



IN THE INCOME TAX APPELLATE TRIBUNAL

"A" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.3807/Mum./2017
(Assessment Year : 2008-09)

Dy. Commissioner of Income Tax
Central Circle-3, Mumbai

..... Appellant

v/s

Leena Construction Pvt. Ltd.
432/434, Rahim Chambers
Vijaywadi Chira Bazar
Mumbai 400 002 – AAACL1474A

..... Respondent

Revenue by : Shri Anadi Varma
Assessee by : Shri Rakesh Joshi

Date of Hearing – 15.11.2019

Date of Order – 28.11.2019

ORDER

PER SAKTIJIT DEY, J.M.

The captioned appeal has been filed by the Revenue challenging the order dated 3rd March 2017, passed by the learned Commissioner of Income Tax (Appeals), Pune-11. Though, the impugned order of learned Commissioner (Appeals) is for the assessment years 2007-08 and 2008-09, however, presently we are concerned with the assessment year 2008-09 only.

2. In the memorandum of appeal, the Revenue has raised six grounds. However, the grounds are on the common issue of deletion of addition made of ₹ 1.50 crore under section 68 of the Income Tax Act, 1961 (for short "*the Act*").

3. Brief facts are, the assessee, a resident company, is engaged in construction business. Originally, the assessee filed its return of income on 19th August 2008, declaring total income of ₹ 12,03,486. Subsequently, a search and seizure operation under section 132 of the Act was conducted in case of the assessee as well as other group entities. Pursuant to such search and seizure operation, proceedings under section 153A of the Act were initiated against the assessee. In pursuance to the notice issued under section 153A of the Act, the assessee again filed its return of income on 10th March 2015, declaring total income of ₹ 12,03,486. In the course of assessment proceedings, the Assessing Officer noticed that during the year under consideration, the assessee had received an amount of ₹ 1.50 crore towards share capital and share premium from various companies as under:–

"27. The facts of the cause and the appellant's submissions are identical to those discussed above in asst year 2007-08 except for the names of the investor companies which are as under:–

<i>1.</i>	<i>Name of Party</i>	<i>Amount</i>
<i>2.</i>	<i>Artilegence Bio Innovation Ltd.</i>	<i>₹ 25,00,000</i>
<i>3.</i>	<i>Doldrum Invet and Fin Pvt. Ltd.</i>	<i>₹ 25,00,000</i>

4.	<i>Novelty Traders Ltd.</i>	<i>₹ 25,00,000</i>
5.	<i>Oshin Invest and Finance Pvt. Ltd.</i>	<i>₹ 25,00,000</i>
6.	<i>Sidh Housing Development Co. Ltd.</i>	<i>₹ 50,00,000</i>
	<i>Total:</i>	<i>₹ 1,50,00,000</i>

4. To verify the genuineness of the transactions relating to share application money and share premium as well as to ascertain the identity and creditworthiness of the investor companies, the Assessing Officer issued notices under section 133(6) of the Act. As alleged by the Assessing Officer, some of the notices issued under section 133(6) of the Act returned back un-served with the postal remark "*party not available at given address*". Whereas, in respect of some other parties, though, notices issued did not return back, however, no reply was received. In addition to the independent enquiry conducted, the Assessing Officer also called upon the assessee to produce the parties for verification of their identity, genuineness of the transaction and creditworthiness. In response to the query raised by the Assessing Officer, the assessee submitted a note stating that the amount received towards share premium and share application are genuine and in support of such claim, the assessee also furnished certain documentary evidences, such as, application for issue of share, board resolution of investor company, acknowledgment of return of income filed by the investor company, financial statement of the investor

company, compliance made before Registrar of Companies, Bank statement of investor company. Thus, it was submitted by the assessee that the transaction relating to receipt of share application and share premium is genuine. The Assessing Officer, however, did not accept the contention of the assessee. He observed, neither the investor companies had creditworthiness to introduce fund nor the assessee company had proved its worth to attract such investment. He observed, the share application money and share premium were received from dubious source and ultimately transferred to another entity, Leena Builders. Thus, ultimately, the Assessing Officer concluded that the share application money and share premium of ₹ 1.50 crore is nothing but unexplained cash credit as per section 68 of the Act and added back to the income of the assessee. The assessee challenged the aforesaid addition before the first appellate authority.

5. Learned Commissioner (Appeals), after considering the submissions of the assessee and relying upon the observations made by him while deciding identical issue in assessee's appeal for the assessment year 2007-08, deleted the addition on two reasoning. Firstly, the addition is not based on any incriminating material found as a result of search and secondly, the Assessing Officer has made the addition purely on the basis of notices issued under section 133(6) of the Act without establishing any direct or indirect link of assessee's

own money flowing out and again received back in the form of share capital and share premium.

6. Shri Anadi Verma, the learned Departmental Representative submitted, before learned Commissioner (Appeals), the assessee had not raised any specific ground challenging the addition made by the Assessing Officer in the absence of any incriminating material found during the search. He submitted, in memorandum of appeal filed before learned Commissioner (Appeals), the assessee had challenged the addition on merits only. He submitted, only on the basis of submissions made by the assessee learned Commissioner (Appeals) has decided the issue in assessee's favour by holding that in absence of any incriminating material found during the search and seizure operation, no addition can be made. The learned Departmental Representative submitted, no opportunity was given to the Assessing Officer to have his say on the contention raised by the assessee regarding absence of incriminating material. He submitted, no report was called for from the Assessing Officer to verify whether the addition made was on the basis of incriminating material found during the search or not. Deliberating on the factual aspect of the issue the learned Departmental Representative submitted, the addition made on account of share capital and share premium was on the basis of incriminating material found during the search and seizure operation.

In this context, he drew our attention to the report dated 30th November 2018, received by him from the Assessing Officer. He submitted, in the said report the Assessing Officer has specifically referred to incriminating materials found in loose paper bundles no.10, 11, 12, 13, 15 and 16, revealing introduction of share capital. He submitted, in the course of search and seizure operation, unsigned share transfer forms were seized from the office of Shri Dilip Porwal, one of the directors of the assessee company. He also drew our attention to such share application form placed in the paper book filed by the Assessing Officer. Further, he drew our attention to the report dated 4th November 2019, received from the Assessing Officer mentioning the details of incriminating material relating to investments in share capital and share premium which were found during the search and seizure operation. Thus, he submitted, the reports furnished by the Assessing Officer along with other materials clearly indicate existence of incriminating material found during the search and seizure operation connected with investment in share application and share premium. Thus, he submitted, learned Commissioner (Appeals) was totally unjustified in holding that the addition cannot be made in the absence of incriminating material found as a result of search. He submitted, it may be a fact that while making the addition, the Assessing Officer has not specifically referred to any incriminating

material, however, such deficiency in the assessment order should not have led learned Commissioner (Appeals) to hold that the addition has been made without any incriminating material. He submitted, to ascertain the correct facts regarding availability or otherwise of the incriminating material relating to the addition made, learned Commissioner (Appeals) either should himself have conducted necessary enquiry or at least called for a factual report from the Assessing Officer. He submitted, learned Commissioner (Appeals) having failed to do so has not discharged his statutory functions correctly. In this context, he relied upon the decision of the Hon'ble Delhi High Court in CIT v/s Jan Sampark Advertising and Marketing Pvt. Ltd., [2015] 375 ITR 373 (Del.). Further, he submitted, enquiry during the search and seizure operation as well as post search clearly revealed that the investor companies lack creditworthiness to introduce share premium and share capital with the assessee. He submitted, through detailed enquiry conducted by the Investigation Wing, it was found that the investor companies are shell companies. Hence, neither the transactions were genuine nor they have the creditworthiness. Therefore, though, the identity of the creditors might have been established, neither the genuineness of transaction nor the creditworthiness of the investors have been established. He submitted, the onus is entirely on the assessee to prove the identity,

creditworthiness and genuineness of the creditors appearing in its books which are the basic ingredients of section 68 of the Act. He submitted, the assessee having failed to establish the creditworthiness of the investors and the genuineness of the transaction, the provision of section 68 of the Act is clearly attracted. In support, he relied upon the decision of the Hon'ble Supreme Court in PCIT v/s NRA Iron & Steel Pvt. Ltd., [2019] 412 ITR 161 (SC). Thus, he submitted, learned Commissioner (Appeals) having not properly examined the issue factually, the matter may be restored back to his file for de novo adjudication after calling for report from the Assessing Officer regarding availability of incriminating material relating to the addition made.

7. Shri Rakesh Joshi, the learned Authorised Representative appearing on behalf of the assessee strongly relied upon the observations of learned Commissioner (Appeals) and submitted, in the assessment order, the Assessing Officer has not referred to any incriminating material while making the addition of ₹ 1.50 crore under section 68 of the Act. He submitted, in fact, in course of appellate proceedings before learned Commissioner (Appeals), the Assessing Officer had furnished a report vide letter dated 14th March 2016. He submitted, nothing has been brought to on record to show that the addition of ₹ 1.50 crore was made on the basis of incriminating

material found during the search and seizure operation. He submitted, since, it is a case of unabated assessment, the addition can only be made on the basis of incriminating material found during the search. As regards the reports of Assessing Officer and other documentary evidences submitted by the learned Departmental Representative, the learned Authorised Representative submitted, some of the documents placed in the paper book do not belong to the year under consideration.

8. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions cited before us. On a perusal of the impugned order of learned Commissioner (Appeals), it is clear that insofar as the appeal relating to the impugned assessment year is concerned he has not rendered any independent finding, but, has merely relied upon his reasoning while deleting similar addition made in the assessment year 2007-08. However, it is clear, he has deleted the addition on two grounds; firstly, there is no incriminating material found during the search relating to the addition made and secondly, the assessee has furnished evidence regarding the amount received towards share capital and share premium, whereas, the Assessing Officer has made the addition without making proper enquiry. As regards the availability or otherwise of incriminating materials found during the search relating to the

addition made, it is noticed that, though, learned Commissioner (Appeals) has recorded a finding that there is no incriminating material found during the search insofar as the amount received towards share application money and share premium, however, it is not forthcoming on what basis learned Commissioner (Appeals) has recorded such finding. At least, the order passed by learned Commissioner (Appeals) does not disclose any such factual basis. Merely relying upon legal propositions enunciated in certain judicial precedents, he has held that no addition can be made in the absence of incriminating material in case of an unabated assessment. However, before applying the legal proposition, true and correct facts relating to the addition made has to be ascertained. Though, learned Commissioner (Appeals) has referred to the letter dated 14th March 2016, received from the Assessing Officer, however, it is quite unclear whether such letter of the Assessing Officer is in response to the query raised by the learned Commissioner (Appeals) regarding availability of incriminating material. On a specific query raised by the Bench, the learned Authorised Representative fairly submitted, assessee is unaware of the contents of letter dated 14th March 2016, sent by the Assessing Officer and whether such letter is in pursuance to a query raised by the learned Commissioner (Appeals) regarding availability of incriminating material is not in his knowledge. He also fairly submitted that he is not

aware of any report being called for by the learned Commissioner (Appeals) from the Assessing Officer regarding availability of incriminating material relating to the addition made. Therefore, he submitted, the issue can be restored back to learned Commissioner (Appeals) for ascertaining the correct fact regarding availability or otherwise of incriminating material relating to the addition made from the Assessing Officer. Keeping in perspective the aforesaid submissions of learned Authorised Representative, we must observe that before us, the learned Departmental Representative has filed two reports dated 30th November 2018 and 4th November 2019, received from the Assessing Officer, wherein, it has been very clearly and categorically stated that certain loose papers found during the search and seizure operation were relating to the introduction of share capital and share premium. In fact, in the said reports the Assessing Officer has also specifically referred to the loose paper bundles containing such material. Further, certain documentary evidences representing such incriminating material found during search have been filed along with the said report. It is not forthcoming, whether learned Commissioner (Appeals) had taken effort to verify all these facts and materials now brought on record by the Revenue. On going through the aforesaid reports of the Assessing Officer and the accompanying materials, prima facie it appears that some incriminating material

connected to introduction of share capital was found during the search and seizure operation. However, a final conclusion on the issue can be arrived at only after proper verification of all the seized materials. Neither the Assessing Officer while making addition in the assessment order has referred to any incriminating material nor learned Commissioner (Appeals) has himself conducted any enquiry to render a conclusive finding that the addition is not made on the basis of any seized material. Perusal of the impugned order of learned Commissioner (Appeals) gives an impression that he has rendered his finding on unavailability of incriminating material primarily on the basis of submissions made by the assessee. Availability or otherwise of incriminating material being a purely factual issue, learned Commissioner (Appeals) should have done well to either verify the seized material himself or called for a report from the Assessing Officer for ascertaining the correct facts. No such exercise has been undertaken by the learned Commissioner (Appeals) before deleting the addition made on the ground of unavailability of incriminating material. Therefore, to that extent, the decision of learned Commissioner (Appeals) is unsustainable, hence, has to be set aside. However, in our considered opinion, the issue, whether the addition is on the basis of incriminating material found during search or not has to be restored back to learned Commissioner (Appeals) for de novo adjudication after

proper enquiry and verification of all the ancillary and incidental facts as well as the seized material. In this context, he may also examine the reports of the Assessing Officer submitted before us along with accompanying documents to come to a conclusion whether the subject addition made is on the basis of incriminating material or not. Insofar as the merit of the issue is concerned, that will arise only after the preliminary issue of availability of incriminating material or otherwise is resolved. In any case of the matter, even on merits of the addition also, learned Commissioner (Appeals) is required to examine whether the investors possess the creditworthiness to make the investment in share capital and share premium and also the genuineness of the transaction. This is in view of the enquiry conducted by the Investigation Wing of the Department in course of which it was found that the investors are shell companies having no credentials to invest in share premium or share capital. With the aforesaid observations, all the issues relating to the addition of ₹ 1.50 crore under section 68 of the Act is restored to the file of learned Commissioner (Appeals) for de novo adjudication after conducting proper enquiry and keeping in view our observations hereinabove. Needless to mention, the assessee must be provided a reasonable opportunity of being heard before deciding the issues. Grounds are allowed for statistical purposes.

9. In the result, appeal stands allowed for statistical purposes.
Order pronounced in the open Court on 28.11.2019

Sd/-
MANOJ KUMAR AGGARWAL
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 28.11.2019

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai