

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

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

**ITA No. 6546/MUM/2018
Assessment Year: 2006-07**

Arun Kumar Dalmia HUF
1010, Maker Chambers V,
Nariman Point, Mumbai-
400021.

Income Tax Officer-12(3)(4),
Vs. Aayakar Bhavan, M.K. Road,
Churchgate, Mumbai-400020.

PAN No. AAEHA0173J
Appellant

Respondent

Assessee by : Shri Vinod Kumar Bindal, AR
Revenue by : Smt. Jothilakshmi Nayak, Sr. DR

Date of hearing : 27/11/2019
Date of pronouncement : 16/12/2019

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2006-07. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-55, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) r.w.s 147 of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under:

1. The Ld. CIT(A) erred in upholding the action of the Assessing Officer in issuing notice u/s 148 of the Income Tax Act and thereby reopening the assessment.

The Appellant contend that on the facts and in the circumstances of the case and in law, the notice issued u/s. 148 of the Act is bad in law and consequently the assessment needs to be quashed.

2. The CIT(A) erred in upholding the action of the Assessing Officer in making the addition under Section 68 of the Act in respect of loan taken from M/s Basant Marketing Pvt. Ltd.

The appellant contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in making the impugned addition in as much as all the relevant details have been furnished with the CIT(A) and that he has not appreciated the facts of the case in its entirety and as such, the impugned addition ought to be deleted.

The Appellant further contend that the CIT(A) ought not to have upheld the action of the Assessing Officer in as much as the Assessing Officer has violated the principles of natural justice in making the impugned addition and hence, the impugned addition ought to be deleted.

3. Briefly stated, the facts of the case are that the assessee filed his return of income for the assessment year (AY) 2006-07 on 16.01.2008 declaring total income of Rs.59,567/-. The return was processed u/s 143(1) of the Act. Thereafter, the Assessing Officer (AO) reopened the assessment by issuing notice u/s 148 dated 28.03.2013. In response to it the assessee submitted *vide* letter dated 08.10.2013 that the return originally filed on 16.01.2008 be

treated as return filed in response to notice u/s 148 of the Act. In response to the request by the assessee to supply the reasons for re-opening, the AO provided it on 10.01.2014.

During the course of reassessment proceedings, the AO observed from the balance sheet of the assessee as on 31.03.2006 that an amount of Rs.8,06,000/- is appearing as loan from M/s Basant Marketing Pvt. Ltd. In response to a query raised by the AO, the assessee filed loan confirmation from M/s Basant Marketing Pvt. Ltd. and ledger copy of the accounts of M/s Basant Marketing Pvt. Ltd. appearing in its books of accounts. The AO observed that the loan is appearing as opening balance. Further, the AO asked the assessee to produce evidence of receipt of loan in earlier year such as Cheque number, date of cheque/demand draft, name and address of the bank and the bank statement evidencing the receipt of loan from M/s Basant Marketing Pvt. Ltd. In response to it, as recorded by the AO the assessee filed the said details. Thereafter, the AO issued notice u/s 133(6) dated 25.02.2014 to M/s Basant Marketing Pvt. Ltd. to furnish a copy of accounts of the assessee appearing in their books of accounts for the financial year 2005-06, copy of bank statement along with balance sheet for the year ended 31.03.2006. However, M/s Basant Marketing Pvt. Ltd. failed to file the details till the date of assessment dated 13.03.2014.

Further, the AO observed that the Central Bureau of Investigation (CBI), during the search at the residence of Shri Arun Dalmia and Shri Harsh Dalmia found that 20 dummy companies of Shri Dalmia were engaged in money laundering and tax evasion; one of the 20 such companies was M/s Basant Marketing Pvt. Ltd., who had given loan of Rs.8,06,000/- to the assessee.

Considering the above facts and also that in response to the notice issued u/s 133(6), M/s Basant Marketing Pvt. Ltd. did not file any reply, the AO made an addition of Rs.8,06,000/- u/s 68 of the Act.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). In respect of the reopening of assessment u/s 148 of the Act, the Ld. CIT(A) held that (i) nowhere in the statute, it is mentioned that satisfaction of the supervisory authority should also be provided to the assessee ; this is a procedural part of the proceeding and this document is usually in the file of the Joint/Additional Commissioner, who while giving approval for reopening verify all the documents ; now raising the question whether Joint/Additional Commissioner has applied his mind is not warranted at the appellate stage, (ii) reopening done u/s 148 is valid in view of the decision in *Sterlite Industries (Delhi) Ltd. v. ACIT 302 ITR 275 (Mad)* and *AGR Investments Ltd. v. Additional CIT 333 ITR 146 (Delhi)*, (iii) there was no response by M/s Basant Marketing Pvt. Ltd. to the notice u/s 133(6) issued by the AO.

On the basis of the above facts, the Ld. CIT(A) confirmed the addition of Rs.8,06,000/- made by the AO u/s 68 of the Act.

5. Before us, the Ld. counsel for the assessee files a *Paper Book* containing documents and certifies that those were filed before the AO and CIT(A). Further, filing a copy of the decision of the ITAT 'F' Bench, Mumbai in the case of *DCIT v. M/s Udaipur Properties & Finance Ltd.* (ITA No. 6449/Mum/2017) for AY 2010-11, it is stated that on similar facts involving M/s Basant Marketing Pvt. Ltd., the Tribunal dismissed the appeal filed by the Revenue against the order of the CIT(A) deleting the addition of Rs.1,86,30,000/-. Thus

it is stated that the addition of Rs.8,06,000/- made by the AO u/s 68 of the Act and subsequently confirmed by the Ld. CIT(A) be deleted.

6. On the other hand, the Ld. Departmental Representative (DR) explains that as per the investigation carried out by CBI, Shri Arun Dalmia through the companies floated by him was engaged in money laundering and tax evasion ; one of the 20 such entities was M/s Basant Marketing Pvt. Ltd., who had given loan of Rs.8,06,000/- to the assessee. Further, it is stated that in response to the notice u/s 133(6) issued by the AO, M/s Basant Marketing Pvt. Ltd. has not furnished any reply. Thus it is stated that the addition of Rs.8,06,000/- made by the AO u/s 68 of the Act which has been confirmed by the Ld. CIT(A) be upheld.

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

In the instant case, the AO has reopened the assessment originally made u/s 143(1) of the Act. The basis of information is with regard to the amount of Rs.8,06,000/- appearing in the balance sheet as loan from M/s Basant Marketing Pvt. Ltd. The CBI during the course of searches at the residence of Shri Arun Dalmia and Harsh Dalmia found that through 20 dummy companies, they were engaged in money laundering and tax evasion. 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. Accordingly, the 1st ground of appeal is dismissed.

7.1 The AO in the assessment order dated 13.03.2014 has mentioned that in response to notice u/s 142(1) dated 24.02.2014, the assessee produced evidence of receipt of loan in earlier year such as cheque number, date of cheque/demand draft, name and address of the bank and bank statement evidencing receipt of loan from M/s Basant Marketing Pvt. Ltd. The AO has also mentioned that the assessee *vide* letter dated 18.02.2014 submitted the loan confirmation from M/s Basant Marketing Pvt. Ltd. and ledger copy of the accounts of M/s Basant Marketing Pvt. Ltd. appearing in its books of accounts. After examining the same, the AO has recorded that the loan is appearing as

opening balance. We refer here to para 2 of the assessment order dated 13.03.2014.

The question arises whether addition u/s 68 can be made in the current year if the amount had been credited in an earlier year? The answer is that section 68 permits an addition to be made only when any sum is found to be credited in books of account of the assessee for that year and hence, where amount in question had been credited in account of assessee in earlier years and was not a fresh credit shown in the relevant assessment year, section 68 would not be attracted. In this regard, we are supported by the decision in *ACIT v. ATS Promoters & Builders (P.) Ltd.*(2015) 57 taxmann.com 21 (All).

Section 68 of the Act says that where any sum is found credited in the books of an assessee maintained for any previous year and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year. From assessment year 1989-90, 'previous year' is now defined to mean only the earlier financial year. In the instant case the AO himself has recorded in the assessment order, after examining the loan confirmation from M/s Basant Marketing Pvt. Ltd. and ledger copy of the account of M/s Basant Marketing Pvt. Ltd. that loan amount of Rs.8,06,000/- is appearing as an opening balance. In such a scenario, addition u/s 68 cannot be made in the assessment year 2006-07, if the amount had been credited in an earlier year.

In view of the above factual scenario and position of law, we delete the addition of Rs.8,06,000/- made by the AO u/s 68 of the Act. Accordingly, the 2nd ground of appeal is allowed.

8. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 16/12/2019.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER
Mumbai;

Dated: 16/12/2019

Rahul Sharma, Sr. P.S.

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.

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

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai