

IN THE INCOME TAX APPELLATE TRIBUNAL “A”BENCH: KOLKATA
[Before Shri A.T. Varkery, JM & Dr. Arjun Lal Saini, AM]

I.T.A No. 822/Kol/2018 A.Y 2013-14

DCIT, C.C-2(4), Kolkata	Vs.	M/s. Maa Annapurna Transport Agency Ltd. PAN: AADCM 0917A
Appellant		Respondent

Date of Hearing	02-01-2020
Date of Pronouncement	15.01-2020

For the Appellant	Shri Dhrubajyoti Roy, JCIT, ld.DR
For the Respondent	Shri S.S. Gupta, FCA & Shri Arvind Agarwal, Advocate, ld.AR

ORDER

Shri A.T. Varkery, JM

This is an appeal preferred by the revenue against the order of Learned Commissioner of Income-tax (Appeals) [in short, the ‘Ld. CIT (A)], Kolkata-4 dated 23-01-2018 for the assessment year 2013-14.

2. The grounds of appeal of the revenue are as under:-

“1 That on the facts and the circumstances of the case and in law, the Ld. CIT (A) did not call for Remand Report and erred in deleting the addition of Rs. 2,60,67,315/- u/s. 68 of the Act, only keeping reliance upon submission of the A/R of the assessee. None of the twelve companies could be located on the given address from whom the assessee company had claimed to have taken unsecured loan.

2 That on the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.12,75,987/- on account of interest payment to bogus loan creditors.

3- That on the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in accepting the Appeal of the assessee, whereas the assessee company had not deposited the deducted amount of Rs. 8,46,634/- on account of employees' contribution to PF and ESI within the time of due date.

4 That on the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the amount of Rs. 3,15,107/- being the interest on late payment of TDS.

5 That on the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in concluding that the identity of the loan creditors was proved relying solely on the basis of paper documentation whereas in reality the loan creditors were non-existent at the addresses

given as found out after physical verification and decided the appeal without calling for any report from the A.O on the submission made by assessee before him.

6 That the appellant craves leave to add to and/or alter, amend, modify or rescind the grounds hereinabove before or hearing of this appeal.”

3. Ground Nos. 1 & 5 are the same and therefore, are being dealt with.

4. The main grievance of the revenue as per grounds of appeal raised before us is that the Id. CIT(A) has erred in deleting the addition of Rs. 2,60,67,315/- u/s. 68 of the Income-tax Act, 1961 (in short, the ‘Act’), which was added by the AO without calling for the remand report when 12 (twelve) companies, which had provided the loan to the assessee could not be located at the given addresses; and that the Id. CIT(A) has erred in concluding that the identity of the loan creditors were proved solely on the basis of paper documentation placed by the assessee before the Id. CIT(A) whereas in the reality the loan creditors were non-existent at the addresses furnished by the assessee.

5. Brief facts of the case as noted by the AO are that during the assessment proceedings while perusing the accounts and details of the assessee, the AO opined that the assessee company had received unsecured loans from various entities out of which the following companies have been found to be paper companies and having no worth and he drew this chart/table at page 2&3 of the assessment order giving out the details as below:

Sl. No.	Name and address of the loan creditor	Interest Paid	Amount of loan Received	Fate of Notice U/s. 133(6)	Field enquiry report
1	AMIT REALTORS PVT. LTD 20/1 ASHUTOSH CHOWDHURY AVENUE, 1 ST FLOOR, KOLKATA, WEST BENGAL- 700019	74,795	2,567,315		The company could not be located at the given address
2	AYUSH FINTRADE PVT. LTD, 27 SHAKESPEARE SARANI, GROUND FLOOR, KOLKATA, WEST BENGAL- 700 017.	42,082	1,000,000	Returned back	Do
3	BRAIN BUSINESS PVT .LTD	132,821	4,000,000		Do-

.	33 BRABOURNE ROAD, 5 TH FLOOR, PS-HARE STREET, KOLKATA, WEST BENGAL-700 001.				
4	CAMELLIA VINCOM PVT LTD 1 B NATORE PARK, 4 TH ROAD, KOLKATA-700 039. WEST BENGAL	23,178	1,000,000		Do-
5	GENUINE RETAILS PVT LTD 4 G.C AVENUE, 1 ST FLOOR, KOLKATA, WEST BENGAL-700 013	142,520	3,500,000		Do-
6	GREEN LINE TRADE LINKS PVT. LTD 104 S.P MUKHERJEE ROAD, 4 TH FLOOR, ROOM NO. 404, KOLKATA, WEST BENGAL-70026	423,001	5,500,000		Do-
7	JAGADAMBA DEALCOM PVT. LTD BLOCK-A, 3 RD FLOOR, 9 LAL BAZAR STREET, KOLKATA, 700 001, WEST BENGAL	189,247	2,500,000		Do-
8	MEMARI COLD STORAGE PRIVATE LIMITED 12 MAYFAIR ROAD, KOLKATA, WEST BENGAL-700 019.	72,329	2,000,000		Do-
9	ORIENTATION ACADEMICS (P) LIMITED 12 MANGO LANE, 1 ST FLOOR, KOLKATA, WEST BENGAL-700 001	48,658	2,000,000	Returned back	Do-
10	RAJSHREE ENTERPRISES	53,753	2,000,000	No address given by the assessee	-
11	RAJSHREE SERVICES & SALES PRIVATE LIMITED, GREEN VIEW, FLAT NO. K-001, 27/1 B.T ROAD, WEST BENGAL-700 058	27,370	1,000,000		Do-
12	RANBHUMI MARKETING PVT. LTD 3 EZRA STREET, 4 TH FLOOR, ROOM NO. 412, KOLKATA, WEST BENGAL-700001	46,233	2,500,000		Do-
	TOTAL	12,75,987/-	2,85,67,315		

6. After reproducing the aforesaid chart at pages 2 & 3 of the assessment order, the AO asked the Id.AR of the assessee company to explain the identity, creditworthiness and genuineness of the loan creditors for the loan received during the year under consideration.

7. The AO acknowledges that pursuant to the same, the Ld. AR of the assessee company filed the reply, balance sheets, bank statements and ITRs of some of the loan creditors. However, the AO notes that the reply could not be accepted by him, thereafter from para 3.2 onwards he described the general modus operandi carried out by the jamakharcha companies/paper companies from pages 3-7 of his order and then at para 3.9 added Rs.2,60,67,315/- u/s. 68 of the Act by observing the following:

“3.9 The total of unsecured loans received from bogus companies as mentioned in the table above is Rs. 2,85,67,315/-.The assessee has also repaid back unsecured loans during the year itself to these paper companies and has taken again afresh from the same company or the other paper companies. Hence, a peak has been calculated based on the incoming and outgoing of these unsecured loans of Rs. 2,85,67,315/-, which comes to Rs. 2,60,67,315/-. In the light of the ratio of the decisions as discussed above vis-a-vis the facts and circumstances in the instant case as well as the assessee's inability to discharge its own burden of proof to substantiate the genuineness of introduction of unsecured loans, it is held that the purported unsecured loans aggregating to Rs. 2,60,67,315/- are nothing but the assessee's own money conducted under the garb of fresh unsecured loans into the assessee's business. Therefore, Rs. 2,60,67,315/- is hereby treated as unexplained cash credit found in the books of the assessee during the A.Y 2013-14 and accordingly added back to the total income of the assessee.”

8. Aggrieved, the assessee preferred an appeal before the Id. CIT(A), who was pleased to delete the addition. Aggrieved, the revenue is before us.

9. The Learned Departmental Representative (in short, the Id. DR) assailing the action of the Id. CIT(A) contended that since the AO could not trace out the loan creditors in the addresses furnished by the assessee, the AO had no other alternative to make the addition. According to him, since the loan creditors were not traceable, they are non-existent. Therefore, according to him, the loan is nothing, but camouflage to bring the assessee's unaccounted money and therefore, the AO has rightly added the bogus loan. According to him, the Id. CIT(A) failed to take note of this fact that the twelve(12) loan creditors could not be traced out in the addresses furnished by the assessee and therefore, while deciding the appeal he simply should not have accepted the averments made by the assessee and should not have simply believed the

submissions of the assessee and thus erred in deleting the impugned addition, which action is perverse and need to be interfered with and therefore, the Id. DR prays that the impugned order of the Id. CIT(A) be reversed and AO's order be upheld.

10. Per contra, the Learned Authorised Representative (in short, the 'Id.AR') of the assessee submitted that from perusal of the grounds raised by the revenue [i.e ground nos. 1 & 5], it is clear that the revenue has not challenged the categorical findings of the Id. CIT(A) in respect of the identity, creditworthiness and genuineness of all the loan creditors and their transaction with the assessee. According to the Id.AR the only grievance of the revenue is that the Id. CIT(A) has believed whatever the assessee has stated before him, and without calling for remand report has given relief to the assessee. So, firstly the Ld. AR taking on the Revenue's challenge as to the CIT(A) passing the impugned order without calling for the remand report, submitted that the assessee had filed the entire documents before the Ld. CIT(A) as well as the AO and drew our attention to the 2(two) voluminous/bulky paper book (running to more than 653 pages-PB-I and PB-II), which were filed before the AO as well as before the Id. CIT(A). He drew our attention to the certificate rendered on the cover of the Paper Book to prove his bonafide on this aspect. Therefore, according to the Id. AR when all the documents were filed before the AO during assessment proceedings and no new documents were produced before the Id. CIT(A) during the appellate proceedings, therefore, question of the Id. CIT(A) calling for remand report as envisaged in Rule 46A of the Income-tax Rules, 1962 (hereinafter to in short referred to the 'Rules') does not arise. According to the Id.AR from perusal of the grounds of appeal, it is clearly vivid that the revenue has raised a vague and general ground without pointing out, which documents were produced by the assessee before the Id. CIT(A) for the first time and not filed before the AO. Therefore, according to him, the grounds of appeal raised by the revenue lacks merit on the issue of not calling for remand report and since the Id. CIT(A) has gone through each and every document and has recorded a finding that all the 12 (twelve) loan creditors included corporate entities were having their CIN Number given by the Ministry of Corporate Affairs, R.O.C details, PAN, ITRs, which, inter alia, show that all the 12 loan creditors are Income-tax assesseees and on perusal of their respective balance sheets would reveal

their creditworthiness and since all the transactions have taken place through banking channel and TDS having been duly deducted while assessee paid interest to these loan creditors clearly show the genuineness of the transaction. The Ld. AR also contested the claim of the Revenue raised in the grounds of appeal that the loan creditors were not traced in their address. According to him, out of 12 creditors the AO has remarked in the chart only of one creditor i.e. M/s. Amit Realty that the company *could not be located* at the given address and for the other two i.e. M/s. Orientation Academics & Rajashree Enterprises that “*notice returned back*”. (page 2 & 3 of assessment order). So, according to Ld. AR, the grounds of appeal of department are per-se wrong and misleading. According to Ld. AR., even the chart which depicts that notice have returned back is incorrect. According to him, the notice u/s 133(6) was served upon all loan creditors except one creditor i.e. of M/s. Rajshree Enterprises. That too (i.e. M/s. Rajshree Enterprises) according to ld. AR, is a proprietary concern; and the proprietor of the said company is the director of corporate creditor M/s. Rajashree Services & Sales Pvt. Ltd. which had duly replied to the AO’s notice u/s. 133(6) of the Act. So, the ground of appeal regarding the non-traceability of creditors is a figment of imagination of AO, and that too when his conclusion is not based on any Inspector’s report after physical verification of address etc. Thus, according to ld. AR, the grounds of appeal raised by the revenue are bereft of merits. The Ld. AR also drew our attention to the documents produced by the loan creditors pursuant to notices issued by the AO u/s. 133(6) of the Act to substantiate their identity, creditworthiness and genuineness of each and every transaction, which will be discussed in details below. Therefore, according to the ld. AR, the ld. CIT(A) has rightly deleted the addition, which decision need not be interfered by this Tribunal. In his rejoinder the Ld. DR could not controvert the factual assertions made by Ld. AR.

11. Having heard both the parties and after perusing the records and case laws cited by both the parties, we note that the assessee had taken loan from said [name and amount lend from chart at page 2& 3 supra] twelve (12) parties to the tune of Rs. 2,85,67,31/-. During the assessment proceedings, the AO issued show cause notice to the assessee and asked the assessee to substantiate the identity, creditworthiness and genuineness of the loan creditors/loan transaction. Thereafter, he has drawn a chart,

which has already been reproduced by us (supra) and from a perusal of the same, we note that out of 12 loan creditors, AO notes that two notices u/s 133 (6) of the Act have been returned back, which means the other loan creditors have duly received 133(6) notices. Out of which, one entity M/s. Rajashree Enterprises which is shown as item no. 10, the AO remarks that the address has not been furnished. Thus, the AO himself accepts that out of twelve (12) loan creditors 9 (nine) loan creditors have received notices u/s 133(6) of the Act sent by the AO. Moreover, the AO himself has accepted/endorsed at para 3.1 of the assessment order that the assessee company had filed balance sheets, bank statements and ITRs of some of the loan creditors. From a perusal of paper book Vol-I&II, we note that the AO has not been fair while acknowledging that assessee had filed balance sheet, bank statements of some of the loan creditors whereas in fact assessee had filed voluminous paper documentation about all 12 loan creditors pursuant to his Show Cause Notice (SCN). It has to be kept in mind that while the AO discharges the duties of quasi judicial authority, he has to be fair in his action. From a perusal of the records submitted before us, we note that before the AO voluminous documents running more than 600 pages were file to substantiate the identity, creditworthiness and genuineness of the loan creditors/loan transaction. We note that out of 12 loan creditors, the AO himself accepts that 9 (nine) out of 12 replied to his 133(6) notices. We also note that out of 3 (three) loan creditors according to AO's chart, did not respond to notice u/s. 133(6), we find that two had replied to AO, viz. M/s. Ayush Fintrade Pvt. Ltd (in short, "M/s. Ayush") and M/s Orientation Academics Pvt. Ltd. (in short, "M/s. Orientation") and they have also filed their respective replies before the AO, the remaining one (1) loan creditor which did not respond to notice u/s. 133(6) was M/s. Rajashree Enterprises (in short, M/s. Rajashree Enterprises'). It was brought to our notice that this is a proprietary concern and the proprietor of this concern was Shri Akhilesh Agarwal, who is also the director of M/s. Rajesh Services & Sales P.Ltd, which is also a loan creditor and has duly replied to the notice of AO issued u/s. 133(6) of the Act. We note that AO in the chart in respect of M/s. Ayush (loan creditor), has stated that the notice u/s. 133(6) has been returned back to him, which we find it to be wrong assertion. On the contrary, we find that pursuant to the notice of AO u/s. 133(6), M/s. Ayush replied and same have been found filed at pages 113 of the PB-I. We also note from perusal of page-113 of the PB-

I, the AO himself has endorsed by Office Seal to have received the letter dt. 8-2-2016 sent by M/s. Ayush i.e. the Office of AO/ DCIT, C-11(1) Kolkata, which is officially stamped having been received on 15-02-2016. Along with the said reply, we note that M/s. Ayush has filed Company Master Data/chart, which is found at page-114 of the PB-I, loan confirmation found at page-124 of the PB-I, bank statement of the loan creditor is found at pages 125-128 of the PB-I, ITR acknowledgements found at pages 129-131 of PB-I and audited accounts of the loan creditors have been found placed at pages 132-147 of PB-I for the year ending 31/3/2012 and 31/3/2013 found placed at pages 1-147 of the PB, for the year ending 31-03-2014 found placed at pages 148-167 and computation of income as on 31-03-2014 found at page 168 of the PB-I. So, the factual assertion of AO in the chart that the notice sent u/s. 133(6) to M/s. Ayush returned back is perverse and incorrect.

12. Coming next to M/s. Orientation, we also note that AO has given his remark in the chart in respect of M/s Orientation that notice u/s. 133(6) have been returned back. We note that M/s Orientation has filed its reply before the AO, which has also been duly stamped by the O/o the DCIT endorsing the fact that it had received letter on 18-02-2016. We also note that the said M/s. Orientation had filed the aforesaid documents, which is being stated in the case of M/s. Ayush (in short) at page-482 to 520 of PB-II.

13. Now coming to M/s. Rajashree Enterprise, where the AO has given his remark “no address has been given by the assessee”. We note that the said proprietary concern, whose proprietor is Shri Akhilesh Agarwal is also director of another corporate loan creditor, M/s. Rajshree Services & Sales P.Ltd (in short, M/s. Rajshree Pvt. Ltd.) and has duly filed its loan confirmation with bank statement of loan creditor, ITR acknowledgements, audited accounts of the loan creditors, which are found enclosed at pages 612-639 of the PB II.

14. We find that all other 9 (nine) creditors have replied directly to the AO’s notice u/s. 133(6), which has been duly acknowledged by the AO in the given chart itself (no adverse remark has been given against these 9 loan creditors). We also find that all the nine (9) companies have also filed the copy of their replies to 133(6)

notices in the paper book I & II. We also find that all the endorsements of the O/o the DCIT that replies have been received by the AO have been found on it. We also note that main plank on which the AO has drawn adverse inference against the loan creditors was that the twelve (12) entities/loan creditors could not be traced out in their addresses furnished before him. In order to come to such conclusion that these loan creditors were not found in the addresses, the AO has not spelt out in his assessment order as to how he came to such a conclusion when the evidence on record with the official stamp of his office having received it (the replies). The said event conveys that these loan creditors have received through postal authorities the notice sent by AO u/s. 133(6) of the Act and they in turn duly replied it back to AO which has been received by the AO. So, in such a scenario, the AO's assertion that they could not be traced in the address is misplaced and cannot be accepted. Moreover, in this aforesaid back-drop we wonder as to how the AO made this wrong factual assertion and further it cannot be discerned from the assessment order as to whether the AO carried out any physical verification about the addresses of the loan creditors and the AO has not spelt out whether he himself has physically verified or he has deputed any inspector to verify the address of the loan creditors. He has not referred to any inspector's report about any inspection carried out by any of the authorities of the department to draw an adverse conclusion that loan creditors were not traceable/found in the addresses. On the other hand, we note that the AO had issued 133(6) notices to these companies/loan creditors, out of which the AO himself has not drawn any adverse inference against 9 (nine) companies [as to the aspect of the notices being returned back]. Then, in such a scenario, the inference drawn is that the notices sent by the AO to the address of the legal entities has been duly served upon them [at least that of nine loan creditors]. And we have found from examination of documents as stated in para 11 and 12 (supra) that all other loan creditors have responded except one (M/s. Rajashree Enterprises) to AO's notice u/s. 133(6) and his office stamp acknowledges that it was received. About M/s. Rajashree Enterprises, we have given our factual finding at para 13 (supra). Therefore, the finding/the conclusion drawn by the AO that loan creditors were not found in the addresses is without any basis/material, so the finding of AO is perverse and that cannot be the basis for drawing any adverse inference against the loan creditors. We note that in order to prove the identity, creditworthiness and

genuineness of the transaction, the assessee had filed before us 2(two) voluminous paper book (PB-I & PB- II) running more than 653 pages, wherein we note that the assessee had filed the following details of each and every loan creditors before us and Ld. CIT(A) and AO:-

- a) Reply to Notice U/s. 133(6)
- b) Company Master
- c) Loan confirmation with Bank Statement
- d) Bank statement of loan creditor
- e) IT Return Acknowledgment
- f) Audited Accounts of Loan Creditors year ending on 31.03.2012, 31.03.2013 & 31.03.2014
- g) Computation of Income 31.03.2014

15. Thus, when all this aforesaid documents in respect of each and every loan creditors have been filed and corporate entities had disclosed their respective CIN Nos. PAN details, ITRs. So, we find that they are all regular income-tax assessee have CIN, PAN etc. go on to establish their identity. Their Creditworthiness can be verified from the audited accounts of the respective loan creditors and on perusal of the balance sheets will reveal the creditworthiness of each and every loan creditors, page 652-653 of PB which is reproduced below gives the birds' eye view of their respective Capital, Reserve etc.

SL. NO	COMPANY NAME	Authorised Capital		Paid up capital		Reserve & Surplus				Gross Income		Netprofit		Tax Paid		Loan given to MATA
		2011-12	2012-13	2011-12	2012-13	Capital Reserve		Revenue Reserve		2011-12	2012-13	2011-12	2012-13	2011-12	2012-13	
						2011-12	2012-13	2011-12	2012-13							
1	AMIT REALTOR S PVT LTD	12500000	12500000	10120000	10120000	54225000	54225000	77090.4	570654.37	4294627	2942416	493564	588608.4	106685	21995	2500000
2	AYUSH FINTRADE PVT LTD	20000000	20000000	13860000	13860000	2550000	2550000	1104137	1121689	1881221	2062628	32420	29703	49610	36277	1000000
3	BRAIN BUSINESS PVT LTD	17500000	17500000	12774820	12774820	69753695	69764300	1275010	1312344	12064022	11516825	151767	53026	51968	25734	4000000
4	CAMELLIA VINCOM PVT LTD	4700000	4700000	4640000	4640000	40860000	40860000	1563	211238.75	25124	757412.4	3738	209675.7	210	100497	1000000
5	GENUINE RETAILS PVT LTD	21000000	21000000	20504300	20504300	201745700	201745700	2590	33776	124923	822204	2590	31186	1159	13948	3500000
6	GREENLINE TRADELINKS PVT LTD	2350000	2350000	2307500	2307500	86092500	86092500	110483	2355596.6	563778.9	11713423	106570	2245113	47654	957400	5500000
7	JAGDAMBA DEALCOM PVT LTD	4000000	4000000	3925000	3925000	72675000	72675000	308774	826175	998841	2719943	393607	517401	179689	254622	2500000
8	MEMARI COLD STORAGE PVT LTD	5000000	5000000	5000000	5000000	2963800	2963800	233535	418656	1094266	794649	337154	185121	368838	186978	2000000
9	ORIENTAL ACADEMICS PVT LTD	500000	500000	100000	100000	NIL	NIL	-8218.1	3880.56	31253	767716	2401.92	12098.64	1074.08	5410.2	2000000

10	RAISHREE ENTERPRISES	-	-	-13754532	-13291495	-	-	-	-	37283130	22967110	3723468	1724370	1114275	282261	2000000
11	RAISHREE SERVICES & SALES PVT LTD	1000000	1000000	200000	200000	-	-	-596049	-122634.9	262154	5533478	-575792	473414.1	-6129.5	198982	1000000
12	KANBHUMI MARKETING PVT LTD	1500000	1500000	765400	765400	29874600	29874600	8639.36	30227.36	2340704	4372302	5937.36	31241	2660	9653	2500000

16. From the aforesaid chart, the creditworthiness of each loan creditor can be seen and we find that they all have enough creditworthiness to give loan of respective sums to the assessee. And the genuineness of the transaction has been established by the fact that the entire loan given by the said loan creditors to the assessee was through banking channel. Further, the TDS has been deducted by assessee while paying the interest to the loan creditors and moreover, we note that the assessee had squared up few loan in this AY as well as in the subsequent AYs. In such scenario and taking note of facts and circumstances of the case, we find that the Id. CIT(A) after examining the documents has given factual finding that the identity, creditworthiness and genuineness of the loan transaction has been clearly discharged by the assessee. We note that the Id. CIT(A) has given clear finding about the identity of the loan creditors [found at page-11, para 6.3 of the impugned order of the Id. CIT(A)] and [at para 6.4 page-12], the Id. CIT(A) has given a specific finding in respect of creditworthiness of the loan creditors and [at page 18 para 6.5], the Id. CIT(A) has given a clear finding about the genuineness of the loan creditors. Since the assessee has been able to discharge the onus casted upon it in respect of the loan creditors' identity and genuineness of the transaction and the fact that the revenue has not challenged the specific finding returned by the Ld. CIT(A) then the same crystallises and becomes final, and thus we find that there is no merit in the ground of appeal raised by the revenue on this issue and so, we confirm the impugned order of the Id. CIT(A) and dismiss the appeal of the revenue. For that, we rely on the following judicial precedents:-

17. The Hon'ble Apex Court in the case of Orissa Corpn. (P) Ltd. (supra) 159 ITR 78 and the Hon'ble Gujarat High Court, in the case of Dy. CIT v. Rohini Builders [2002] 256 ITR

360 / [2003] 127 Taxman 523 , has held that onus of the assessee (in whose books of account credit appears) stands fully discharged if the identity of the creditor is established and actual receipt of money from such creditor is proved. In case, the Assessing Officer is dissatisfied about the source of cash deposited in the bank accounts of the creditors, the proper course would be to assess such credit in the hands of the creditor (after making due enquiries from such creditor). In arriving at this conclusion, the Hon'ble Court has further stressed the presence of word "may" in section 68. Relevant observations at pages 369 and 370 of this report are reproduced hereunder:-

"Merely because summons issued to some of the creditors could not be served or they failed to attend before the Assessing Officer, cannot be a ground to treat the loans taken by the assessee from those creditors as non-genuine in view of the principles laid down by the Supreme Court in the case of Orissa Corporation [1986] 159 ITR 78. In the said decision the Supreme Court has observed that when the assessee furnishes names and addresses of the alleged creditors and the GIR numbers, the burden shifts to the Department to establish the Revenue's case and in order to sustain the addition the Revenue has to pursue the enquiry and to establish the lack of creditworthiness and mere non-compliance of summons issued by the Assessing Officer under section 131, by the alleged creditors will not be sufficient to draw and adverse inference against the assessee. in the case of six creditors who appeared before the Assessing Officer and whose statements were recorded by the Assessing Officer, they have admitted having advanced loans to the assessee by account payee cheques and in case the Assessing Officer was not satisfied with the cash amount deposited by those creditors in their bank accounts, the proper course would have been to make assessments in the cases of those creditors by' treating the cash deposits in their bank accounts as unexplained investments of those creditors under section 69.

18. In the case of Nemi Chand Kothari 136 Taxman 213, (supra), the Hon'ble Guahati High Court has thrown light on another aspect touching the issue of *onus* on assessee under section 68, by holding that the same should be decided by taking into consideration the provision of section 106 of the Evidence Act which says that a person can be required to prove only such facts which are in his knowledge. The Hon'ble Court in the said case held that, once it is found that an assessee has actually taken money from depositor/lender who has been fully identified, the assessee/borrower cannot be called upon to explain, much less prove the affairs of such third party, which he is not even supposed to know or about which he cannot be held to be accredited with any knowledge. In this view, the Hon'ble Court has laid down that section 68 of Income-tax Act, should be read along with section 106 of Evidence Act. The relevant observations at page 260 to 262, 264 and 265 of the report are reproduced herein below:-

"While interpreting the meaning and scope of section 68, one has to bear in mind that normally, interpretation of a statute shall be general, in nature, subject only to such

exceptions as may be logically permitted by the statute itself or by some other law connected therewith or relevant thereto. Keeping in view these fundamentals of interpretation of statutes, when we read carefully the provisions of section 68, we notice nothing in section 68 to show that the scope of the inquiry under section 68 by the Revenue Department shall remain confined to the transactions, which have taken place between the assessee and the creditor nor does the wording of section 68 indicate that section 68 does not authorize the Revenue Department to make inquiry into the source(s) of the credit and/or sub-creditor. The language employed by section 68 cannot be read to impose such limitations on the powers of the Assessing Officer. The logical conclusion, therefore, has to be, and we hold that an inquiry under section 68 need not necessarily be kept confined by the Assessing Officer within the transactions, which took place between the assessee and his creditor, but that the same may be extended to the transactions, which have taken place between the creditor and his sub-creditor. Thus, while the Assessing Officer is under section 68, free to look into the source(s) of the creditor and/or of the sub-creditor, the burden on the assessee under section 68 is definitely limited. This limit has been imposed by section 106 of the Evidence Act which reads as follows:

"Burden of proving fact especially within knowledge.-When any fact is especially within the knowledge of any person, the burden) of proving that fact is upon him. "

What, thus, transpires from the above discussion is that while section 106 of the Evidence Act limits the onus of the assessee to the extent of his proving the source from which he has received the cash credit, section 68 gives ample freedom to the Assessing Officer to make inquiry not only into the source(s) of the creditor but also of his (creditor's) sub-creditors and prove, as a result, of such inquiry, that the money received by the assessee, in the form of loan from the creditor, though routed through the sub-creditors, actually belongs to, or was of, the assessee himself. In other words, while section 68 gives the liberty to the Assessing Officer to enquire into the source/source from where the creditor has received the money, section 106 makes the assessee liable to disclose only the source(s) from where he has himself received the credit and it is not the burden of the assessee to prove the creditworthiness of the source(s) of the sub-creditors. If section 106 and section 68 are to stand together, which they must, then, the interpretation of section 68 are to stand together, which they must, then the interpretation of section 68 has to be in such a way that it does not make section 106 redundant. Hence, the harmonious construction of section 106 of the Evidence Act and section 68 of the Income- tax Act will be that though apart from establishing the identity of the creditor, the assessee must establish the genuineness of the transaction as well as the creditworthiness of his creditor, the burden of the assessee to prove the genuineness of the transactions as well as the creditworthiness of the creditor must remain confined to the transactions, which have taken place between the assessee and the creditor. What follows, as a corollary, is that it is not the burden of the assessee to prove the genuineness of the transactions between his creditor and sub-creditors nor is it the burden of the assessee to prove that the sub-creditor had the creditworthiness to advance the cash credit to the creditor from whom the cash credit has been, eventually, received by the assessee. It, therefore, further logically follows that the creditor's creditworthiness has to be Judged vis-a-vis the transactions, which have taken place between the assessee and the creditor, and it is not the business of the assessee to find out the source of money of his creditor or of the genuineness of the transactions, which took between the creditor and sub-creditor and/or creditworthiness of the sub-creditors, for, these aspects may not be within the special knowledge of the assessee. "

" ... If a creditor has, by any undisclosed source, a particular amount of money in the bank, there is no limitation under the law on the part of the assessee to obtain such amount of money or part thereof from the creditor, by way of cheque in the form of loan and in such a case, if the creditor fails to satisfy as to how he had actually received the said amount and happened to keep the same in the bank, the said amount cannot be treated as income of the assessee from undisclosed source. In other words, the genuineness as well as the creditworthiness of a creditor have to be adjudged vis-a-vis the transactions, which he has with the assessee. The reason why we have formed the opinion that it is not the business of the assessee to find out the actual source or sources from where the creditor has accumulated the amount, which he advances, as loan, to the assessee is that so far as an assessee is concerned, he has to prove the genuineness of the transaction and the creditworthiness of the creditor vis-a-vis the transactions which had taken place between the assessee and the creditor and not between the creditor and the sub-creditors, for, it is not even required under the law for the assessee to try to find out as to what sources from where the creditor had received the amount, his special knowledge under section 106 of the Evidence Act may very well remain confined only to the transactions, which he had' with the creditor and he may not know what transaction(s) had taken place between his creditor and the sub-creditor... "

"In other words, though under section 68 an Assessing Officer is free to show, with the help of the inquiry conducted by him into the transactions, which have taken place between the creditor and the sub-creditor, that the transaction between the two were not genuine and that the sub-creditor had no creditworthiness, it will not necessarily mean that the loan advanced by the sub-creditor to the creditor was income of the assessee from undisclosed source unless there is evidence, direct or circumstantial, to show that the amount which has been advanced by the sub-creditor to the creditor, had actually been received by the sub-creditor from the assessee"

"Keeping in view the above position of law, when we turn to the factual matrix of the present case, we find that so far as the appellant is concerned, he has established the identity of the creditors, namely, Nemichand Nahata and Sons (HUF) and Pawan Kumar Agarwalla. The appellant had also shown, in accordance with the burden, which rested on him under section 106 of the Evidence Act, that the said amounts had been received by him by way of cheques from the creditors aforementioned. In fact the fact that the assessee had received the said amounts by way of cheques was not in dispute. Once the assessee had established that he had received the said amounts from the creditors aforementioned by way of cheques, the assessee must be taken to have proved that the creditor had the creditworthiness to advance the loans. Thereafter the burden had shifted to the Assessing Officer to prove the contrary. On mere failure on the part of the creditors to show that their sub-creditors had creditworthiness to advance the said loan amounts to the assessee, such failure, as a corollary, could not have been and ought not to have been, under the law, treated as the income from the undisclosed sources of the assessee himself, when there was neither direct nor circumstantial evidence on record that the said loan amounts actually belonged to, or were owned by, the assessee. Viewed from this angle, we have no hesitation in holding that in the case at hand, the Assessing Officer had failed to show that the amounts, which had come to the hands of the creditors from the hands of the sub-creditors, had actually been received by the sub-creditors from the assessee. In the absence of any such evidence on record, the Assessing Officer could not have treated the said amounts as income derived by the appellant from undisclosed sources. The learned

Tribunal seriously fell into error in treating the said amounts as income derived by the appellant from undisclosed sources merely on the failure of the sub-creditors to prove their creditworthiness.”

19. Further, in the case of CIT v. S. Kamaljeet Singh [2005] 147 Taxman 18(All.) their lordships, on the issue of discharge of assessee's onus in relation to a cash credit appearing in his books of account, has observed and held as under:-

"4. The Tribunal has recorded a finding that the assessee has discharged the onus which was on him to explain the nature and source of cash credit in question. The assessee discharged the onus by placing (i) confirmation letters of the cash creditors; (ii) their affidavits; (iii) their full addresses and GIR numbers and permanent account numbers. It has found that the assessee's burden stood discharged and so, no addition to his total income on account of cash credit was called for. In view of this finding, we find that the Tribunal was right in reversing the order of the AA C, setting aside the assessment order.”

20. We also take note of the decision of the Hon'ble High Court, Calcutta in the case of S.K. Bothra & Sons, HUF v. Income-tax Officer, Ward- 46(3), Kolkata 347 ITR 347 wherein the Court held as follows:

"15. It is now a settled law that while considering the question whether the alleged loan taken by the assessee was a genuine transaction, the initial onus is always upon the assessee and if no explanation is given or the explanation given by the appellant is not satisfactory, the Assessing Officer can disbelieve the alleged transaction of loan. But the law is equally settled that if the initial burden is discharged by the assessee by producing sufficient materials in support of the loan transaction, the onus shifts upon the Assessing Officer and after verification, he can call for further explanation from the assessee and in the process, the onus may again shift from the Assessing Officer to assessee.

16. In the case before us, the appellant by producing the loan-confirmation-certificates signed by the creditors, disclosing their permanent account numbers and address and further indicating that the loan was taken by account payee cheques, no doubt, prima facie, discharged the initial burden and those materials disclosed by the assessee prompted the Assessing Officer to enquire through the Inspector to verify the statements.”

21. In a case where the issue was whether the assessee availed cash credit as against future sale of product, the AO issued summons to the creditors who did not turn up before him, so AO disbelieved the existence of creditors and saddled the addition, which was overturned by Ld. CIT(A). However, the Tribunal reversed the decision of the Ld. CIT(A) and upheld the AO's decision, which action of Tribunal was challenged by the Hon'ble High Court, Calcutta in the case of Crystal Networks (P.) Ltd. v. Commissioner of Income-tax 353 ITR 171 wherein the Tribunal's decision was overturned and decision of Ld. CIT(A) upheld and the Hon'ble High Court has held that when the basic evidences are on record

the mere failure of the creditor to appear cannot be basis to make addition. The court held as follows:

8. *Assailing the said judgment of the learned Tribunal learned counsel for the appellant submits that Income-tax Officer did not consider the material evidence showing the creditworthiness and also other documents, viz., confirmatory statements of the persons, of having advanced cash amount as against the supply of bidis. These evidence were duly considered by the Commissioner of Income-tax (Appeals). Therefore, the failure of the person to turn up pursuant to the summons issued to any witness is immaterial when the material documents made available, should have been accepted and indeed in subsequent year the same explanation was accepted by the Income-tax Officer. He further contended that when the Tribunal has relied on the entire judgment of the Commissioner of Income-tax (Appeals), therefore, it was not proper to take up some portion of the judgment of the Commissioner of Income-tax (Appeals) and to ignore the other portion of the same. The judicial propriety and fairness demands that the entire judgment both favourable and unfavourable should have been considered. By not doing so the Tribunal committed grave error in law in upsetting the judgment in the order of the Commissioner of Income-tax (Appeals).*

9. *In this connection he has drawn our attention to a decision of the Supreme Court in the case of Udhavdas Kewalram v. CIT [1967] 66 ITR 462. In this judgment it is noticed that the Supreme Court as proposition of law held that the Tribunal must In deciding an appeal, consider with due care, all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner in the light of the evidence and the relevant law.*

10. *We find considerable force of the submissions of the learned counsel for the appellant that the Tribunal has merely noticed that since the summons issued before assessment returned unserved and no one came forward to prove. Therefore, it shall be assumed that the assessee failed to prove the existence of the creditors or for that matter the creditworthiness. As rightly pointed out by the learned counsel that the Commissioner of Income-tax (Appeals) has taken the trouble of examining of all other materials and documents, viz., confirmatory statements, invoices, challans and vouchers showing supply of bidis as against the advance. Therefore, the attendance of the witnesses pursuant to the summons issued, in our view, is not important. The important is to prove as to whether the said cash credit was received as against the future sale of the product of the assessee or not. When it was found by the Commissioner of Income-tax (Appeals) on facts having examined the documents that the advance given by the creditors have been established the Tribunal should not have ignored this -fact finding. Indeed the Tribunal did not really touch the aforesaid fact finding of the Commissioner of Income-tax (Appeals) as rightly pointed out by the learned counsel. The Supreme Court has already stated as to what should be the duty of the learned Tribunal to decide in this situation. In the said judgment noted by us at page 464, the Supreme Court has observed as follows:*

"The Income-tax Appellate Tribunal performs a judicial function under the Indian Income-tax Act; it is invested with authority to determine finally all questions of fact. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law. "

11. *The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law. It is also ruled in the said judgment at page 465 that if the Tribunal does not discharge the duty in the manner as above then it shall be assumed the judgment of the Tribunal suffers from manifest infirmity.*

12. *Taking inspiration from the Supreme Court observations we are constrained to hold in this matter that the Tribunal has not adjudicated upon the case of the assessee in the light of the*

evidence as found by the Commissioner of Income-tax (Appeals). We also found no single word has been spared to up set the fact finding of the Commissioner of Income-tax (Appeals) that there are materials to show the cash credit was received from various persons and supply as against cash credit also made.

13. Hence, the judgment and order of the Tribunal is not sustainable. Accordingly, the same is set aside. We restore the judgment and order of the Commissioner of Income-tax (Appeals). The appeal is allowed.

22. When a question as to the creditworthiness of a creditor is to be adjudicated and if the creditor is an Income Tax assessee, it is now well settled by the decision of the Calcutta High Court that the creditworthiness of the creditor cannot be disputed by the AO of the assessee but the AO of the creditor. In this regards our attention was drawn to the decision of the Hon'ble High Court, Calcutta in the COMMISSIONER OF INCOME TAX, KOLKA TA-III Versus DATAWARE PRIVATE LIMITED ITAT No. 263 of 2011 Date: 21st September, 2011 wherein the Court held as follows:

“In our opinion, in such circumstances, the Assessing officer of the assessee cannot take the burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. After getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing officer should enquire from the Assessing Officer of the creditor as to the genuineness” of the transaction and whether such transaction has been accepted by the Assessing officer of the creditor but instead of adopting such course, the Assessing officer himself could not enter into the return of the creditor and brand the same as unworthy of credence.

So long it is not established that the return submitted by the creditor has been rejected by its Assessing Officer, the Assessing officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness” of transaction through account payee cheque has been established.

We find that both the Commissioner of Income Tax (Appeal) and the Tribunal below followed the well-accepted principle which are required to be followed in considering the effect of Section 68 of the Act and we thus find no reason to interfere with the concurrent findings of fact recorded by both the authorities.”

23. In this case on hand, the assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the loan creditors, thereafter the onus shifted to AO to disprove the documents furnished by assessee. The documents furnished by assessee cannot be brushed aside by the AO without cogent reasons. The AO's action to draw adverse view in the light of the documents discussed supra cannot be countenanced. In the absence of any investigation, much less gathering of evidence by the Assessing Officer, we hold that addition cannot be sustained merely based on inferences drawn by circumstance. Applying

the propositions laid down in these case laws to the facts of this case, we are inclined to uphold the order of the Ld. Commissioner of Income Tax (Appeals)

24. To sum up section 68 of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source shall be assessed as its undisclosed income. In the facts of the present case, both the nature & source of the loan received was fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the loan creditors. The PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed on AO's record. Accordingly all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction were placed before the AO and the onus shifted to AO to disprove the materials placed before him. Without doing so, the addition made by the AO is based on conjectures and surmises cannot be justified. In the facts and circumstances of the case as discussed above, no addition was warranted under Section 68 of the Act. Therefore, we do not want to interfere in the impugned order of Ld. CIT(A) which is confirmed and consequently the appeal of Revenue is dismissed.

25. Ground no. 2 of revenue is against the action of the ld. CIT(A) in deleting the addition of Rs.12,75,987/- on account of interest payment to bogus loan creditors.

26. We note that the AO disallowed the interest expenditure which were paid by the assessee to the aforesaid twelve (12) loan creditors, on the reason that the loan creditors were bogus entities/companies. However, while adjudicating ground nos. 1 & 5 we have found that loan creditors are not bogus companies and that the interest were paid through banking channel and TDS have been duly deducted by the assessee. We find that the ld. CIT(A) has rightly deleted the impugned addition. We confirm the action of the ld. CIT(A) and dismiss this ground of appeal of Revenue.

27. Ground no. 3 of the revenue is against the action of the ld. CIT(A) in deleting the addition made by the AO on the reason of non-deposit of Rs. 8,46,634/- within due date as prescribed in PF/ESI Act. We note that the ld. CIT(A) has given the relief to the assessee after taking note that the assessee had deposited Rs. 8,46,634/- on account of employees' contribution to PF/ESI before the due date of filing of return of

income, which factual finding is corroborated from perusal of pages 35-36 of the PB (Tax Audit Report) from where, we note that the assessee, in fact, had remitted the employees' contribution of PF/ESI before due date of filing of return of income. Therefore, we confirm the order of the Id. CIT(A) by relying on the decision of the Hon'ble Jurisdictional High Court in the case of Vijay Shree Ltd dt. 6-9-2011 in ITAT No. 245 of 2011 and GA No. 2607 of 2011.

28. Ground no. 4 is against the action of the Id. CIT(A) in allowing the amount of Rs. 3,15,107/- which was disallowed by AO being the interest on late payment of TDS. We note that the AO disallowed Rs.3,15,107/- since this amount has been remitted by the assessee for late payment of TDS. We note that the Id. CIT(A) has given relief taking note of the decision of this Tribunal in the case of M/s. Narayani Ispat Pvt. Ltd ITA No. 2127/Kol/2014 as well as the decision of the Hon'ble Allahabad High Court in the case of Triveni Engineering Works Ltd. vs Commissioner Of Income-Tax (144 ITR 732). We note that this issue is no longer *res integra*. This Tribunal in Narayani Ispat P. Ltd. has decided this issue by holding as under:

The issue of delay in the payment of service tax is directly covered by the judgment of Hon'ble Apex Court in the case of Lachmandas Mathura Vs. CIT reported in 254 ITR 799 in favour of assessee. The relevant extract of the judgment is reproduced below:

"The High Court has proceeded on the basis that the interest on arrears of sales tax is penal in nature and has rejected the contention of the assessee that it is compensatory in nature. In taking the said view the High Court has placed reliance on its Full Bench's decision in Saraya Sugar Mills (P.) Ltd. v. CIT (1979) 116 ITR 387 (All.) The learned counsel appearing for the appellant-assessee states that the said judgment of the Full Bench has been reversed by the larger Bench of the High Court in Triveni Engg. Works Ltd. v. CIT (1983) 144 ITR 732 (All.) (FB), wherein it has been held that interest on arrears of tax is compensatory in nature and not penal. This question has also been considered by this Court in Civil Appeal No. 830 of 1979 titled Saraya Sugar Mills (P.) Ltd. v. CIT decided on 29-2-1996. In that view of the matter, the appeal is allowed and question Nos. 1 and 2 are answered in favour of the assessee and against the revenue ...

In view of the above judgment, there remains no doubt that the interest expense on the delayed payment of service tax is allowable deduction.

The above principles can be applied to the interest expenses levied on account of delayed payment of TDS as it relates to the expenses claimed by the assessee which "are - subject' to the -TDS provisions. The assessee claims the specified expenses of certain amount in its profit & loss account and thereafter the assessee from the payment to the party deducts certain percentage as specified under the Act as TDS and pays to the Government Exchequer. The amount of TDS represents the amount of income tax of the party on whose behalf the payment was deducted & paid to the Government Exchequer. Thus the TDS amount does not represent the tax of the assessee but it is the tax of the party which has been paid by the assessee. Thus any delay in the payment of TDS by the assessee cannot be

linked to the income tax of the assessee and consequently the principles laid down by the Hon 'ble Apex Court in case of Bharat Commerce Industries Ltd. Vs. CIT (199) reported in 230 ITR 733 cannot be applied to the case on hand.

Thus, in our considered view, the principle laid down by the Hon'ble Supreme Court in the case of Bharat Commerce Industries Ltd. (supra) is not applicable in the instant facts of the case. Thus, we hold that the Assessing Officer in the instant case has wrongly applied the principle laid down by the Hon'ble Supreme Court in the case of Bharat Commerce Industries Ltd.(supra). We also find that the Hon'ble Supreme Court in the case of Lachmandas Mathura (Supra) has allowed the deduction on account of interest on late deposit of sales tax u/s 37(1) of the Act. In view of the above, we conclude that the interest expenses claimed by the assessee on account of delayed deposit of service tax as well' as TDS liability are allowable expenses u/s 37(1) of the Act. In this view of the matter, we find no reason to interfere in the order of ld.CIT(A) and we uphold the same. Hence, this ground of Revenue is dismissed.”

Therefore, respectfully following the said decision of the Tribunal, we confirm the impugned order of the ld. CIT(A) on this issue and dismiss the appeal of the revenue.

29. In the result, the appeal of revenue is dismissed.

Order Pronounced in the Open Court on 15th January, 2019

Sd/-

(Arjun Lal Saini)
Accountant Member

Sd/-

(Aby. T. Varkey)
Judicial Member

Dated 15 -01-2020

PP(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant/Revenue: The DCIT, C.C-2(4), Aaykar Bhawan, Poorva, 110 Shantipally, Kolkata-107.
2. Respondent/Assessee: M/s. Maa Annapurna Transport Agency Ltd. 5 Fl., 84/1B, Hi Tech Chambers, Tposia Road South, Kolkata-46.
3. CIT,
4. CIT(A), Kolkata.
5. DR, Kolkata Benches, Kolkata

**PP/SPS True Copy By By Order Assistant Registrar
ITAT Kolkata