

आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई।
**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH: CHENNAI**

श्री रमित कोचर, लेखा सदस्य एवं
श्री धुव्वुरु आर.एल. रेड्डी, न्यायिक सदस्य के समक्ष
**BEFORE SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER AND
SHRI DUVVURU R.L.REDDY, JUDICIAL MEMBER**

ITA No.1933/Chny/2018
निर्धारण वर्ष / **Assessment Year: 2003-04**

M/s.Shridevi Park Pvt. Ltd.,
No.1, Hanumantha Road,
T.Nagar, Chennai-600 017.

[PAN: AAJCS1161J]

(अपीलार्थी/ Appellant)

v. The Asst. Commissioner of
Income Tax,
Company Circle-VI(4),
Chennai.

(प्रत्यर्थी/ Respondent)

अपीलार्थी की ओर से/ Appellant by

प्रत्यर्थी की ओर से /Respondent by

सुनवाई की तारीख/Date of Hearing

घोषणा की तारीख /Date of Pronouncement

: Mr.G.Surya Narayanan, Adv.

: Mr. Guru Bashyam, Addl. CIT

: 25.11.2019

: 25 .11.2019

आदेश / O R D E R

PER RAMIT KOCHAR, ACCOUNTANT MEMBER:

This appeal filed by assessee is directed against appellate Order dated 27.02.2018 passed by learned Commissioner of Income Tax (Appeals)-15, Chennai (hereinafter called "the CIT(A)"), in ITA No.484/2013-14/CIT(A)-15 for assessment Year (ay) 2003-04, the appellate proceedings before learned CIT(A) had arisen from assessment order dated 24.12.2007 passed by learned Assessing Officer (hereinafter called "the AO") u/s.143(3) read with Section 147 of the Income-tax Act, 1961 (hereinafter called "the Act").

2. The grounds of appeal raised by assessee in memo of appeal filed with Income-Tax Appellate Tribunal, Chennai (hereinafter called "the Tribunal") read as under:-

"1. The order of the commissioner of income tax (Appeals) in confirming the order of the assessing officer is highly illegal, improper, against the facts and circumstances of the case, against the material evidence on record, perverse and liable to be set aside.

2. The authorities below failed to consider that Rs.14,82,488/- representing the share application money had been accounted for and the proper proof as to return of allotment in Form 2 and annual return filed with the registrar of companies were enclosed with the appeal grounds and produced before the assessing authority and both of them failed to consider the same by holding that no material evidence was produced for the said purpose is highly perverse and without considering the material document is highly illegal, and liable to be set aside.

3. The appellate authority failed to note that for no fault of the appellant that appeal was kept pending for 10 years and all of a sudden in a haste and without offering a persona! hearing would show that the appeal has not been decided in accordance with law and the order is liable to be set aside.

4. The assessing Officer as well as appellate authority failed to note that only the initial onus that will be on the appellant to prove that it is properly done and therefore the burden is proved by production of appropriate document, the authorities shall accept and pass suitable orders in accordance with law and the failure of the authorities. In the present case to consider the facts and material evidence in proper perspective has rendered its finding perverse and liable to be set aside.

5. The authorities below failed to consider that unsecured loans is different from cash credit. Cash credit is given on the basis of security, unsecured loan by itself mean that the loan is not secured. In the present case the loan as well as the repayment has been properly accounted; the creditor has also accounted for the said loan and repayment in their accounts and it is also accepted by their department. Hence both the authorities are wrong in concluding that the said amounts will come under Section 68 is highly improper and liable to be set aside.

6. The order of authorities are liable to be set aside on such further grounds as may be raised at the time of hearing and/or on such further grounds as this Hon'ble Tribunal may deem fit and proper on the facts and circumstances of this case and render justice.

7. It is therefore prayed that the order of the Commissioner of Income Tax Appeals (15) in ITA No. 484/2013 - 14/ CIT (A) - 15 in confirming the order of assessment for the year 2003 - 04 dated 24/12/2007 is liable to be set aside."

3 Briefly stated facts of case are that the assessee is engaged in business of Boarding & Lodging and running Bars. The assessee has claimed to have received certain loans, share application money , some of which were received in cash also. The AO invoked provisions of Sec.69D of the

1961 Act and brought to tax, following unsecured loans amounting to ₹25,44,388/- which are appearing in assessee's Balance Sheet, details of which are as under:

Name of Lender	Amount lent (Cash)
Smt.Balagowri V	Rs.2,00,000
Shri Ganesh V.S.	Rs.2,50,000
GMEC	Rs. 61,900
Shri Balasubramanian P.M. (Director)	Rs.2,50,000
Shri Gurudas P.M. (Brother of Shri P.M.Balasubramanian)	Rs.2,32,488
Shri Rajkumar A	Rs.7,50,000
Smt. Saraswathi Gurudas (wife of Shri Gurudas)	Rs.2,50,000
Shri Srinandh	Rs.2,00,000
Shri Velusamy P.	Rs.3,50,000
Total	Rs.25,44,388

As per AO , the aforesaid loans were hand loans and assessee had failed to show promissory notes in support of aforesaid loans and hence these cash loans were deemed to be income of the assessee by AO , vide assessment order dated 24.12.2017 passed by AO u/s 143(3) read with Section 147 of the 1961 Act

4. Being aggrieved by an assessment framed by AO , the assessee filed first appeal with learned CIT(A) who was pleased to dismiss appeal of the assessee , vide appellate order dated 27.02.2018 passed by learned CIT(A) , by holding as under:

4.3. CIT(A)'s remarks and decision :

I have carefully gone through the observation of the AO in the assessment order as mentioned above under para 4.1 and the appellant's submission before the CIT(A) under para 4.2.

4.3.1. After perusing the ledger folios for loan account and building construction, the AO noticed receipt of cash from Shri P.M.Gurudas towards share application money and on similar lines there was cash receipt from Shri P.M.Balasubramanian, Shri A.Rajkumar and Ms.Saraswathi Gurdas on different dates. Since, no explanation was offered for receipt of cash, the AO initiated penalty proceedings u/s 271D for violation of Section 269SS. On

page2, paragraph 4, the AO has tabulated the amounts received by the appellant company in cash totaling Rs.25,44,388/-. By invoking Section 69D, the AO has concluded that those cash receipts are unexplained amounts borrowed on a hundi Before the CIT(A), the appellant submitted that out of total credits, only Rs.15,44,388/- was received in cash, as follows - Rs.14,82,488/- towards share application money and Rs.61,900/- towards unsecured loans, and the balance amount of Rs.10 Lakhs was received by cheque. The appellant has contended before the CIT(A) that since the aforesaid amount was repaid by cheque, provision of Section 69D will not be applicable. In share application money of Rs. 14,82,488, and unsecured loan of Rs.10,61,900/- the appellant relied on the decision in the case of Uma Polymers Pvt. Ltd. and certain other decisions stating that the AO's addition was unwarranted.

4.3.2. I have considered both the points of view. Although several opportunities were given to the appellant under para 3.1, the appellant could not submit any documentary evidence in support of its claim. Since this appeal is pending for more than ten years, I am constrained to dispose of this appeal based on material available on record.

4.3.3. Coming to the appellant's contention that this share application' money received in cash of Rs.14,82,488/- should not be assessed u/s 69D. It is pertinent to mention that the appellant did not submit any particular related to this claim. In spite of several opportunities given, the appellant could not give any documentary evidence with regard to share application, share allotment, or intimation to the ROC. Since the appellant has not discharged its primary onus of proving the identity, genuineness and capacity of the persons who have claimed to have given money to the appellant in cash towards share application money, I am of the considered opinion that the appellant's claim is devoid of merit and therefore, rejected. Even if the appellant's claim that it is towards share application money is supported by document, it should be assessed as 'unexplained cash credit' u/s 68 as the appellant has failed to discharge its primary onus as mentioned above. Therefore, the AO's addition of share application money of Rs.14.82.488/- is confirmed as unexplained cash credit u/s 68 of the IT Act.

4.3.4. Now coming to the appellant's submission that only Rs.10,61,900/- was received as unsecured loans. In this regard, the appellant's contention that Rs.10 Lakhs was repaid by cheque in subsequent year does not absolve the appellant of its primary onus of proving the identity, genuineness and capacity of the lender at the time of receipt in this AY. Since the appellant has not controverted the AO's observation that the appellant received unsecured loan in cash, I concur with the AO's addition to the extent of Rs. 10,61.900/- u/s 69D. As per Section 69D, a cash loan received shall be deemed to be income of the person borrowing unless it is proved that the said amount is the income of any other person. Here, the appellant has not submitted any material evidence to demonstrate that the amount borrowed was out of accounted income of the person who advanced the loan.

4.3.5. I have perused the case laws relied on by the appellant and I do not find them applicable to the facts and circumstances of the appellant's case. On the issue of unexplained share application money and unexplained cash credit, I have perused the following decisions in favour of Revenue.

A. Provision applies to all credit entries :In the cases where credit entry has been made in the books of the assessee, the ambit of Section 68 is wide and inclusive. Provision applies to all credit entries. The language of Section 68 shows that it is general in nature and applies to all credit entries in whomsoever name they may stand, that is, whether in the name of the assessee or a third party as held in the case of Gumani Ram Siri Ram v. CIT [1975] 98 ITR 337 (Punj. & Har.).

B. The provision applies to noncommercial loans as well and it was precisely the same as held by the Hon. Calcutta High Court in the case of C. Kant & Co. v.CIT [1980] 126 ITR 63 (Cal.). observing that Section 68 does not make any distinction between commercial and non-commercial loans.

C. Further, in the case of Kamal Motors v. CIT [2003] 131 Taxman 155 (Raj.). It was held that the responsibility is on the assessee to discharge the onus that the cash creditor is a man of means to allow the cash credit. The burden to prove the source of receipt is in respect of each entry as held in the case of CIT v. R.S. Rathore [1995] 212 ITR 390 (Raj.),

that while explaining the various credits and investments, it is possible that the assessee may be successful in explaining some of them, but that does not by itself mean that the entire investments has to be considered as explained. It is each and individual entry on which the mind has to be applied by the taxing authority when an explanation is offered by the assessee. On the issue of burden of proof a very specific and illustrious decision was from the Hon. Calcutta High Court in CIT vs. Precision Finance Pvt. Ltd. (1994) 208 ITR 465 (Ca 1) where in it was laid down that the assessee is expected to establish: -

1. Identity of his creditors;
2. Capacity of creditors to advance money; and
3. Genuineness of transaction.

In fact, the principle of onus, that the assessee is required to establish the identity, prove the genuineness of the transaction and establish the creditworthiness of the donor, has been reiterated even in a recent decision of Hon. Delhi High Court in the case of CIT vs. Oasis Hospitalities Pvt. Ltd., 333 ITR 119 (Delhi)(201 1). In this case it was held by the Hon. Court that "The initial onus is upon the assessee to establish three things necessary to obviate the mischief of Section 68. Those are: (i) identity of the investors; (ii) their creditworthiness/investments; and (iii) genuineness of the transaction. Only when these three ingredients are established prima facie, the department is required to undertake further exercise."

E. Onus of proof: Prima facie onus is always on the assessee to prove the cash credit entry found in the books of account of the assessee. In land mark cases like Kale Khan Mohammad Hanif v CIT [1963] 50 ITR 1 (SC), Roshan Di Hatti v CIT [1977] 107 ITR (SC) it has been held that the law is well settled that the onus of proving the source of a sum of money found to have been received by an assessee, is on him. Where the nature and source thereof cannot be explained satisfactorily, it is open to the revenue to hold that it is the income of the assessee and no further burden is on the revenue to show that the income is from any particular source. It may also be pointed out that the burden of proof is fluid for the purposes of Section 68. Once assessee has submitted basic documents relating to identity, genuineness of transaction and creditworthiness then AO must do some inquiry to call for more details to invoke Section 68."

4.3.6. In view of the above remarks, and the decisions relied on, I have come to the conclusion that the appellant could not controvert the AO's observation that the appellant could not discharge its primary onus of explaining the accounted source of its books of accounts to the extent of Rs.65,44,388. Accordingly, the AO's addition is confirmed and the appellant's grounds are dismissed.

5. In the result, the appeal is dismissed."

5. Being aggrieved by an appellate order passed by learned CIT(A), the assessee has now filed an appeal before tribunal and has raised several grounds of appeal in memo of appeal filed with tribunal assailing appellate order passed by learned CIT(A). At outset, the Ld.Counsel for the assessee prayed that the matter may be set aside and restored to the file of the AO for fresh adjudication as authorities below have not provided assessee with proper and adequate opportunity of being heard to

assessee. The learned counsel for assessee submitted that learned CIT(A) has passed appellate order after 10 years of filing of appeal by assessee with learned CIT(A) . Our attention was drawn to para 3 of learned CIT(A) order wherein it is stated that assessee filed appeal with learned CIT(A) on 28.1.2008 and learned CIT(A) posted appeal for first hearing on 16.02.2016 and then on 27.12.2017 and 01.02.2018. It was submitted that assessee appeared on 27.12.2017 and then he could not appear on 01.02.2018 and then the appeal was adjudicated by learned CIT(A). It was submitted that it was department which kept appeal pending for ten years. Thus, in nut-shell it was prayed that proper and adequate opportunity of being heard was not given to assessee by authorities below and prayers were made to set aside orders of authorities below and restore the matter to file of AO for fresh adjudication on merits in accordance with law. Our attention was also drawn to ground number 3 wherein specific ground to that effect was taken by assessee in appeal filed with tribunal. It was submitted that both the authorities below erred in concluding that these loans were obtained in cash and that these loans were borrowed against hundis. The assessee has filed list of persons who had advanced loans to assessee along with cheque/DD No's and prayers were made to set aside matter/issues to file of AO for necessary verifications and enquiries, as may deem fit by the AO. It is claimed that these details were all placed before authorities below but authorities below failed to took cognizance of these details. It is also claimed that some of loans were even repaid by account payee cheque along with interest

which has not been considered by authorities below. It is submitted that with respect to share application moneys received, the shares stood allotted to the persons advancing share application money. The assessee has filed an affidavit of Shri P.M.Gurudas, Managing Director of the company along with Form No. 2 , list of shareholders and Annual Return of the assessee company filed with Registrar of Companies, MCA and prayers are made that the matter/issues may be restored to file of the AO for making necessary enquiries and verification and fresh adjudication . The Ld.DR on the other hand submitted that he had no objection if matter is restored to file of the AO for fresh adjudication. However, it was submitted by learned DR that 10 years have passed and the assessee is adopting delay tactics to protract litigation and prayed that onus is on the assessee to prove that these are genuine loans/deposits which satisfies mandate of Sections 68 & 69D of the Act.

