltd., who has provided bogus loan for a sum of Rs. 8.78 crore, has not

provided copy of Bank Statement inspite of both the creditors i.e. M/s Shirin Exports Pvt. Ltd. And M/s Vigorous Trade Link Pvt. Ltd. Has not been proved, as both the companies failed to comply with notice dated 19.3.2015.

2. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 13,86,000/- made by disallowing commission paid for obtaining the above grounds unsecured loan and added back by the AO u/s. 68 when the assessee had failed to discharge its onus of proving the genuineness of the transaction.

3. It appears that Ld. CIT(A) has admitted the additional evidences and no opportunity was given to the AO for examination.

4. The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.

2. The brief facts of the case are that assessee filed its return of income declaring an income at NIL on 16.09.2012 and the same was processed u/s. 143(1) of the Income Tax Act, 1961 (in short "Act"). The case of the assessee was selected for scrutiny. Accordingly, notice u/s. 143(2) of the Act was issued on 14.8.2013 and thereafter the case was transferred to Ward 2(1) on 7.10.2013. Subsequently, notice u/s 142(1) of the Act alongwith questionnaire were issued. In response to the same, the AR of the assessee attended the proceedings from time to time. Letters seeking information u/s. 133(6) of the Act dated 19.3.2015 were sent to M/s Shirin Exports Pvt. Ltd. and M/s Vigorous Trade Link Pvt. Ltd. who had tendered unsecured loan to the assessee company amounting to Rs.

8,78,00,000/- and Rs. 9,70,00,000/- respectively. In response to the same, M/s Vigorous Trade Link Pvt. Ltd. has submitted a letter on 24.3.2015. AO on perusal of the statement of State Bank of India CA 32383244692 of M/s Vigorous Trade Link Pvt. Ltd., received from them on 18.3.2015 in response to an earlier letter regarding seeking information u/s. 133(6) of the Act, detail thereof is mentioned at page no. 3 of the assessment order. The AO further observed that M/s Vigorous Trade Link Pvt. Ltd. was incorporated on 05.7.2011 and during the period 1.4.2011 to 31.3.2012 they were not having either any self owned or rented business premises. AO further observed that as per their balance sheet as on 31.3.2012, total liabilities was Rs. 30,83,87,792/- out of which Trade Payables was Rs. 30,76,20,342/- and under such financial conditions they would not have been able to tender interest free unsecured loans of Rs. 9,70,00,000/- to the assessee company unless funds had been received from M/s Promart Retail Pvt. Ltd. The assessee company, M/s Apple Green Power Ltd., held 93.49% shares of M/s Promart Retail India Pvt. Ltd. as on 31.3.2012. Therefore, AO noted that it becomes apparent that funds of the assessee company was routed back via M/s Vigorous Trade Link Pvt. Ltd. in the form of unsecured loan. AO further observed that vide letter dated 05.01.2015 which was issued by the DDIT(Inv.), Unit-I, Noida, wherein it was informed that search and seizure operations was conducted on M/s Apple Group of companies on 11.11.2014 by his Unit. In the Preliminary Search Report dated 27.11.2014 of the Director of Income Tax (Inv.), Kanpur it was stated that during the search and seizure operations, incriminating documents were found and seized from the residence and corporate offices of the M/s Apple Group of companies. These documents show that the group has introduced bogus unsecured loans from domestic as well as companies based on Hong Kong. Therefore, AO by relying upon the decision of the Hon'ble Delhi High Court in the case of CIT vs. Nipun Builders & Developers Pvt. Ltd. 2013-TIOL-32-HC-DEL-IT, dated 07.01.2013 and the case of CIT vs. NR Portfolio Pvt. Ltd. 2013-TIOL-

955-HC-DEL-IT dated 22.11.2013 and Hon'ble Apex Court decisions in the case of CIT vs. Durga Prasad More (1971) 82 ITR 540 and Sumati Dayal vs. CIT (1995) 80 Taxman 89/214 ITR 801(SC) & CIT vs. Sri Meenakshi Mills Ltd. 63 ITR 609, has observed that assessee company received accommodation entries Rs. 18,48,00,000/- i.e. from M/s Shirin Exports Pvt. Ltd. amounting to Rs. 8,78,00,000/- and M/s Vigorous Trade Link Pvt. Ltd. amounting to Rs. 9,70,00,000/- and further observed that the accommodation entry gives usually charge 0.75% of the cheque amount as commission for providing accommodation entry. Therefore, he observed that in addition of Rs. 18,48,00,000/- the assessee company must have given Rs. 13,86,000/- as commission for providing accommodation entry. As the payment of Rs. 18,61,86,000 (Rs. 18,48,00,000/- plus Rs. 13,86,000/- has not been disclosed by the assessee company in their books of accounts, hence, he added back the amount of Rs. 18,61,86,000/- to the income of the assessee from undisclosed sources as per provisions of section 68 of the I.T. Act, 1961 and assessed the income of the assessee at Rs. 18,61,86,000/- u/s. 143(3) of the Act vide assessment order dated 25.03.2015. Against the assessment order, assessee appealed before the Ld. CIT(A), who vide his impugned order dated 29.05.2015 has partly allowed the appeal of the assessee and directed to delete the additions in dispute. Aggrieved with the impugned order, Revenue is in appeal before the Tribunal.

3. During the hearing, Ld. CIT DR relied upon the order of the Assessing Officer. She submitted that Ld. CIT(A) has wrongly deleted the addition of Rs. 18,48,00,000/- made by disallowing unsecured loan which was added back by the AO u/s. 68 when the assessee had failed to discharge its onus of proving the genuineness of the transaction because M/s Shirin Exports Pvt. Ltd., who has provided bogus loan for a sum of Rs. 8.78 crore, has not provided copy of Bank Statement in spite of both the creditors i.e. M/s Shirin Exports Pvt. Ltd. and M/s Vigorous Trade Link Pvt. Ltd. has not been proved, as both the companies failed to comply with notice dated 19.3.2015. She further submitted that Ld. CIT(A) has

also erred in deleting the addition of Rs. 13,86,000/- made by disallowing commission paid for obtaining the above grounds unsecured loan and added back by the AO u/s. 68 of the Act when the assessee had failed to discharge its onus of proving the genuineness of the transaction. She further submitted that it appears from the records that Ld. CIT(A) has admitted the additional evidences and no opportunity was given to the AO for examination. In support of her contention, Ld. CIT(DR) filed a Paper Book containing pages 1 to 106 in which she has attached the copy of written submission on the merits of the case including various case laws to support the case of the Department; copy of order sheet entry; reply of Shirin Export in response of notice u/s. 133(6); acknowledgement of return of income of Shirin Export of AY 2012-13; Audit report of Shirin Export of AY 2012-13; Reply of Vigorous Trade Link Pvt. Ltd. In response to notice u/s. 133(6); bank account furnished by Vigorous Trade Link Pvt. Ltd. Of AY 2012-13; Audit Report of Vigorous Trade Link Pvt. Ltd. Of AY 2012-13; letter of AO to Vigorous Trade Link Pvt. Ltd. 19.3.2015; Letter of AO to Shirin Export dated 19.3.2015; Letter of AO written to the Promart Retail dated 5.1.2015; Reply of Promart Retail India Pvt. Ltd. Dated 16.3.2015; letter of AO written to the appellant dated 12.3.2015; acknowledgement of return of income of Promart Retail of AY 2012-13; Audit Report of Promart Retail of AY 2012-13; Reply of Promart Retail to AO regarding change of address; share holding of Promart Retail as on 31.3.2012; Details of Promart Retail from MCA Website; Letter of AO to Norman Stelco Pvt. Ltd. To AO dated 12.1.2015; letter of the appellant to AO dated 6.1.2015; confirmation of accounts of Nirmanstelco Pvt. Ltd; Acknowledgement of return of income of NormanStelco Pvt. Ltd. Of AY 2012-13; Letter of the appellant to the AO dated 12.12.2014 and Details of unsecured amount of Promart Holding Ltd. She relied upon on the various case laws including the following decisions:-

- Pr. CIT vs. NDR Promoters Pvt. Ltd. (DHC) decided in ITA No. 49/2018 vide order dated 17.1.2019.
- Pr. CIT vs. NRA Iron Steel Pvt. Ltd. In SLP (Civil) No. 9855/2018 vide order dated 5.3.2019 (Hon'ble Supreme Court of India).
- Pr. CIT vs. Matchless Glass Services (P) Ltd. 65 taxmann.com 310 (Delhil) dated 18.12.2015 (DHC).
- Onassis Axles (P) Ltd. Vs. CIT 44 taxmann.com 408 (Delhi). (DHC) dated 13.2.2014.
- CIT vs. N. Tarika Properties Pvt. Ltd. 40 taxmann.com 525 (Delhi) dated 28.11.2013.
- CIT vs. Nipun Builders & Develpers Pvt. Ltd. 30 taxmann.com 291 (Delhi) dated 7.1.2013.
- CIT vs. MAF Academy (P) Ltd.
- CIT vs. Nova Promoters & Finlease (P) Ltd.
- CIT vs. Youth Construction (P) Ltd.
- CIT vs. Ultra Modern Exports (P) Ltd.
- CIT vs. NR Portfolio (P) Ltd.
- CIT vs. Frostair (P) Ltd.
- Beutex India P Ltd. Vs. CIT
- CIT vs. Reliance International Corporation P Ltd.
- CIT vs. P. Mohankala
- Pr. CIT vs. Bikram Singh

- CIT vs. Precision Finance P Ltd.
- CIT vs. DK Garg
- ACIT vs. Saraswati International Ltd.
- CIT vs. Jansampartk Advertising & Marketing P. Ltd.

4. On the contrary, Ld. Counsel for the assessee relied upon the order of the Ld. CIT(A) and in support of his contention, he filed a copy of Synopsis wherein he has relied upon various case laws and also relied upon the case laws mentioned in the impugned order.

5. We have heard both the parties and perused the records especially the impugned order, Written Submission of both the parties and the case laws cited by them. In this case, we find that during the year under consideration the assessee has received loans from the following parties:-

(i) Shirim Exports Private Ltd. RS.8,78,00,000/-

(ii) Vigorous Trade Link Pvt. Ltd. Rs.9,70,00,000/-

5.1 We note that the assessee has furnished the following documents/details before the Assessing Officer in respect of these loans:

- Complete name and address of loan creditors.
- Confirmation of accounts by the loan creditors.
- Copy of bank statements of loan creditors reflecting the loans given to assessee company.
- Income Tax particulars of loan creditors alongwith copy of their ITR.
- Copy of Audited Statement of accounts of loan creditors.

5.2 In our view, the assessee has, thus discharged the onus cast upon it under Section 68 of Income Tax Act, 1961. The Assessing Officer has not pointed out any discrepancy in the above documents. The Assessing Officer issued notices to the loan creditors for independent verification of the loan transactions. The notices issued by the Assessing Officer were duly served upon the loan creditors and in response to such notices the loan creditors filed their replies before the Assessing Officer confirming the loans given by them to the assessee company. In spite of availability of all the aforesaid information, and even the confirmation by creditors in compliance to notice issued by the Assessing Officer, in our opinion, the Assessing Officer was not justified in making the impugned addition of loans without rebutting the evidences furnished by the assessee. It is observed that the Assessing Officer, before making the additions, did not even issue any show cause notice to the assessee. Such action is not tenable. The Assessing Officer has made remarks that some alleged incriminating documents were found and seized during search and survey relating to Apple group of companies. According to the assessee, these remarks are highly vague and arbitrary. The Assessing Officer was duty bound to bring on record any such alleged incriminating document, if any. There is substance in the submission of assessee that had there been any search relating to the case of assessee, the A.O. could not have made assessment u/s 143(3) as in terms of provisions of section 153A, the assessment proceedings would have got abated. It is a settled law that suspicion howsoever strong cannot take place of evidence. It is undisputed fact that both the creditors are companies incorporated under the provisions of Companies act 1956 and are existing income tax assessee. They have been allotted PAN by department. They are having bank accounts. The loan transactions have taken place by account payee cheques. There is no cash deposit or unexplained deposit in the bank accounts of the creditors. The loans given by the creditors are reflected not only in their bank statements but also in their audited statement of accounts furnished before the Assessing Office. It is germane to note that

it is not merely a case of necessary documentary evidences furnished by the assessee. The important aspect of the matter is that the Assessing Officer has independently verified the transactions by issuing notices to the loan creditors. In fact, the matter does not end here. The Assessing Officer went one step further and made independent confirmation from the creditor of the creditor i.e. "source of source". As is evident from the bank statements of the loan creditors as also noted by the Assessing Officer himself in the assessment order, that the creditors company received the amount from a company namely Promart Retail India Pvt. Ltd. The Assessing Officer issued notice to Promart Retail India Pvt. Ltd. and made independent inquiries from it. In response to such notice Promart Retail India Pvt. Ltd. filed their reply to the Assessing Officer and duly confirmed the fact of their having given amounts to the two creditors of assessee company. Thus, the Assessing Officer has made independent verification not only from the "source" (i.e. the loan creditor of the appellant) but also from the "source of source"(i.e. creditor of the loan creditor). The Assessing Officer has made remarks that the loan creditors received the amounts from Promart Retail India Pvt. Ltd. in which the assessee company holds 93.49% shares. In our view, this cannot be a ground for making the additions. On the contrary, it establishes the source of credit and genuineness of the transactions. It is not the case of the Assessing Officer that amount invested by assessee company in the share capital of Promart Retail Pvt. Ltd. is the unaccounted money of the appellant company. The said investments made by the assessee has been found by the Assessing Officer to be fully explained and the Assessing Officer has not made any adverse inference in respect of such investments. The Assessing Officer has also verified this investment by making independent 'inquiries from the Promart Retail India Pvt. Ltd. Therefore, there is no rationale for the Assessing Officer to make the addition on the ground that the assessee has made investment in Promart Retail India Pvt. Ltd. As per the audited statements of accounts of Shirin Exports Pvt. Ltd. it is having turnover of more than Rs. 25 Crore for A. Y.

2012-13. It has also filed its return of income and paid the taxes thereon. Similarly as per the audited statements of accounts of Vigorous Trade Link Pvt. Ltd. it is having turnover of more than Rs. 27 Crore for A.Y. 2012-13 and it has filed its return of income and paid the taxes thereon. Therefore, the loan creditor companies cannot be alleged to be paper companies or fake companies. Even the "source" of "source" i.e. Promart Retail India Pvt. Ltd. is a company having turnover of more than RS.73 crores for A.Y. 2012-13. It has filed return of income declaring income of Rs.3,24,88,166/- and paid taxes of RS.1,15,05,860/-. We note that the Ld. CIT(DR) has referred to the judgments of Hon'ble Delhi High Court in the case of Nipun Builders and Developers Pvt. Ltd and N.R. Portfolios (P) Ltd. It is seen that the case laws relied upon by A.O. are not applicable to the facts of the assessee's case. In the case laws relied upon by Ld. CIT(DR) as well as by the A.O., the Hon'ble High Court while relying upon its earlier judgement in case of Nova Promoters & Finance Pvt. Ltd., distinguished the judgement of Apex Court in case of Lovely Exports Ltd. by holding as under :-

"27. The decision in the case of Lovely Exports Ltd. (supra) was considered in Nova Promoters and Finlease (P) Ltd. (supra) and it was elucidated:-

'38. The ratio of a decision is to be understood and appreciated in the background of the facts of that case. So understood, it will be seen that where the complete particulars of the share applicants such as their names and addresses, income tax file numbers, their creditworthiness, share application forms and share holders' register, share transfer register etc. are furnished to the Assessing Officer and the Assessing Officer has not conducted any enquiry into the same or has no material in his possession to show that those particulars are false and cannot be acted upon, then no

addition can be made in the hands of the company under sec. 68 and the remedy open to the revenue is to go after the share applicants in accordance with law. We are afraid that we cannot apply the ratio to a case, such as the present one, where the Assessing Officer is in possession of material that discredits and impeaches the particulars furnished by the assessee and also establishes the link between self-confessed "accommodation entry providers", whose business it is to help assessees bring into their books of account their unaccounted monies through the medium of share subscription, and the assessee. The ratio is inapplicable to a case, again such as the present one, where the involvement of the assessee in such modus operandi is clearly indicated by valid material made available to the Assessing Officer as a result of investigations carried out by the revenue authorities into the activities of such "entry providers". The existence with the Assessing Officer of material showing that the share subscriptions were collected as part of a pre-meditated plan - a smokescreen - conceived and executed with the connivance or involvement of the assessee excludes the applicability of the ratio. In our understanding, the ratio is attracted to a case where it is a simple question of whether the assessee has discharged the burden placed upon him under sec.68 to prove and establish the identity and creditworthiness of the share applicant and the genuineness of the transaction. In such a case, the Assessing Officer cannot sit back with folded hands till the assessee exhausts all the evidence or material in his possession and then come forward to merely reject the same, without carrying out any verification or enquiry

into the material placed before him. The case before us does not fall under this category and it would be a travesty of truth and justice to express a view to the contrary. '

28. In Nova Promoters & Finlease (supra), it was held that in view of the link between the entry providers and incriminating evidence, mere filing of PAN number, acknowledgement of income tax returns of the entry provider, bank account statements etc. was not sufficient to discharge the onus. "

5.3 From the above, it is apparent that the Hon'ble Delhi High Court in the aforesaid case laws, distinguished the judgment of Lovely Exports, because following facts were found by the Court:

'The shareholders were self-confessed entry operators. The notice u/s 131/133(6) issued by A.O. to the shareholder was returned back unserved with the remarks "No such company". Thus the identity / existence of shareholder was in doubt. The assessing officer had in his possession material establishing the link between self-confessed entry providers. The assessing officer was found to be in possession of valid material with regard to involvement of assessee with such entry providers. As per the investigation carried out by the investigation wing, the shareholders were found to be entry providers. In view of the availability of incriminating material, link between the assessee and entry providers was found.'

5.4 However, in the assessee's case the Assessing Officer has not brought on record any such feature. It is a case of receipt of loans and not of issue of shares. Further, it is not a case where any loan creditor is found to be entry operator. The A.O. has not brought on record any incriminating or adverse material/information in his possession in relation

to the loan creditors. The identity of the loan creditors has not even been doubted by the Assessing Officer. The notices issued by the Assessing Officer u/s 133(6) of the Income Tax Act, 1961, have been duly served on the loan creditors and they have confirmed about their having given loans to the assessee company. Therefore, the case laws relied upon as referred above are not applicable. We note that the Assessing Officer has referred to the judgments of Hon'ble Apex Court in the case of CIT v Durga Prasad More (1971) 62 ITR 640 and Sumati Dayal v CIT (1995) 80 Taxman 89. However, the facts and circumstances of the case of the assessee are different from the facts and circumstances of the case relied upon by the A.O. In the case laws relied upon by the A.O., the Apex Court has held that human probabilities and circumstantial evidence can be considered when the evidences furnished were contrary to the human probabilities and circumstantial evidence. In the assessee's case, the A.O. has not established as to how the documentary evidences furnished by the assessee were contrary to the human probabilities and circumstantial evidences. The Assessing Officer has not established as to what are the reasons and evidences on the basis of which he is alleging the loan creditors as paper companies and the transactions as fake loans. Similarly, the reliance placed by the Assessing Officer to the case of CIT v Meenakshi Mills Ltd (63 ITR 609) is not applicable to the facts of the assessee's case. In this case law relied upon by the A.O., the issue was with regard to lifting of corporate veil for taxability of interest income earned in non-taxable territories. In the assessee's case, there are no such facts. Further the judicial decisions relied upon by the Ld. CIT(DR) as referred above have been duly considered. In our considered view, we do not find any parity in the facts of the decisions relied upon with the peculiar facts of the case in hand. Therefore, in view of the aforesaid factual matrix and legal position, the addition of Rs.18,48,00,000/- made by Assessing Officer was rightly deleted by the Ld. CIT(A), which does not need any interference on our part, hence, we uphold the action of the

Ld. CIT(A) on the issue in dispute and accordingly, reject the ground no. 1 raised by the revenue.

7. As regards Ground no. 2 relates to addition of Rs.13,86,000/- made by the Assessing Officer on account of Commission paid. We note that the Assessing Officer has made the addition of Rs.13,86,000/- as alleged commission paid for obtaining alleged accommodation entry of Rs.18,48,00,000/-. In view of findings given for ground No. 1 as aforesaid, the addition of Rs.13,86,000/- made by the Assessing Officer was rightly deleted by the Ld. CIT(A), which does not need any interference on our part, hence, we uphold the action of the Ld. CIT(A) on the issue in dispute and accordingly, reject the ground no. 2 raised by the revenue.

8. As regards ground no. 3 is concerned, the Ld. CIT(DR) did not establish that which additional evidences were admitted by the Ld. CIT(A) for which opportunity was not provided to the AO, hence, this ground is dismissed.

9. In the result, the Appeal of the Revenue is dismissed.

Order pronounced on 18-09-2019.

Sd/-

Sd/-

**[O.P. KANT]
ACCOUNTANT MEMBER**

**[H.S. SIDHU]
JUDICIAL MEMBER**

Date:18/09/2019

SRB

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1. Appellant 2. Respondent 3. CIT 4. CIT (A) 5. DR, ITAT

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By Order,

Assistant Registrar, ITAT, Delhi Benches