

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI**

Before Sh. H. S. Sidhu, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 1457/Del/2017 : Asstt. Year : 2009-10

M/s Etisha Finance & Investment Pvt. Ltd., C/o Oswal Sunil & Company, 71, Daryaganj, New Delhi-110002	Vs	Assistant Commissioner of Income Tax, Central Circle-11, New Delhi-110055
(APPELLANT)		(RESPONDENT)
PAN No. AAACE1803C		

Assessee by : None

Revenue by : Sh. Saras Kumar, Sr. DR

Date of Hearing: 16.12.2019

Date of Pronouncement: 02.01.2020

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order of Id. CIT (A)-24, New Delhi dated 03.01.2017.

2. During the course of hearing today, nobody was present on behalf of the assessee, neither any adjournment was sought.

3. Following grounds have been raised by the assessee:

"1. On the facts and in the circumstances of the case as well as in law the learned Commissioner of Income Tax (Appeals) erred in upholding the addition of Rs. 60,00,000/- made by Ld Assessing officer under section 68 of the act which is bad in law and liable to be set aside.

2. On the facts and in the circumstances of the case as well as in law the learned Commissioner of Income Tax (Appeals) grossly erred in upholding the action of learned Assessing Officer of treating Rs. 60,00,000/- as unexplained

cash credit under section 68 of the Act without appreciating the fact that appellant had furnished the enough material to prove the identity, veracity and genuineness of the transaction at the Assessment proceedings which has been confirmed by the Learned Commissioner of Income Tax (Appeals) in his order.

3. On the facts and in the circumstances of the case as well as in law the learned Commissioner of Income Tax (Appeals) grossly erred in not considered the evidences to further support the appellant claim with a reason that the prayer regarding the admission of additional evidences was not made before him.

4. On the facts and in the circumstances of the case as well as in law the learned Commissioner of Income Tax (Appeals) grossly erred in treating the Advance against the property amounting to Rs. 60,00,000/- as loan on the presumption that the appellant AR had admitted the same before him during the course of appellate proceedings.”

4. The detailed background of the case taken from the record of the Id. CIT (A) with regard to the adjudicated process is that the assessment in this case has passed on 27.12.2011. The assessee instituted the appeal against the assessment order before the Id. CIT (A). The Ld. CIT(A)-XXXI passed appellate order dated 27.11.2012. In that order, the Ld. CIT(A) notes that he gave opportunity of hearing on 11.06.2012, 25.06.2012, 02.07.2012, 08.11.2012 and 07.11.2012. However, there was no compliance. Adjournments were repeatedly sought by the A.R. on the grounds that he was not well. There was no response from the assessee. The Id. CIT(A), while adjourning the hearing to 26.11.2012 had clearly written in the request letter of the A.R. that adjournments had already been given in the past but none appeared and therefore final opportunity was being given on 26.11.2012. Even on 26.11.2012, none appeared. Once again a letter was received through speed post that their counsel was down with viral fever and requested for one month time.

5. The Id. CIT(A) however noted that the assessee has not availed of any of the numerous opportunities afforded to him. He noted that it is an established principle that if one wants to avail the benefits under law he cannot simply slip over his rights. Hence, he proceeded to decide the appeal ex-parte on merits. He noted that the assessee has not provided any information to the A.O. Even the Director of the assessee -company has refused to appear for examination. No written or oral submissions were made Id. CIT(A). After considering the facts on record, he confirmed the addition.

6. Later, the assessee carried the matter in appeal before the ITAT, where he pleaded that sufficient opportunity was not provided by the CIT(A). The Tribunal set aside the issue to the file of the Id. CIT(A) with the direction to decide the matter afresh after providing sufficient opportunity to the assessee. The Tribunal also directed the assessee to cooperate with the CIT(A) and not to take unnecessary adjournments.