6. We have considered rival contentions and perused the material on record. We have observed that assessee is engaged in business of Boarding & Lodging and running Bars. The assessee has received certain loans/deposits/share application money during year under consideration, aggregating to ₹ 25,44,388/- from various persons, as detailed below:-

<i>Name of Lender</i>	<i>Amount lent (Cash)</i>
<i>Smt.Balagowri V</i>	<i>Rs.2,00,000</i>
<i>Shri Ganesh V.S.</i>	<i>Rs.2,50,000</i>
<i>GMEC</i>	<i>Rs. 61,900</i>
<i>Shri Balasubramanian P.M. (Director)</i>	<i>Rs.2,50,000</i>
<i>Shri Gurudas P.M. (Brother of Shri P.M.Balasubramanian)</i>	<i>Rs.2,32,488</i>
<i>Shri Rajkumar A</i>	<i>Rs.7,50,000</i>
<i>Smt. Saraswathi Gurudas (wife of Shri Gurudas)</i>	<i>Rs.2,50,000</i>

<i>Shri Srinandh</i>	<i>Rs.2,00,000</i>
<i>Shri Velusamy P.</i>	<i>Rs.3,50,000</i>
<i>Total</i>	<i>Rs.25,44,388</i>

The AO had made additions of the aforesaid amounts mainly on grounds that these are hand loans received in cash which are in the nature of hundi loans and the assessee has not produced promissory notes , which led to infringement of Section 69D of the 1961 Act and assessee failed to discharge onus which lay on it under provisions of the 1961 Act. Even share application money was held to be received in cash and it was held that assessee failed to discharge its onus which lay under the 1961 Act which led to additions being made by the AO. The learned CIT(A) confirmed the additions made by the AO. The assessee has submitted before us that majority of these loans were not received in cash and none of these loans were hundi loan. It is claimed that these loans were received through banking channel and details are sought to be placed before the Bench , giving details of cheque/DD number of amounts received from various person. It is also claimed that repayments were made along with interest to these lenders through account payee cheque's. It is also claimed the shares of assessee company were allotted to persons who advanced share application money and affidavit is placed on record of Managing Director of the assessee company along with Form No. 2 and Annual Returns filed by assessee company with Registrar of Companies, Ministry of Corporate Affairs. Thus, in nut-shell it is made out that injustice is done to assessee and bone of contentions made out by

assessee were not appreciated by authorities below in right perspective despite all material placed by it before authorities below. It is also made out that appeal of the assessee was kept pending by learned CIT(A) for a period of almost 10 years and effective opportunity was not accorded by learned CIT(A) while disposing the appeal by learned CIT(A). Our attention was drawn to para 3 of learned CIT(A) order . Prayers are made to set aside the issues in its appeal to the file of the AO for fresh adjudication on merits in accordance with law. We find merit in the contentions of assessee and we are of the considered view that issues in this appeal need to be restored to file of AO for framing denovo assessment on merits in accordance with law. We make it clear that these amounts stood credited in books of accounts of the assessee and primary onus is on assessee to prove identity of the creditors, creditworthiness of the creditors and genuineness of the transactions through cogent and credible evidences. In case the assessee did not cooperate in set-aside proceedings, the AO shall be at liberty to adjudicate the issue on merits in accordance with law based on material on record. The AO is directed to admit evidences/explanations filed by the assessee in its defense during set aside proceedings. Needless to say that AO shall give proper and adequate opportunity of being heard to the assessee in accordance with principles of natural justice in accordance with law in denovo assessment proceedings . We order accordingly.

7. In the result, the appeal filed by assessee in ITA No.1933/Chny/2018 for ay: 2003-04 is allowed for statistical purposes.

Order pronounced in Open Court on this 25th day of November, 2019 in Chennai.

Sd/-

(धुव्वुरु आर.एल. रेड्डी)

(DUVVURU R.L.REDDY)

न्यायिक सदस्य/**JUDICIAL MEMBER**

Sd/-

(रमित कोचर)

(RAMIT KOCHAR)

लेखा सदस्य/**ACCOUNTANT MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: 25th November, 2019.

TLN

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF