IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H" MUMBAI

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

ITA No. 3031/MUM/2017
Assessment Year: 2007-08

Khetan Twist Net Pvt. Ltd., B-204, Hetal Arch, Opp: Natraj Market, S.V. Road, Malad (West), Mumbai-400064. **PAN No. AABCK4794N** **Appellant**	Vs.	The Income Tax Officer-12(3)(2), Room No. 147A, 1st Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020. **Respondent**

Assessee by : Smt. Arati Vissanji, AR
Revenue by : Shri Sunil Deshpande, DR

Date of Hearing : 05/11/2020
Date of pronouncement : 23/11/2020

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2007-08. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-20, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) r.w.s. 147 the Income Tax Act 1961, (the 'Act').

2. We begin with additional ground of appeal contesting the reopening done by the Assessing Officer (AO) which is reproduced below :

"The Tribunal be pleased to hold that as the "Reasons recorded" for reopening of the assessment as well as consequential order passed u/s 143(3) r.w.s 147 of the Act dated 26th March, 2015 being order under appeal is solely on the basis of the information received from the Investigation Department, the order under appeal is to be declared as bad-in-law and accordingly be quashed."

3. The Ld. counsel for the assessee submits that the CIT(A) at para 5.2 of his order dated 30.01.2017 has mentioned that :

"5.2 It is noted that the AO had reopened the assessment on the basis of specific information in his possession that income of the assessee had escaped assessment. The AO has followed due procedure of law to initiate, conduct and conclude the assessment proceedings. Having regard to the facts of the case the action of the AO in reopening the assessment cannot be faulted with and the same is upheld. Accordingly, the grounds of appeal in this regard are dismissed."

4. In view of the above finding of the CIT(A), we admit the additional ground of appeal filed by the assessee for adjudication. This being the basic ground, we proceed to decide it first.

5. The Ld. counsel for the assessee draws our attention to the reasons recorded by the AO for reopening the assessment (para 5 of the assessment order dated 26.03.2015), which is reproduced below:

"In this case, assessee filed its return of income on 17/10/2007 declaring total income of Rs.18,28,410/-. The return was processed u/s. 143(1) on 19/03/2009.

In this case information has been received from the office of the DGIT (Inv), Mumbai vide his letter No. DGIT (Inv)/Information/PJ/2013-14 dated 07/3/2014, that a search action u/s 132 of the I.T. Act was conducted in the case Shri Pravin Kumar Jain & Group on 01/10/2013. During the course of search proceedings statement of

Shri Pravin Kumar Jain was recorded u/s. 132(4) of the I.T. Act, in which he admitted that he is indulged in providing accommodation entries and also explained the complete modus operands of providing such entries. The DGIT(Inv.) has given the extract of the statement of Q.66, from which it is observed that Shri Pravin Kumar Jain is engaged in the business of giving accommodation entries which are routed through the companies under his control. All the companies either owned by Shri Pravin Kumar Jain directly/indirectly under his control are paper companies with no real business transaction. In most of this cases, various brokers who operate in the field providing accommodation entries approach him when they want a certain type of accommodation entry like bogus unsecured loan, bogus LTCG, etc.

During the search proceeding, Shri Pravin Kumar Jain has also given list of his group companies wherefrom accommodation entries have been provided to the beneficiaries. The DGIT (Inv.) has forwarded the list of all the beneficiaries of the accommodation entries pertain to jurisdiction of the CIT-6 Mumbai. From the list it is seen that M/s. Khetan Twist Net P. Ltd. PAN: AABCK4791N invested amounting to Rs.15,00,000/- during the F.Y. 2006-07 in the concern M/s. Javda India Impex Ltd. controlled and managed by Shri Pravin Kumar Jain.

As Shri Pravin Kumar Jain has admitted that his group companies which include above party, are engaged in providing accommodation entries, it is clear that the sums shown against the assessee to have been received from the above party is nothing but an accommodation entry taken by the assessee to bring its unaccounted money in its books of accounts.

Considering the above facts, which the assessee had failed to disclose fully and truly all the material facts, I have reason to believe that income amounting to Rs.15,00,000/- chargeable to tax has escaped assessment for such assessment year. I am satisfied that this is a fit case for issue if notice u/s.148 of the I.T. Act 1961."

5.1 Referring to the above reasons recorded by the AO, the Ld. counsel argues that wrongly it is stated therein that the assessee has invested

Rs.15,00,000/- during the FY 2006-07 in M/s Javda India Impex Ltd. Also it is stated that the copy of statement recorded was not provided to the assessee. Thus it is stated that the notice u/s 148 issued by the AO, reopening the assessment is invalid. In this regard, reliance is placed on the decision in *Pr. CIT v. G&G Pharma India Ltd*. (2016) 384 ITR 147 (Delhi).

6. On the other hand, the Ld. Departmental Representative (DR) submits that the original return of income was processed u/s 143(1) of the Act and on the basis of information received from the Director General of Income Tax (Inv.), the AO has rightly reopened the assessment.

7. We have heard the rival submissions and perused the relevant materials on record. In the case of *G&G Pharma India Ltd*. (supra) relied on the by the Ld. counsel, the assessee filed returns for the AY 2003-04 which was processed u/s 143(3) of the Act. Based on information received from the Directorate of Investigation about four entries, stated to have been received by the assessee on a single date, i.e., February 10, 2003, from four entities which were termed as accommodation entries, the AO issued notice to the assessee for reassessment for the AY 2003-04 on March 19, 2010 stating that it was evident that the assessee-company had introduced its own unaccounted money in its bank by way of accommodation entries. The assessee's appeal was dismissed by the CIT(A). The Tribunal concluded, from the reasons recorded, that the AO issued notice only on the basis of information received from the Investigation Wing but without coming to an independent conclusion for reason to believe that income had escaped assessment and allowed the appeal of the assessee. On appeal by the Revenue, the Hon'ble Delhi High Court held :

> "that once the date on which the so-called accommodation entries were provided was known, it would not have been difficult for Assessing Office, if he had in fact undertaken the exercise, to make a reference to the manner in which those very entries were provided in the accounts of the assessee, which must have been tendered along with the return, which was filed on November 14, 2004 and was processed under section 143(3) of the Act. Without forming a prima facie opinion, on the basis of such material, it was not possible for him to have simply concluded that it was evident that the assessee company has introduced its own unaccounted money in its bank by way of accommodation entries. The basic jurisdictional requirement was application of mind by the Assessing Officer to the material produced before issuing the notice for reassessment. Without analyzing and forming a prima facie opinion on the basis of material produced, it was not possible for the Assessing Officer to conclude that he had reasons to believe that income had escaped assessment."

7.1 In the instant case, as mentioned earlier, the original return of income filed by the assessee on 17.10.2007 was processed u/s 143(1) of the Act. On the basis of information received from the Director General of Income Tax (Investigation) that the assessee had obtained accommodation entries amounting to Rs.15,00,000/- from M/s Javda India Impex Ltd., controlled and managed by Shri Pravin Kumar Jain, whose statement was recorded u/s 132(4) during the course of search on 01.10.2013, wherein he admitted that he indulged in providing accommodation entries, the AO recorded the reasons and then issued notice u/s 148 of the Act.

A perusal of para 6 of the assessment order dated 26.03.2015 clearly indicates "that the assessee invested Rs.15,00,000/- in M/s Javda India Impex Ltd." is a minor error in view of the fact that the original return was processed u/s 143(1) of the Act. 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. Intimation u/s 143(1) is not an assessment. Further in *Rajesh Jhaveri Stock Brokers P. Ltd.* (supra), the Hon'ble Supreme Court held :

> "Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in *Central Provinces Manganese Ore Co. Ltd.* v. *ITO* [1991] 191 ITR 662, for initiation of action under section 147(*a*) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction *ITO* v. *Selected Dalurband Coal Co. (P.) Ltd.* [1996] 217 ITR 597 (SC); *Raymond Woollen Mills Ltd.* v. *ITO* [1999] 236 ITR 34 (SC)."

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.

8. In view of the above facts, the additional ground is dismissed.

9. <u>The 1st ground of appeal</u>

1.1 In the facts and circumstances of the case and in law, the Ld. CIT(A) ought to have held that the AO ought not to have assessed the loan obtained of Rs.15 lacs from the lender as income for the year and accordingly ought to have directed the AO for deletion of the said amount assessed as income vide order dated 26thMarch,

2015 passed u/s. 143(3) r.w.s, 147 of the Act and for disallowance made of interest thereon of Rs.44,795/-.

Without prejudice to the above and in alternate

1.2 Keeping in view the content of the Reasons supplied for reopening of the assessment vide letter dated 28thOctober, 2014, wherein it is stated by the AO that the appellant has invested Rs.15 lacs in the concern of M/s, Javda India Impex Ltd., the Ld. CIT(A) ought to have held that the AO ought not to have assessed the loans obtained of Rs.15 lacs from the said party as income for the year.

10. The facts are that during the Financial Year (FY) 2006-07 relevant to the AY 2007-08, the assessee received unsecured loan of Rs.15,00,000/- from M/s Javda Impex Ltd. To verify the genuineness of transaction, the AO issued notice u/s 133(6) dated 16.02.2015 to M/s Javda Impex Ltd. which was served on 20.02.2015. The AO has recorded that the said concern did not file any reply. However, the assessee *vide* letter dated 09.02.2015 submitted the loan confirmation of M/s Javda India Impex Ltd. Further, it submitted that they had taken loan from Javda India Impex Ltd. and the said loan was recorded in their books of accounts and interest had been paid on the said loan. In this regard, the confirmation from the lender and their bank accounts were filed before the AO. However, the AO was not convinced with the above explanation of the assessee and observing that Javda India Impex failed to file any reply to the notice u/s 133(6), made an addition of Rs.15,00,000/- as bogus unsecured loan and consequent interest of Rs.44,795/-.

11. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that the Ld. CIT(A) *vide* order dated 30.01.2017 confirmed the above addition/disallowance made by the AO on the reason that (i) the

assessee was one of the beneficiary of the accommodation entries where loans were shown to have been taken from shell company M/s Javda India Impex Ltd. which had existence only on paper and had acted as entry provider for a commission, (ii) the assessee has not clarified how M/s Javda India Impex Ltd. had given such a loan without any security to the assessee-company, (iii) the assessee has not submitted any confirmation of loan in response to notice u/s 133(6) issued by the AO, (iv) even the assessee has not provided any proof establishing that the loan has been squared off subsequently.

Thus observing that the assessee failed to furnish the creditworthiness of M/s Javda India Impex Ltd. and genuineness of the transaction related to the loan, the Ld. CIT(A) confirmed the addition of Rs.15,00,000/- made by the AO as bogus unsecured loan, and Rs.44,795/- as interest paid on it.

12. Before us, the Ld. counsel for the assessee files a copy of the letter dated 02.01.2015 and 09.02.2015 addressed to the AO and also loan confirmation duly signed by the assessee and Javda Impex Pvt. Ltd. (the lender), ledger account of the assessee in the books of Javda Impex Pvt. Ltd. for FY 2006-07 and 2007-08 ; copy of bank account statement of the assessee with Canara Bank recording the receipt of loan ; loan confirmation of financial year 2007-08 in which the said loan was repaid. On a query from the Bench, the Ld. counsel clarifies that the above documents had been filed before the AO as well as the CIT(A).

Also reliance is placed by the Ld. counsel mainly on the decision by the Hon'ble Bombay High Court in *CIT v. Orchid Industries Ltd*. (2017) 397 ITR 136 (Bom) and the order of the Tribunal in *Ambee Investment & Finance Pvt. Ltd. v. ITO* (ITA No. 3899 & 3948/Mum/2017) (Mumbai ITAT) (08.02.2019), *Diwali*

Capital & Finance Pvt. Ltd. v. DCIT (ITA No. 2091/Mum/2018 & 3986/Mum/2017) (Mumbai ITAT) (10.01.2019).

13. On the other hand, the Ld. DR relies on the order of the Ld. CIT(A) and submits that though the notice u/s 133(6) dated 16.02.2015 was served on M/s Javda Impex Ltd. on 20.02.2015, no compliance was made by the said concern to the AO. Further stating that the AO has rightly made the above additions, the Ld. DR relies on the order of the Ld. CIT(A).

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

In the case of *Orchid Industries Pvt. Ltd*. (supra), the Hon'ble Bombay High Court, on the question whether the Appellate Tribunal was justified in deleting the addition made on account of share application money u/s 68 of the Act, relying only on the documentary evidence produced by the assessee though the entities were not traceable at their given address, held the following :

> "That failure by the parties who had paid the share application money and to whom the share certificates were issued to appear before the Assessing Officer and the fact that the summons could not be served at the address given, as they were not traced and that in respect of some of the parties who had appeared before the Assessing Officer it was found that just before the issuance of cheques, the amounts were deposited in their account, did not negate the case of the assessee. The assessing officer could not have added the share application money under section 68 only on that ground. The Appellate Tribunal had considered the fact that the assessee had produced on record the documents, such as the permanent account number of all the creditors along with the confirmation, their bank statements showing payment

of share application money, to establish the genuineness of the parties. It had also recorded that the assessee had produced the entire record regarding the allotment of shares to those parties, their share application forms, allotment letters and share certificates and the profit and loss accounts of those parties disclosed that they had sufficient funds in their account for investing the shares of the assessee."

14.1 As mentioned earlier, the assessee had filed before the AO loan confirmation duly signed by the assessee and Javda Impex Pvt. Ltd. (the lender), ledger account of the assessee in the books of Javda Impex Pvt. Ltd. for FY 2006-07 and 2007-08 ; copy of bank account statement of the assessee with Canara Bank recording the receipt of loan ; loan confirmation of financial year 2007-08 in which the said loan was repaid.

It is well-settled that in order to discharge the onus u/s 68 of the Act, the assessee must prove the following :

i. the identity of the creditor,
ii. the capacity of the creditor to advance money ; and
iii. the genuineness of the transaction

After the assessee has adduced evidence to establish *prima facie* the aforesaid, the onus shifts to the Department as held in *Shankar Ind v. CIT* 114 ITR 689; *Prakash Textile v. CIT* 121 ITR 890; *CIT v. United* 187 ITR 596; *Rajshree v. CIT* 256 ITR 331; *Ashokpal v. CIT* 220 ITR 452, 454; *CIT v. Metachem* 245 ITR 160; *CIT v. Shree Gopal* 204 ITR 285.

In the instant case, the onus clearly shifted to the AO. There was enough material before the AO in the shape of loan confirmation, ledger account, bank account statement to make further inquiry/verification in the above matter. In the instant case, the AO has not done even elementary/ preliminary inquiry to

verify the genuineness of the transaction. The addition made by him is based on surmises and conjectures.

The ratio laid down by the Hon'ble Bombay High Court in the case of *Orchid Industries Pvt. Ltd*. (supra) is squarely applicable here. Respectfully following the same, we delete the addition of Rs.15,00,000/- (unsecured loan) and Rs.44,795/- (interest), made by the AO. Thus the 1st ground of appeal is allowed.

15. The 2nd ground of appeal

> In the facts and circumstances of the case and in law, the Ld. CIT(A) ought to have held that the addition made of Rs.30,000/- representing expenditure assumed to have been incurred by the appellant for obtaining loan of Rs.15 Lacs from M/s. Javda India Impex Limited is not sustainable in law as it is based on conjectures and surmises and hence, has to be deleted in assessing the income for the year.

16. In view of our decision, allowing the 1st ground of appeal, the 2nd ground of appeal is consequential and accordingly allowed.

17. The 3rd ground of appeal

> In the facts and circumstances of the case and in law, the Ld. CIT(A) ought to have held estimated disallowance made of Rs. 5 lacs against cost of purchases and expenses is not sustainable in law and accordingly ought to have directed the AO for deletion of the said disallowance.

18. In the assessment order dated 26.03.2015, the AO added back an amount of Rs.5,00,000/- on the ground that the assessee failed to file by 23.03.2015, day to day stock register, purchase bills, purchase register, bills of

transportation, GP & NP ratio of last three years, opening and closing stock valuation with supporting books of accounts.

19. In appeal, the Ld. CIT(A) confirmed the above ad-hoc disallowance on the reason that no books or vouchers were produced before the AO or in the appellate proceedings before him to establish the genuineness of the expenses claimed.

20. Before us, the Ld. counsel relies on the order of the Hon'ble Supreme Court in the case of *Pr. CIT v. R.G. Buildwell Engineers Ltd*. (2018) 99 taxmann.com 284 (SC) stating that where High Court upheld the order of the Tribunal setting aside ad-hoc disallowance of expenses claimed on ground that assessee's books of account were not rejected, therefore SLP filed against said order was to be dismissed.

On the other hand, the Ld. DR relies on the order of the Ld. CIT(A).

21. We have heard the rival submissions and perused the relevant materials on record. In the instant case the AO has made an ad-hoc disallowance of Rs.5,00,000/- from the purchase and other expenses. The books of accounts were not rejected by the AO before making such ad-hoc disallowance. In the case of R*.G. Buildwell Engineers Ltd*. (supra), in course of assessment, the assessee claimed deduction of expenses towards bricks, machinery repair, cartage, labour expenses etc. The AO disallowed 10% of said expenses on the ground that insufficient evidence was adduced. The Tribunal set aside the ad-hoc disallowance on two grounds, firstly, assessee's books of account were not rejected and secondly, such expenses were allowed consistently in past scrutiny assessment. The High Court upheld the order passed by the Tribunal.

The SLP filed by the Department against the view taken by the High Court was dismissed by the Hon'ble Supreme Court.

In the instant case, as the disallowance made by the AO is on ad-hoc basis without rejecting the books of accounts maintained by the assessee, we delete the addition of Rs.5,00,000/- by following the ratio laid down in *R.G. Buildwell Engineers Ltd.* (supra). Thus the 3rd ground of appeal is allowed.

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

Order pronounced in the open Court on 23/11/2020.

Sd/-	Sd/-
(SAKTIJIT DEY)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 23/11/2020
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.

BY ORDER,

//True Copy//

(Dy.//Asst. Registrar)
ITAT, Mumbai