

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

ITA No. 1848/MUM/2019

Assessment Year: 2011-12

&

ITA No. 1849/MUM/2019

Assessment Year: 2012-13

&

ITA No. 1850/MUM/2019

Assessment Year: 2013-14

Shree Bhavani Developer,
Ground floor, Siddhivinayak
Darshan, J.B. Boricha,
Mahalaxmi Adarsh Nagar,
Mumbai-400 001.

PAN No. ABFFS9075D

Appellant

Vs. ITO-21(3)(3), 117,
Aayakar Bhavan, M.K.
Road, Mumai- 400 020.

Respondent

Assessee by : Shri Pramod Kumar Parida, AR

Revenue by : Ms. Nitin Waghmode, DR

Date of Hearing : 09/08/2019

Date of pronouncement: 31/10/2019

ORDER

PER N.K. PRADHAN, AM

The captioned appeals filed by the assessee are directed against the order of the Commissioner of Income Tax (Appeals)-33, Mumbai [in short 'CIT(A)'] and arise out of the assessment completed u/s 143 r.w.s 147 of the Income Tax Act 1961 (the 'Act'). There has been a delay of 17 days on the part of the assessee in filing the appealed before the Tribunal. Having

gone through the affidavit filed, we find that there was a genuine difficulty on the part of the assessee in not filing the appeal in time. Considering it, we condone the delay of 17 days.

As common issues are involved, we are proceeding to dispose them off through a consolidated order for the sake of convenience. Facts being identical, we begin with the assessment year (AY) 2011-12.

ITA No. 1848/MUM/2019
Assessment Year: 2011-12

2. Briefly stated the facts of the case are that the assessee filed its return of income for the A.Y 2011-12 on 29.09.2011 declaring total income of Rs.Nil. The return was processed u/s. 143(1) of the Act. Thereafter, the Assessing Officer (AO) received information from the Director General of Income Tax (Inv.) [in short 'DGIT'] that the loan of Rs.10,00,000/- received by the assessee from M/s. Nayan Gems was nothing but accommodation entries. The loan was received on 14.01.2011 by RTGS. The AO re-opened the assessment by issuing notice u/s. 148 to the assessee.

The AO observed that the statement of Shri Nitin Jogad, proprietor of Nayan Gems was recorded, who admitted that he is a proprietor for namesake as per direction of Sanjay Chaudhari and Shri Chaudhari and other associated persons also admitted that their group concerns were providing accommodation entries.

During the course of assessment proceedings the AO issued notices u/s. 133(6) dated 09.10.2015 to M/s. Nayan Gems. In response to it, the said concern *vide* letter dated 19.10.2015 filed (i) copy of ledger account

in its books, (ii) copy of bank statements, (iii) copy of acknowledgement of return filed and (iv) copy of PAN Card.

The assessee *vide* letter dated 30.10.2015 filed (i) confirmation of loan accounts for the financial year 2011-12, (ii) details of transactions Nayan Gems: party name confirmation and ledger, (iii) loan paid and given details with excel sheet and interest received details, (iv) details of commission paid with excel sheet, confirmation, TDS Certificates, (v) TDS paid after 31.03.2013, excel sheet with paid challan and (vi) details of sundry creditors more than three years.

Further, the assessee filed a reply dated 18.02.2016 before the AO stating that the outstanding loan as on 31.03.2011 was Rs. 10,00,000/- and they have normal loan activities carried out during the year and the said loan is already repaid in the year 2013-14. In this regard, a copy of the ledger account and bank statement was filed by the assessee before the AO.

However, the AO was not convinced with the above reply of the assessee on the ground that Shri Nitin Jogad (Proprietor of M/s. Nayan Gems) has explained the *modus operandi* of accommodation entry and the assessee failed to establish the genuineness, nature and source of cash credits. Thus, the AO made an addition of Rs.10,00,000/- as unexplained cash credit u/s. 68 of the Act. Further, he added Rs.20,000/- by calculating commission paid @2% for accommodation entries.

3. In appeal, the Id. CIT(A) agreed with the reasons giving by the AO and confirmed the addition of Rs.10,00,000/- made by the AO.

4. Before us, the ld. counsel for the assessee submits that the AO has issued defective notice u/s. 148 of the Act as reason to believe was not formed out of own volition but was based on borrowed information from the report of the DGIT, which is not a valid information to form the required reasons and therefore, the jurisdiction required becomes defective and the notice be treated as *void-ab-initio* and consequently the order be vacated. Further, it is argued that the AO ought to have appreciated that there was no failure by the appellant to disclose truly and fully all material facts pertaining to loan transaction; therefore the issue of notice for re-opening merely on the basis of information supplied by the DGIT cannot be a valid reason to reopen and add the loan amount on deemed basis to determine the alleged escaped income.

The ld. counsel further submits that the AO erred in making deemed addition without appreciating that the appellant had raised genuine loans from the party against which the primary onus cast upon was discharged; therefore the addition u/s. 68 is not justified and the same may be deleted. Further, it is argued by him that doubts and reports of third parties, however strong, cannot be substitute to bare facts on merits and hence the unilateral addition u/s. 68 is uncalled for as the same had been returned to the parties in subsequent year(s).

Also, the ld. counsel submits that the AO erred in making deemed addition on account of possible commission paid purely out of presumption and therefore, the addition u/s.68 has no merits and the same may be deleted.

The ld. counsel files a paper book containing the documents which were filed before the AO and Ld. CIT(A). Specific reference was made to the confirmation of loan, ledger loan account filed before the AO.

5. On the other hand, the ld. Departmental Representative (DR) submits that a perusal of the bank statement of Nayan Gems shows that loan of Rs.10,00,000/- was given by it to the assessee on 14.01.2011 and the on the same date an amount of Rs.10,00,000/- was received by Nayan Gems from one Nazar Impex P. Ltd. Hence, Nayan Gems did not have own funds to advance loan to the assessee and the source of the same is out of borrowing of the same amount on the same date from another concern, whose credential and creditworthiness is not known. It is argued that the real nature of transactions as reflected in the bank statement is matching with the statement of Shri Nitin Jogad, proprietor of Nayan Gems and statement of Shri Sanjay Chaudhuri, the entry operator controlling Nayan Gems. Reliance is placed by him on the decision in *Jayant Security & Finance Limited v. ACIT 254 Taxman 81(Guj.)* and *Ankit Agrochem (P) Ltd. v. JCIT (2018) 253 Taxman141 (Raj.)*The ld. DR thus supports the order passed by the ld. CIT(A).

6. We have heard the rival submissions and perused the relevant material available on record. The reasons for our decision are given below.

As mentioned earlier, in the first ground of this appeal, the assessee has raised an objection against the notice u/s.148 issued by the AO. In the instant case, the assessee filed its return of income for the A.Y. 2011-12 on 29.09.2011 declaring total income of Rs.Nil. The said return was

processed u/s.143(1) of the Act. Thereafter, the AO reopened the assessment on the basis of information from the DGIT that the assessee had obtained accommodation entries. The Hon'ble Supreme Court in the case of *ACIT v. Rajesh Jhaveri Stock Brokers P. Ltd.* (2007) 291 ITR 500 (SC) analyzed the distinction between the acceptance of a return u/s 143(1) and an assessment which is framed u/s 143(3) of the Act. In the former case, the AO would have much wider latitude to reopen the assessment. In the case of *Avirat Star Homes Venture P. Ltd. v. ITO* (2019) 411 ITR 321 (Bom), the Hon'ble Bombay High Court referring to the above decision has held :

“that the return had been accepted without scrutiny. The income-tax investigation had subsequently provided information about certain companies having bank accounts with a bank in Kolkata and who were involved in giving accommodation entries of various nature to several beneficiaries including the assessee. The information supplied by the Investigation Wing to the Assessing Officer formed a *prima facie* basis to enable the Assessing Officer to form a belief of income chargeable to tax having escaped assessment. The Assessing Officer perused the information supplied by the Investigation Wing and having formed the belief that income chargeable to tax had escaped assessment, could not be stated to have acted mechanically. Further, the mere fact that the assessee had asked for certain information from the Assessing Officer, which at this stage was not supplied, would not invalidate the reasons recorded by the Assessing Officer in issuing the notice. The notice was valid.”

Thus in the instant case, the AO has rightly issued notice u/s 148 for reopening the return of income processed u/s 143(1) of the Act. Therefore, the 1st ground of appeal is dismissed.

6.1 Now we turn to the 2nd & 3rd ground of appeal. We find that in response to notice u/s.133(6) dated 09.10.2015, M/s. Nayan Gems *vide* letter dated 19.10.2015 filed (i) copy of ledger account in its books, (ii) copy of bank statements, (iii) copy of acknowledgement of return filed and (iv) copy of PAN Card.

The assessee *vide* letter dated 30.10.2015 filed (i) confirmation of loan accounts for the financial year 2011-12, (ii) details of transactions Nayan Gems: party name confirmation and ledger, (iii) loan paid and given details with excel sheet and interest received details, (iv) details of commission paid with the excel sheet, confirmation, TDS Certificates, (v) TDS paid after 31.03.2013, excel sheet with paid challan and (vi) details of sundry creditors more than three years.

Further, the assessee filed a reply dated 18.02.2016 before the AO stating that the outstanding loan as on 31.03.2011 was Rs. 10,00,000/- and they have normal loan activities carried out during the year and the said loan is already repaid in the year 2013-14. In this regard, a copy of the ledger account and bank statement was filed by the assessee before the AO.

In the case of *CIT v. Daulat Ram Rawatmull* (1973) 87 ITR 349 (SC), it is held by the Hon'ble Supreme Court that once the assessee is able to establish that he has in fact received money from a third party, he cannot be burdened with a further onus of establishing the source from which such third party had been able to obtain the money.

It is well-settled that when an assessee claims that he had borrowed money from a third party, the initial onus lies on the assessee

to establish (a) the identity of the party, (b) the ability of the third party to advance money and (c) *prima facie* that the loan is a genuine one.

If the assessee establishes the aforesaid three pre-conditions, it would be for the Department to disprove the same.

As held in the case of *CIT (Addl.) v. Bahri Bros (P) Ltd.* (1985) 154 ITR 244 (Pat.), onus can be said to be discharged by the assessee when he produces certificates from the bank in respect of amounts received from lenders by a/c payee cheques and of repayments of loan, interest and brokerage by a/c payee cheques.

In the instant case, as the assessee established the aforesaid three pre-conditions, it was for the Department to disprove the same. The least the AO could have done was to verify the transactions through bank. The least the Id.CIT(A) could have done was to direct the AO u/s.250(4) of the Act to conduct an enquiry to find out the genuineness of the transactions. Neither the AO nor the Id. CIT(A) has made an attempt to verify it.

An explanation, *prima facie* reasonable cannot be rejected on capricious or arbitrary grounds or on mere suspicion or on imaginary or irrelevant grounds. In this regard, we fruitfully refer to the decision in *R.B.N.J. Naidu v. CIT*, [1956] 29 ITR 194 (Nag.), *Lajwanti Sial v. CIT*, [1956] 30 ITR 228 (Nag.).

In view of the above factual matrix and position of law, we set aside the order of the Id. CIT(A) and delete (i) the addition of Rs.10,00,000/- made by the AO u/s. 68 of the Act and (ii) addition of commission of Rs.20,000/-. Thus, the 2nd & 3rd grounds of appeal are allowed.

Facts being identical, our decision for A.Y. 2011-12 applies *mutatis mutandis* to A.Y 2012-13 & 2013-14.

7. In the result, the appeals for A.Y. 2011-12 and A.Y. 2013-14 are partly allowed, whereas the appeal for A.Y. 2012-13 is allowed.

Order pronounced in the open Court on 31.10.2019

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 31.10.2019

S. Samanta, P.S. (On tour)

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai