

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI**

BEFORE SHRI M. BALAGANESH (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 5199/MUM/2017
Assessment Year: 2012-13**

M/s Ronil Developers Pvt. Ltd., 7, Sherman, Narayan Dabholkar Marg, Nepeansea Road, Mumbai - 400006 PAN: AAACR3857P	Vs.	The ITO-13(3)(2), Now ITO 5(3)(1), Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Assessee by : Shri Pradip N. Kapasi (AR)

Revenue by : Shri Maurya Pratap (DR)

Date of Hearing: 06/12/2019
Date of Pronouncement: 31/01/2020

ORDER

PER RAM LAL NEGI, JM

This appeal has been preferred by the assessee against the order dated 19.05.2017 passed by the Commissioner of Income Tax (Appeals)-21 (for short 'the CIT(A), Mumbai, pertaining to the assessment year 2012-13, whereby the Ld. CIT(A) has partly allowed the appeal filed by the assessee against the assessment order passed by the Assessing officer (for short the AO) u/s 143 (3) of the Income Tax Act, 1961 (for short the 'Act').

2. The brief facts of the case are that the assessee company engaged in the business of development of properties, filed its return of income for the assessment year under consideration declaring nil income. The AO passed assessment order u/s 143 (3) of the Act, and determined the total income of the assessee at Rs. 69,56,880/- after making addition of Rs. 8,00,000/- by rejecting the claim of payment made to Kamladevi K Agarwal towards full and final consideration for handing over the vacant possession of Room No. 1, Ground Floor, Dongarsi Road Malabar Hill, Mumbai and an amount of Rs.

11,56,879/- rejecting the claim of payment made to Bombay Municipal School for surrendering the rented school premises at 23A Dongarsi Road, Mumbai (Total Rs. 8,00,000 + 11,56,879=19,56,879) and further addition of Rs. 50,00,000/- treating the unsecured loan taken by the assessee company as unexplained cash credit u/s 68 of the Act. The assessee challenged the assessment order before the Ld. CIT (A). The Ld. CIT (A) after hearing the assessee, partly allowed the appeal and restricted the addition of Rs. 19,56,879/- aforesaid to Rs. 10,19,807/-. However, confirmed the addition of 50,00,000/-. Still aggrieved, the assessee is in appeal before the Tribunal.

3. The assessee has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

1. **.Incorrect Assessment of total income at Rs. 60,19,810/-**

On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in partly upholding the action of the Income Tax Officer- 13(3)(2), Mumbai i.e. the Learned Assessing Officer (hereinafter referred to as "Ld AO) resulting in assessment of Rs. 60,19,810/- as the Total Income of the Appellant as against the returned income of Rs. Nil.

2. **Addition of payment to Kamladevi K Agarwal and Capitalized in books of accounts- Rs. 8,00,000/-**

On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in upholding the action of the Ld. AO in making an addition of Rs. 8,00,000/- on account of payment made by the Appellant to Ms. Kamladevi Agrawal as full and final consideration for handing over vacant possession of its property, despite the fact that the Appellant had not claimed the said payment/expenditure in its Profit and Loss account/computation of income and had merely capitalized the said amount in the schedule of fixed assets in its Balance sheet, on which no depreciation had been claimed.

3. **Addition of payment to Bombay Municipal School and Capitalised in books of accounts – Rs. 2,19,810/-**

On the facts and in the circumstances of the case and in law, the Ld.CIT (A) erred in confirming the action of Ld. AO in making an addition to the extent of Rs. 2,19,810/- being 19% of the payment (of Rs. 11,56,879) made to Bombay Municipal

School for surrendering the tenancy of the school premises which belonged to the Appellant, despite the fact that the Appellant had not claimed the said payment/expenditure in its Profit and Loss account/computation of income and had merely capitalized the amount in the schedule of fixed in its Balance sheet, on which no depreciation had been claimed.

4. Addition under section 68 of the Act R. 50,00,000/-

4.1 On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in upholding the action of the Ld. AO in assessing the receipt of unsecured loan by the Appellant from its director, Mr. Chitranjan K Thakkar, as an unexplained cash credit under section 68 of the Act, without appreciating that the Appellant had furnished adequate documentary evidence to substantiate the genuineness and source of the said loan and had discharged the onus which lay on it under section 68 of the Act.

4.2 On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in upholding the action of the Ld. AO in assessing the receipt of unsecured loan by the Appellant from its director, Mr. Chitranjan K Thakkar, as an unexplained cash credit under section 68 of the Act, without appreciating that the Appellant had received such loans from the same party in the past, in respect of which no addition had been made.

5. Levy of interest under section 234B of the Act

On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in confirming the interest levied by the Ld. AO u/s 234B of the Act and the said levy of interest being wholly unjustified, ought to be deleted.

6. Inadequate Opportunity

The Ld. CIT (A) and Ld. AO erred on the facts and in the circumstances of the case and in law, in passing their respective orders u/s 250 and u/s 143 (3) of the Act providing the Appellant sufficient and adequate opportunity, in breach of the principles of natural justice and in arriving at conclusions therein based on incorrect factual averments/allegations and therefore, the said orders, being bad in law are liable to be quashed.

4. Ground No. 1 of the appeal is of general nature, hence does not require separate adjudication.

5. Vide Ground No. 2 the assessee has challenged the action of the Ld. CIT (A) in upholding the action of the Ld. AO in making addition of Rs. 8,00,000/- on account of payment made by the assessee to Ms. Kamladevi K Agarwal as full and final consideration for handing over vacant possession of its property. Before us, the Ld. counsel submitted that the assessee paid Rs. 8,00,000/- to Kamladevi Kashinath Agarwal for handing over the vacant possession of Room No. 1, Ground Floor, Mumbai. The Ld. counsel invited our attention to page 11 of the paper book, which is the photocopy of pay order dated 24.04.2009 in favour of Kamladevi Kashinath Agarwal vide which the amount of Rs. 8,00,000/- was transferred to Kamladevi. The Ld. counsel submitted that the payment was made in connection with civil suit for eviction bearing RAC No. 157 of 2006 in the small causes court. The Ld. counsel further invited our attention to the joint declaration dated 28.04.2009 to substantiate the contention that the assessee paid Rs. 8,00,000/- to Smt.Kamladevi K. Agarwal by pay order No. 223054 dated 24.04.2009 drawn on Oriental Bank of Commerce as the full and final consideration for handing over vacant and peaceful possession of the Room in question. The Ld. counsel further pointed out that the assessee has reflected the same in the books of account as advance with corresponding liability in balance sheet. During the course of assessment proceedings, the assessee furnished the details before the AO. The Ld. counsel further pointed out that the appellant has not claimed the said payment/expenditure in its profit and loss account/computation of income and only capitalized the said amount in the schedule of fixed assets in its balance sheet. Further, the assessee had not claimed any depreciation. Accordingly, the AR submitted the details.

6. On the other hand, the Ld. Departmental Representative (DR) supporting the order passed by the Ld. CIT (A) submitted that since the payment was made in the month of April 2009, the Ld. CIT (A) has rightly confirmed the findings of the AO.

7. We have heard the rival submissions of the parties and perused the material on record in the light of the rival contentions. We notice that the authorities below have rejected the claim of the assessee mainly on the ground that since the assessee had made payment in question in the financial year 2009, the assessee is not entitled to claim expenditure in the assessment year under consideration. As pointed out by the Ld. counsel, the appellant has not claimed the said payment/expenditure in its profit and loss account/computation of income and only capitalized the same amount in the schedule of fixed assets in its balance sheet. Further, the assessee had not claimed any depreciation. Since, there is no dispute with regard to the payment of Rs. 8,00,000/- to Ms. Kamladevi K Agarwal and since the assessee has only capitalized the same amount in the schedule of fixed assets, in our considered view, the Ld. CIT (A) has wrongly upheld the findings of AO. Hence, we allow this ground of appeal and set aside the findings of the Ld CIT(A) and accordingly direct the AO to delete the addition of Rs. 8,00,000/-.

8. So far as Ground No. 3 of the appeal is concerned, this Ground pertains to the payment of Rs. 11,56,879/- made by the assessee to Bombay Municipal School for taking vacant possession of the school premises belonging to the appellant. The Ld. counsel submitted before us that the Ld. CIT (A) has wrongly confirmed the addition to the extent of Rs. 2,19,810/- being 19% of the payment made, despite the fact the assessee has not claimed the said payment in its profit and loss account and merely capitalized the same in the scheduled of fixed assets in the balance sheet.

9. On the other hand, the Ld. DR pointed out that the payment was made in the name of Shri Subhash Thakkar, who was neither Director of the Company nor was having any relation with the assessee company. The Ld. CIT (A) has permitted capitalization to the extent of Rs. 9,37,072/- only which was about 81% of the amount paid on the ground that the balance of 19% was owned by C.K. Thakkar. The payment was made on the ground of commercial

expediency as the appellant was developing the project as a business, however, the said co-owner C.K. Thakkar has no business interest.

10. We have heard the rival submissions and perused the material on record in the light of the respective contentions of the parties. As pointed out by the Ld. CIT (A), the assessee is owner of only 81% of the property and therefore any expense incurred on the property has to be shared in the ratio of 81:19 between the assessee and C.K. Thakkar, who also happens to be Director of the company. Since, the assessee had the share of 81% in the said property, the Ld. CIT (A) has rightly allowed the capitalization to the extent of 81% of the total amount paid which comes to Rs. 2,19,810/-. Hence, we do not find any merit in the contention of the assessee to interfere with the findings of the Ld. CIT (A). We therefore, dismiss this ground of appeal and confirm the findings of the Ld. CIT (A).

11. Vide Ground No. 4.1 and 4.2, the assessee has challenged the action of the Ld. CIT (A) in confirming the addition of Rs. 50,00,000/- on account of unexplained cash credit u/s 68 of the Act. The Ld. counsel for the assessee submitted that the Ld. CIT (A) has affirmed the action of the AO without appreciating that the appellant has furnished adequate documentary evidence to substantiate the genuineness of the transaction by adducing cogent and convincing evidence.

12. On the other hand, the Ld. DR supporting the order passed by the Ld. CIT (A) submitted that since the assessee has failed to discharge the onus of proving the genuineness of the loan transaction, the Ld. CIT (A) has rightly confirmed the addition made by the AO.

13. We have heard the rival submissions and perused the material on record. We notice that the AO has made addition of the said amount on the ground that the assessee has failed to produce any evidence to substantiate its claim. Before the Ld. CIT (A), the assessee contended that the loan in question was received from C.K. Thakkar, director of the company, which was transferred to the bank account of the assessee company on different dates. The assessee further contended that since Mr. C.K. Thakkar was a non-resident therefore,

could not furnish the confirmation before the AO. The assessee furnished the confirmation from C.K. Thakkar as additional evidence. Moreover, the assessee has furnished the copy of certificate issued by the Chief Manager, NRI Branch, Bank of Baroda, Mumbai confirming that Sh. C.K. Thakkar who was maintaining NRE account no. 27920100000167 with the Bank and was having balance of Rs. 2,14,63,000/- in the said account. So far as the creditworthiness is concerned the assessee has furnished the copy of opening balance of Rs. 1.48 crore with the company, opening balance of Rs. 97,00,000/-with Ruby Home Holdings Pvt. Ltd., three solvency certificates issued by the Bank of Baroda each for about 2.2 crores, copy of affidavit of Bank Manger filed in the court confirming NRI deposits of high value in Bank, FCNR fixed deposit receipts, bank balance in NRO A/c of the lender, opening bank balance in A/c No. 27920100000167 and other documentary evidence to establish creditworthiness of the lender. As pointed out by the Ld. counsel, the Ld. CIT(A) has failed to consider the fact that even in the earlier years, the director had advanced unsecured loans to its company and no addition was made by the department. Moreover, the Ld. counsel did not point out any change in the material fact in the present case. Hence, we are of the considered view that the Ld. CIT(A) has wrongly confirmed the addition made by the AO u/s 68 of the Act. We therefore, allow this ground of appeal of the assessee and set aside the findings of the Ld.CIT (A). Accordingly, we direct the AO to delete the addition of Rs. 50,00,000/- made by the AO u/s 68 of the Act. Other grounds of appeal were not pressed.

In the result, appeal filed by the assessee for assessment year 2012-2013 is partly allowed.

Order pronounced in the open court on 31st January, 2020.

Sd/-

(M. BALAGANESH)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 31/01/2020

Alindra, PS

Sd/-

(RAM LAL NEGI)

JUDICIAL MEMBER

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**