7. The proceedings later carried out as the consequence order of the ITAT dated 15.06.2015 by the Id. CIT (A)-24, New Delhi. Accordingly, notice of hearing dated 15.07.2016 was issued fixing the hearing on 09.08.2016. The AR of the assessee made written submissions and requested for fixing hearing in fourth week of August, 2016. Accordingly fresh notice was issued fixing the hearing on 30.08.2016 at 3:00 P.M. However, nobody attended on the designated date and time before the Id. CIT (A). However, a letter dated 31.08.2016 was submitted stating that the A.R. cannot attend and requested for adjournment of case for first week of September, 2016. Accordingly the hearing was fixed to 09.09.2016 at 4:00 P.M. by the Id. CIT (A). On the designated date and time Sh. Lokesh Jain, CA of M/s Oswal Sunil Company, Chartered Accountants, 71 Daryaganj, New Delhi attended. It has been stated in

these written submissions that the assessee has established the genuineness of the impugned transactions vide its replies dt. 13.12.2011 and 7.12.2011 made before the A.O. Sh. Lokesh Jain, CA made oral submissions. On 9.9.2016, vide Order Sheet noting in the appellate file, submitted that the amount of Rs.60 lakhs was a loan. A specific question was made whether the sum of Rs.60,00,000/- takers from these two parties was bearing interest, to which Sh. Jain replied in the negative. However, no explanation was submitted purpose of the credit of Rs.60 lakhs.

8. To examine the claims of the assessee, a letter dated 03.10.2016 was issued by the Id. CIT (A) to the Assessing Officer i.e. ITO Ward 8(3), New Delhi to examine the assessment record and to report whether the two letters dated 07.12.2011 and 13.12.2011 claimed by the assessee to have been submitted before the A.O. during the assessment proceedings, were actually available on record or not. In response, the A.O. vide letter dated 28.11.2016 reported the following:-

*"To,
The Commissioner of Income Tax (Appeal)-24,
Room No. 2, First Floor,
E-2, ARA Centre Jhandewalan,
New Delhi*

Sir,

(Through: Proper Channel)

Sub: Appellate proceedings in the case of M/s Etisha Finance Investment Pvt. Ltd. - Appeal No. 161/16-17, A.Y. 2009-10 PAN-AAACE1803C- Remand Report- reg.

Kindly refer to your office letter F.No.CIT(A)-24/Remand Report/16-17/536 dated 3/10/2016 on the above mentioned subject.

In this connection, it is to state that the vide Setter dated 7/12/2011 and 13/12/2011 (copy enclosed), assessee had filed following documents:

- i. Copy of ABN Amro Bank (KBS) statement for FY 2008-09*
- ii. Copy of confirmations of Advances alongwith advances received and given against property.*
- iii. Bank statement of Raunak Vyapar & Viniyog Pvt. Ltd.*

iv. *Copy of Bank account of Bhavasagar Vinimay Pvt. Ltd.*

As mere filing of confirmation and bank statement is not sufficient to prove the creditworthiness & genuineness of transaction, vide order sheet entry dated 13/12/2011 assessee was requested to "produce the persons related to M/s Raunak Vyapar & Viniyog Pvt. Ltd. and M/s Bahvsagar Vinimay Pvt. Ltd. and documents related to agreement of property with details of assets. The AR was also requested to produce copy of return of income bf Mr. Deepak Malhotra and Smt. Partibha Maihotra and also required to attend in the capacity of director of the company." As assessee could not produce the related persons of these companies and other information, as called for vide order sheet entry dated 13/12/2011, the onus cast upon the assessee company does not stand discharged that prove the identity, creditworthiness and genuineness of the transaction."

*Yours faithfully,
(Ramesh Kumar)
Income Tax Officer
Ward-8(3), New Delhi*

9. The assessee vide his letter dated 28.12.2016 submitted the following:-

*"To,
The Commissioner of Income Tax (Appeals-XXIV)
First Floor, E-2, ARA Centre
Jhandcwan, New Delhi-110055*

*Sub: In the case of Etisha Finance Investment Pvt. Ltd.
Assessment Year 2009-10 PAN-AAACE1803C*

Respected Sir,

This is in reference to your letter dated 7-12-2016 along with the remand report send by the Ld. Income Tax Officer Ward 8(3) CR Building, New Delhi. In this matter we submit as under:

- 1) *During the course of proceeding we have submitted the required paper before the Ld. AO eg.*
 - *Relevant Bank Statement*
 - *Confirmation*
 - *Detail of Advances given*

vide our letter dated 7-12-2011 and 13-12-2011 in case of

- A) *Raunak Vyaper & Viniyog Pvt. Ltd.*
- B) *Bavsagar Vinimay Pvt. Ltd.*

The same has been confirmed by the Ld. AO vide their Remand Report dated 28-11-2016.

Apart from above we have also submitted as under:-

- Copy of ITR*
- Copy of Annual accounts*
- Certificate of Incorporation*
- Copy of PAN Card*
- Updated Confirmation till the transaction is squared.*

A complete set of papers, as slated above, are also submitted before your honour also.

2) Regarding the appearance of person, it is submitted that the both the companies are having their office at Kolkata. Therefore it is practically possible or even not permitted under law¹ to enforce their appearance here in Delhi before the A.O. There are also other relevant provisions under the act for confirmation. We request you to please issue the notice u/s 133(6) to them to get the independent confirmation now.

3) Copy of ITR of Mr. Deepak Malhotra and Parthibha Malhotra are enclosed for your kind perusal.

In view of the factual and legal submission made, it would be appreciated by your Honour that the adjustments made by the Learned A.O. are unwarranted and deserve to be deleted.

The Appellant Company hopes your Honours shall find the above submission in order and where your Honours does not concur with the Appellant, the Appellant would appreciate if a fresh opportunity is granted to represent the ease in writing or orally, before the final order is passed by your office.

We shall be pleased to provide any further details that may be required by your Honours in relation to the above submission.

Your favorable action will be highly appreciated."

Thanking you,

Yours faithfully,

*For Oswal Sunil & Company
Chartered Accountants*

10. The Id. CIT (A) held as under:

"Evidence submitted before the A.O. is only confirmation and bank statement of the creditors. I have verified the assessment record also and find that the A.O's report is factually correct. It is clear that the identity of the creditors was not proved. Now the appellant seeks to surreptitiously introduce more 'evidence', which was not submitted earlier. It also now seeks that notice u/s 133(6) be issued. I am afraid that this approach reeks of approaching

appellate proceedings with unclean hands. The appellant had sufficient opportunity before the A.O. to make its submissions, and cannot seek a second innings de novo. The appellant has not explained what prevented it from submitting these documents before the A.O. It has not even made a prayer for admission of additional evidence, but seeks to have the same considered as if it had been submitted before the A.O. I therefore decline to consider the same.

11. Regarding the merits of the evidence on record, the Id. CIT (A) held that the assessee has made a claim that the amounts totaling Rs.60,00,000/- was received as advance against sale of property. However, neither before the A.O., nor before the First Appellate Authority in the first round, nor in the present proceedings, did the assessee substantiate the genuineness of the transaction by producing the agreement for sale, so that the same could be examined for its genuineness. The assessee never brought on record the details of the property which was the purported subject matter of the 'advance' received.

12. It was held that the assessee has possesses copies of the bank account etc. of the alleged creditors who are apparently unrelated concerns, but not the agreement entered into by it with the creditors. Thus the assessee has clearly failed to establish the genuineness of the transaction. Finally, the Directors of the assessee company, which is a closely-held company, have even not appeared before the A.O. for examination, despite a specific request by the A.O. and repeated opportunity having been provided. The Id. CIT (A) held that this is a brazen attempt by the assessee to ride roughshod over the requirement of law that the onus lies on the assessee u/s 68 to prove the genuineness of the amounts credited to its accounts. Holding that the appellate authority cannot be a mute spectator to these tactics, the Id. CIT (A) ruled that the assessee has failed to discharge the onus on it u/s 68 in respect of this credit.

13. Thus, we find that assessee has not only failed to comply to the notices received by the Assessing Officer, CIT(A) in the first round, pleaded before the Tribunal for opportunity to submit the details and miserably failed again to comply to the notices issued by the revenue authorities in the second round. Even before the Tribunal in the second round no compliance was made. Nobody represented the case before the Tribunal also. We have considered the issue on merits. We have gone through the details available regarding the amounts received from M/s Raunak Vyapar and Viniyog Pvt. Ltd., M/s Bhavsagar Vinimay Pvt. Ltd. We find the assessee has failed to discharge even the primary onus of proving genuinity and creditworthiness of the creditors. Hence, relying on the judgments of various Hon'ble High Courts, namely Dayal Singh & Sons Vs CIT 335 ITR 90 (P&H), CIT Vs C. Vijayan and Co. 324 ITR 281 (Ker.), Kamal Kishore Vs CIT 131 Taxman 155 (Raj.), CIT Vs Divine Leasing & Finance Ltd. 158 Taxman 440 (Del.) and CIT Vs Precision Finance Pvt. Ltd. 208 ITR 465 (Cal.), we hereby decline to interfere with the order of the Id. CIT (A) in confirming the addition made u/s 68 of the Income Tax Act, 1961.

14. In the result, the appeal of the assessee is dismissed.

Order Pronounced in the Open Court on 02/01/2020.

Sd/-

(H. S. Sidhu)
Judicial Member

Dated: 02/01/2020

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR