

THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri C.N. Prasad (JM)

I.T.A. No. 5606/Mum/2018 (Assessment Year 2010-11)

DCIT-10(3)(1) Room No. 212 Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	M/s. Opera Infra Projects Pvt. Ltd. 602, Vardhaman Apartment, 60 Hanuman Road Vile Parle East Mumbai-400 057. PAN : AACCP1304P
(Appellant)		(Respondent)

Assessee by	Shri R.B. Popat
Department by	Ms. Shreekala Pardeshi
Date of Hearing	15.04.2021
Date of Pronouncement	22.06.2021

ORDER

Per Shamim Yahya (AM) :-

This appeal by the Revenue is directed against the order of learned CIT(A) dated 12.7.2018 and pertains to assessment year 2010-11.

2. Grounds of appeal read as under :

(1) "On the facts and in the circumstances of the case and in law, the Ld.CIT (A) erred in deleting the addition of Rs. 1,50,00,000/- made u/s 68 of the Income Tax Act, 1961 on account of unsecured loan, without appreciating the fact that mere furnishing of documents of M/s Prabhav Industries Ltd will not suffice in law to accept it; when, in fact, the identity of its owner in person was not established and the absence of such owner in person resulted into non-affirmation of such documents.

(2) "On the facts and in the circumstances of the case and in law, the Ld.CIT (A) erred in deleting the addition of Rs. 1,50,00,000/- made u/s 68 of the Income Tax Act, 1961 on account of unsecured loan relying on the documentary evidences ignoring the key factor that the Shri Shirish C. Shah himself has stated and accepted in various statement given by him on oath and also confirmed by his Key employees that M/s. Prabhav Industries Ltd is engaged in providing accommodation entries against receipt of cash."

(3) "On the facts and in the circumstances of the case and in law, the Ld.CIT (A) erred in deleting the addition of Rs. 1,50,00,000/- made u/s 68. of the Income Tax Act, 1961 on account of unsecured loan, without considering the observation made by the Delhi High Court in Nova Promoters and Finlease Pvt. Ltd 18. Taxmann.com 217 wherein the Court has observed that such type of cases cannot be decided only on the basis of documentary evidences and there is need to take into account the surrounding circumstances."

(4) "On the facts and in the circumstances of the case and in law, the Ld.CIT (A) erred in deleting the addition of Rs. 1,11,167/- on account of interest expenditure paid on bogus unsecured loan, without appreciating the fact that the interest expenditure paid on bogus loan is nothing but a sham transaction."

(5) "On the facts and in the circumstances of the case and in law, the Ld.CIT (A) erred in deleting the addition of Rs. 2,55,000/- on account commission for the sham transaction, without appreciating the fact that the modus operandi of the business of the Shri Shirish C. Shah is that of providing accommodation entries and to charge the commission @ 1.5 % to 2% on the value of transactions as stated and accepted by him."

(6) The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the AO be restored.

3. Brief facts of the case are that in this case, the return of income was filed on 15.10.2010 showing a total income of Rs.56,07,113/-. The return of income was processed u/s.143(1) of the I.T.Act,1961. Subsequently, the A.O. received information from the Sales-tax Department through the DGIT(Inv.), Mumbai that the assessee is beneficiary of bogus purchases/hawala transactions with various hawala parties, Accordingly, the case was reopened u/s 147 with the issuance of notice u/s 148 dated 23.03.2015 after recording the reasons for reopening the assessment. In response to notice u/s. 148, the assessee vide letter dated 10.04.2014 requested to treat the return of income filed on 15.10.2010 may be treated as filed in response to notice u/s. 148 of the Act. [Upon request of the assessee, the reasons were communicated to the assessee vide letter dated 24.06.2015. Notices u/s. 143(2) and 142(1) were issued to the assessee. During the course of assessment proceedings, the assessee did not raise any objections. As per the information, the assessee has entered into transactions with five hawala parties amounting to Rs.66,86,153/-. Further, on examination of the books of accounts, the A.O.

further found four more hawala parties as per the list of Sales-tax Department and accordingly the total purchase transactions worked out to Rs.1,05,55,097/-. The A.O. relied on various judicial pronouncements held that the assessee has inflated its purchases to reduce its profitability and accordingly made disallowance @ 12.5% amounting to Rs. 13,19,387/- (12.5% of Rs. 1,05,55,097/-). Further, during the assessment proceedings, an information has been received from DCIT, Central Circle-1 (1), Ahmedabad that the assessee company has obtained accommodation entry of Rs. 1,50,00,000/- from Prabhav Industries Ltd., one of the entries operated and controlled by Shirish Chandrakant Shah, bogus entry operator. The A.O. held that the assessee did not prove the identity and creditworthiness of M/s. Prabhav Industries Ltd., which is a benami concerns of Shri Shirish Shah as well as genuineness of transaction in the form of unsecured loan of Rs. 1,50,00,000/-. Accordingly, the A.O. made addition of Rs. 1,50,00,000/- as unexplained cash credit u/s. 68 of the Act. Further, the A.O. disallowed interest expenditure of Rs. 1,11,167/- corresponding to the bogus/sham transactions of unsecured loans amounting to Rs.1,50,00,000/- which were held to be non-genuine. The A.O. also disallowed commission paid of Rs.2,55,000/- (being 1.5% of Rs. 1,50,00,000/-) in relation to sham transaction of unsecured loans. Aggrieved by this, the assessee company is in appeal.

4. Upon assessee appeal learned CIT(A) sustained the disallowance qua bogus purchase but deleted the disallowance qua bogus purchase unsecured loan.

5. Revenue is in appeal before us against this deletion.

6. Brief facts on the issue in appeal is that the Assessing Officer observed that during the course of assessment proceedings, an information has been received from DCIT, Central Circle-1(1), Ahmedabad that the assessee company has obtained accommodation entry of Rs. 1,50,00,000/- from M/s. Prabhav

Industries Ltd., one of the entities operated and controlled by Shirish Chandrakant Shah, Bogus Entry Operator. It is further informed that a search and seizure action was carried out at the residence and offices of Shri Shirish Chandrakant Shah on 09.04.2013. During the search & seizure action, it was found that Shirish Chandrakant Shah is engaged in providing accommodation entries of share capital, share premium, share application money, unsecured loans, Long Term Capital Gains, Short Terms gain where cash was received by him from various clients and against this cash he provided these accommodation entries and assisted number of business concerns in introducing their unaccounted funds to the books of account. Accordingly, in view of the above facts, during the course of hearing on 02.03.2016, the AR of the assessee company asked to produce the loan providing entity physically to prove the identity, genuineness and creditworthiness. The AR was also asked to show cause as to why the unsecured loan shall not be added back to the total income of the assessee company.

7. Assessee's reply was reproduced by the Assessing Officer as under in his order :-

"Kindly refer to the ongoing assessment proceedings u/s. 148 of the Income Tax Act, 1961 for the income tax Assessment year 2010-11 wherein you asked us to show cause on 1.03.2016 as why loan from M/s. Prabhav Industries Ltd. should not be treated as non genuine and you have asked us to prove its genuineness, creditworthiness and its identity and show cause as to why it should not be added as taxable income on account of bogus loan as accommodation entry; In that connection we submit as under :-

Details of the loan taken from M/s. Prabhav Industries Ltd. during the FY 2009-10 is as below:

Date of Loan Borrowed	Cheque Number	Amount (Rs.)
9 th March, 2010	RTGS	50,00,000/-
10 th March, 2010	RTGS	50,00,000/-
10 th March, 2010	RTGS	50,00,000/-
	Total Rs.	1,50,00,000/-

Further we have repaid the aforesaid loan during the FY 2010-11 vide following details :-

Date of Loan repaid	Bank Name	Cheque Number	Amount (Rs.)
21 st April, 2010	Vijaya Bank	684111	50,00,000/-
19 th May, 2010	Vijaya Bank	684130	1,00,00,000/-
		Total (Rs.)	1,50,00,000/-

As can be seen from the above the aforesaid loan was borrowed as well as repaid through banking channels only during the years mentioned above which proves the genuineness of the transaction. Relevant parts of Bank statements are enclosed to support our claim which highlights loan borrowed and repaid thereafter respectively. Hence question of taking accommodation entries to adjust the books does not arise.

With respect to the identity of M/s. Prabhav Industries Limited we enclose herewith the copy of their certificate of Incorporation alongwith Annual Returns filed for F. Y. 2009-10 as part of supporting evidences Prabhav Industries Limited is a Public Company incorporated in the year 1995 which is currently listed on Bombay Stock Exchange which clearly indicates that the identity of the party is proved and its existence is also proved. As far as the creditworthiness is concerned we are enclosing herewith the photocopy of the audited account of the company which shows that the company is credit worthy having net worth of about Rs. 148.72 crores during the FY 2009-10. So the company is capable of giving loan of Rs. 1.50 crores to us which is just negligible considering their size.

We have enclosed Banker's certificate towards loan repayment made to M/s. Prabhav Industries Ltd. which will further support that the loan was actually repaid to the said party as well as interest was also paid on the loan thereby deducting tax and the entire transaction of borrowing and repayment was through proper Banking Channel only. TDS returns were also duly filed. We have enclosed form 16 A in support of the same.

Confirmation of accounts from M/s. Prabhav Industries was also submitted you vide our submissions dated 1st March, 2016 which farther indicates that loan was actually borrowed and it was not at all accommodation entry adjusted in books. Enclosing herewith again a copy of account confirmed by M/s. Prabhav Industries Ltd. for your records and references.

We request your goodself to provide us with information which you have received from Income Tax Office Central Circle, Ahmedabad which you propose to use against us so as to enable us to give any further information, if any that you may desire.

We request you to provide us an opportunity to confront the party or its statements, if any by way of cross examination, in case if it is proposed to be used against us. In this regards, it may also be noted we have requested the company to furnish details such as their income tax return and other relevant documents so as to enable us to furnish before you. In the meantime it is submitted since the lender company is based on Baroda, it

may not be possible to produce the said party before you, however, it is requested that you may kindly summon them.”

8. However the Assessing Officer was not convinced. He referred extensively to the search conducted and concluded as under :-

The above facts further get strengthened by the following analysis/facts

- a. On analysis of the address of the company, it can be seen that Prabhav Industries Ltd. is having its registered office at Vadodara. However, the bank accounts in which the funds were received and paid as share capital at Fort. Mumbai.
- b. Moreover, Director/Managing Director of Prabhav Industries Ltd. is unaware about the details of the investors in these companies. He is also unaware of the companies in which these companies have invested. More so, when the investments received and made run into tens and hundreds of crores.
- c. M/s Prabhav Industries Limited did not have any activities except for issuing of paper bills and looking bogus sales. This company has been making losses or showing marginal profits.
- d. M/s. Prabhav Industries Ltd. has raised share capital through private placement during the same period i.e. FY 2009-10
- e. The BSE compliance of these companies was being looked after by Shri Devang D. Master who was also a trusted employee of Shri Shirish C. Shah.
- f. Further, corroborative facts with regard to M/s Prabhav Industries Ltd and the companies that have been found to have made investment in Prabhav Industries Ltd., which in turn have made investment in various beneficiaries are shell companies controlled and managed by Shri Shirish Shah.
- g. The companies investing in the shares of all these companies are common and most of them are part of camouflage of companies managed and controlled by Shri Shirish Shah.

6.5 In view of the above discussion, it is clear that the payments of funds from the company i.e. M/s Prabhav Industries Ltd. to various companies/firms/individual are non-genuine and nothing but accommodation entries. The investment in M/s Prabhav Industries Ltd. has also been found to be made by companies which are managed and controlled by Shirish C. Shah. It is therefore, ample clear that the funds invested in the companies, managed and controlled by Shirish Shah, including M/s. Prabhav Industries Ltd., are merely layering transactions wherein payment has been finally reached into the bank accounts of the beneficiaries as share capital/share premium/unsecured loans.

6.6 The assessee, in the instant case, has emphasized that the unsecured loan of Rs. 1,50,00,000/- was raised through banking channel only and that the interest was also paid through banking channel only and that nothing as such

is done in cash in the transaction in question. The contention of the assessee is not acceptable in the light of above elaborated facts. Further, in the most recent judgement delivered on 07.01.2015 by the Hon'ble Bombay High Court in the case of Shri Naresh Pahuja 54 taxmann.com 258, it has been held that merely routing of a gift through a banking channel would not by itself establish that gift was genuine. The Head note of the above cited judgement is reproduced hereunder;

"Section 63, read with section 254 of the Income-tax Act, 1961 – Cash credits (gift) - Assessment year 1995-96 - Assessing Officer made addition in income of assessee as income from undisclosed sources holding that gifts received by assessee from one 'K' were not genuine - Commissioner (Appeals) as well as Tribunal upheld findings of Assessing Officer – On rectification application, Tribunal held that there was no error apparent on record after recording that mere routing of a gift through a banking channel would not by itself establish that gift was genuine - Whether, therefore, finding of facts recorded by Tribunal could not be interfered with - Held, yes"

6.7 The Hon'ble ITAT, Jaipur in the case of M/s. Kachwala Gems vs. JCIT ITA No 134/JP/2002 dated 10.12.2003 affirmed by the Hon'ble Supreme Court in the case of M/s. Kachwala Gems vs. JCIT (2006) 206 CTR (SC) 585, 288 1TR 10 (SC) has held that even payment by account payee cheque is not sufficient to establish the genuineness of purchases.

6.8 The Revenue is not doubting all the unsecured loans but doubting only the transactions for which the genuineness could not be proved in view of the gamut of activities being carried out by Shri Shirish Shah and his Group concerns, which is nothing but providing accommodation entries only and which has been Admitted by not only Shri Shirish Shah in his Statement recorded on oath but also by various of the brokers of his concerns. One cannot lose sight of the fact that dark deeds are performed under the cover of darkness and direct evidence can never be available. Sometimes, the facts speak louder and clearer.

6.9 In a judgment of the Hon'ble Supreme Court in Vijay Kunnir Talwar v. CIT (330 ITR 1), the following observation was made:-

"24. ...All the authorities below, in particular the Tribunal have observed in unison that the assessee did not produce any evidence to rebut the presumption drawn against him under Section 68 of the Act by producing the parties in whose name the amounts in question had been credited by the assessee in his books of account. In the absence of any cogent evidence, a bald explanation furnished by the assessee about the source of the credits in question viz., realisation from the debtors of the erstwhile firm, in the opinion of the assessing officer, was not satisfactory. It is well settled that in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income tax as the income of the assessee of that previous year, if the explanation offered

by the assessee about the nature and source thereof is, in the opinion of the assessing officer, not satisfactory."

6.10 The Hon'ble Supreme Court in the case of CIT v. P. Mohanakala 12007] 161 Taxman 169/291 ITR 278, while considering the scope of Section 68, observed as follows:-

"15. ... When and in what circumstances Section 68 of the Act would come into play? That a bare reading of Section 68 suggests that there has to be credit of amounts in the books maintained by an assessee; such credit has to be of a sum during the previous year; and the assessee offers no explanation about the nature and source of such credit found in the books; or the explanation offered by the assessee in the opinion of the Assessing Officer is not satisfactory. It is only then the sum so credited may be charged to income-tax as the income of the assessee of that previous year. The expression "the assessee offers no explanation" means where the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. It is true the opinion of the Assessing Officer for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the sine qua non for forming the opinion."

6.11 The Hon'ble Supreme Court, following the earlier decision in CIT v. Orissa Corpn. (P.) Ltd. 11986] 159 ITR 78, noted that where the conclusion of the Tribunal was not unreasonable or perverse or based on no evidence, no question of law as such would arise for consideration. The Hon'ble Court further observed thus:

"25. ...The doubtful nature of the transaction and the manner in which the sums were found credited in the books of accounts maintained by the assessee have been duly taken into consideration by the authorities below. The transactions though apparent were held to be not real one. May be the money came by way of bank cheques and paid through the process of banking transaction but that itself is of no consequence."

6.12 After carefully going through the submissions of the assessee as well as the data/details/documents available on record, it becomes crystal clear that;

- (a) The primary onus is on the assessee to establish the genuineness of the transactions recorded by it in its books of account;
- (b) Since the primary facts are in the knowledge of the assessee, it is the duty of the assessee to provide the correct details with regard to the impugned transactions;

- (c) If the investigation done by the Department leads to doubt regarding the genuineness of the transactions, it is incumbent on the assessee to produce the parties along with the necessary documents to establish the genuineness of the transaction; which the assessee fails to do so in the instant case and
- (d) Payment by account payee cheque is not sacrosanct.

6.13 In view of the above discussion, it is evident that neither identity and creditworthiness of M/s. Prabhav Industries Limited, which is a benami concerns of Shri Shirish Shah, is proved nor the genuineness of the transaction in the form of unsecured loan raised by the assessee company. The entire gamut of transactions shows that the total funds of Rs. 1,50,00,000/- have been brought in by way of 'unsecured loan' in the name of M/s. Prabhav Industries Limited, whose very existence could not be established by the assessee company nor the source of these funds. Therefore, the purported unsecured loan of Rs. 1,50,00,000/- is hereby treated as a 'cash credit' in the books of the assessee company, whose nature and source is not explained and, therefore, deemed to be the assessee's income as envisaged in Section 68 of the Income Tax Act, 1961 and accordingly the same is added to income of the assessee company under the head "Income from other sources" and the same is hereby held to be not eligible for any deduction there against. Penalty proceedings u/s. 271(l)(c) of the Act are hereby initiated for furnishing inaccurate particulars of income/concealment of income."

9. Upon assessee's appeal learned CIT(A) reproduced the assessee's submission. Thereafter in a very short order without dealing with the case laws of Hon'ble Bombay High Court and Hon'ble Supreme Court referred by the Assessing Officer, he deleted the addition of unsecured loan by referring to case law on addition of share capital and share premium. He held as under :-

"I have carefully considered the submission of the AR of the appellant and relied upon cases. During the course of scrutiny assessment appellant filed following documents and records to establish identity, genuineness and credit worthiness of loan creditor.

1. Loan confirmation of loan creditor.
2. Loan creditor is Bombay stock exchange listed public limited company
3. Bank statement.
4. Certificate of incorporation of the loan creditor
5. Annual Return of Loan creditor for FY 2009-10.
6. Audited accounts copy for FY 2009-10 of loan creditor
7. Networth of loan creditor is Rs. 148.72 crore during FY 2009-10 also proves credit worthiness of the loan creditor.
8. Bankers certificate of repayment of loan and interest to loan creditor.
9. Form 16 A of IDS return filed of IDS deducted on interest paid to loan creditor.

10. Appellant sought information received by AO against your appellant and used against your appellant which was not provided till date.
11. Appellant request to AO to summon loan creditor and allow us to confront the loan creditor by way of cross examination in case information is used against your appellant which was also not provided till date.

The AR of the appellant filed the following documents as downloaded from money control website, BSE website and loan creditor web site to substantiate claim of the appellant already made before the AO about the identity of the loan creditor, genuineness of the loan transaction and credit worthiness of the loan creditor.

1. Profile of the company indicating CI No. ISIN No, name of the directors, address of the company, telephone number of the company, email address of the company, website address of the company, listing with BSE etc.
2. Share price chart downloaded from BSE website.
3. Investor relation page down loaded from the loan creditor namely Prabhav Industries Ltd. Company web site indicating availability of annual report from 2009-10 to 2015-16.
4. Balance sheet of the loan creditor namely Prabhav Industries Ltd. downloaded from money control website indicating net worth of the company as on ending of March 2010 is Rs.147.92 crore.

From the above submissions identity of the loan creditor namely Prabhav Industries Ltd., which is that it is listed public limited company on BSE is proved, further credit worthiness of the loan creditor is established based on networth of the company as on year ending march, 2010 is Rs. 147.92 crore. Further, genuineness of transaction is also established by virtue of payment of interest on loan, deduction of IDS, TDS returns of the appellant, loan borrowed is repaid during the beginning of the next year all the facts as noted by the learned AO in his order and also confirmed by the bankers certificate which was filed during assessment proceedings.

Respectfully following, the Hon. Supreme Court judgement in the case of CIT V. Lovely exports Pvt. Ltd. reported in [2009] 319 ITR (St.) 5. (SC) and relied upon by The Hon. Jurisdictional High court in the case of CIT v. Creative World Telefilms Ltd. [2011] 333 ITR 100 (Bom.HC), Gagandeep Infrastructure Pvt. Ltd. (2017) 80 taxmann.com 272 (Bom HC), PCIT Vs. Paradise Inland Shipping P. Ltd. (2017) 84 taxmann.com 58 (Bom HC) wherein Hon. Courts have consistently held that when the details about identity of loan creditor namely Prabhav Industries Ltd having CIN No. L45200GJ1995PLC28373 and ISIN No. INE 538J01012 which a Public Limited Company (in our case) and is also BSE listed company is proved, then the department is free to proceed to reopen loan creditor's individual assessment in accordance with law but it cannot be regarded as undisclosed income of the appellant company.

From the detailed discussion and analysis of the AO, in the background of the evidences gathered during the search & seizure operation, it is clear that of Shri Shirish Chandrakarit Shah was indulged in providing accommodation

entry for all the interested parties for various financial transactions. Even if it is assumed that the appellant company is one of the party, which has received accommodation entry for unsecured loan even then the question arises whether the three ingredient of section 68 of the Act is fulfilled or not. This is to be noted that the creditor company is in this case is a Listed Public Limited Company and in that case, the appellant is fortified by the judgment of Hon'ble Apex Court and Hon'ble Jurisdictional High Court in cases which has been referred above. The Hon'ble Courts have held that in case of Listed Public Limited Company, if there is any doubt regarding any of the ingredients of section 68 then the revenue is free to examine the lender company rather than making addition in the recipient company. Thus, I am constrained to follow the principles laid-down by Hon'ble Supreme Court in case of *Lovely Exports (Supra)* and Hon'ble Jurisdictional High Court i.e. *Bombay High Court* in case referred in earlier para. Thus, the addition of Rs. 1,50,00,000/- and other consequential addition i.e. Rs.1,11,167/- on account of interest payment and Rs.2,55,000/- on account of alleged commission are directed to be deleted and grounds of appeal filed on these issues are allowed.”

10. Against this order Revenue is in appeal before us.

11. We have heard both the parties and perused the records. Learned Departmental Representative relied upon the order of the Assessing Officer. He submitted that there is no doubt that the assessee is in receipt of bogus accommodation entry. That all the papers submitted in support are only make believe papers. The search and survey operation has clearly revealed that the assessee is in receipt of bogus accommodation entry. He further submitted that the Assessing Officer duly relied upon several decisions from Hon'ble Supreme Court and Hon'ble Bombay High Court in support of the addition. That learned CIT(A) has not at all dealt with those decisions. Instead he has granted relief only on the basis of decisions rendered in the context of share application and share premium. That those decisions are not at all applicable. That in the present case the issue is bogus unsecured loan and issue is not bogus share capital and share premium.

12. Per contra, learned Counsel of the assessee relied upon several case laws and supported the findings of learned CIT(A). He submitted that all the necessary details have been submitted by the assessee. Hence, addition is not at all sustainable. Several decisions were referred by learned Counsel of the assessee in the submission.

- City gold Education Research Ltd. ITA No. 4742/Mum/2015 (A.Y. 2010-11)
- PCIT v. Himachal Fibers Ltd. [2018] 98 taxmann.com 172 (Delhi) SLP Dismissed by SC
- PCIT v. Himachal Fibers Ltd [2018] 98 taxmann.com 173 (SC)
- CIT v. Gangeshwari Metal (P.) Ltd [2013] 30taxmann.com 328 (Delhi-HC)
- Rukmini Ag.P.Ltd Vi.DCIT, CC- 5(1) ITA No. 2562/Mum/2018(AY:2010-11)
- Bini Builders (P.) Ltd. v. DCIT, Central range-7(3) [2020] 118 taxmann.com 447 (Mumbai-T)
- Satyam Smertex (P.) Ltd. v. DCIT [2020] 117taxmann.com 93 (Kol.-Trib.)
- Prime Comfort Products (P.) Ltd. v. ACIT, Cir.-20(l) [2019] 111 taxmann.com 89 (Del.- T.)
- Bini Builders (P.) Ltd. V. DCIT,CR-7(3)[2020]118taxmann.com447 (Mum. T.)
- Goodview Trading P. Ltd [2017]77taxmann.com204 (Del. HC)
- PCIT-4 v. Hi-Tech Residency P Ltd [2018] 96 taxmann.com 402 (Delhi-HC)
- PCIT-4 v. Hi-Tech Residency (P.) Ltd [2018] 96 taxmann.com 402 (SC)
- ITO Vs. Axisline Investment Consultants (P) Ltd. (108 taxmann.com 276)
- ACIT Vs. Shyam Indus Power Solutions (P) Ltd. (90 taxmann.com 424)
- DCIT Vs. Acro Exports Trade (P) Ltd. (111 taxmann.com 403)

13. Upon careful consideration, we find that the assessee has taken unsecured loans which were found to be receipt from bogus entry operators. Findings in the case of search and seizure amply proved that the receipt was from a company which was benami concern of the bogus entry operator. The Assessing Officer has rejected the documents submitted by the assessee in support of the claim of the genuineness of the loan in view of the extensive findings in the case of search and seizure operation. Finding of the Assessing Officer inter alia was that what is apparent is not correct and in substance the transaction is bogus. In this regard he has referred to Hon'ble Supreme Court decision in the case of CIT Vs. P. Mohankala (supra), CIT Vs. Orissa Corporation P. Ltd. (supra), Vijay Kunnir Talwar Vs. CIT (supra) and Bombay High Court in Shri Naresh Pahuja (supra). Although the assessee has made elaborate submission before learned CIT(A), Learned CIT(A) has adjudicated the issue only on the premise that the assessee has submitted necessary papers in support of the loan. That the loans were through banking channels. He only relied upon the case laws from Hon'ble Supreme Court and Hon'ble Bombay High Court which were delivered with reference to bogus share capital and share premium cases which is not at all the case here. Moreover, the case laws referred by learned Counsel of the assessee are also with reference to

bogus share capital and share premium. The issue in the present case is bogus unsecured loan. The assessee even does not have basic documents of loan agreement. When query in this regard was raised by the Bench, learned Counsel of the assessee submitted that he has got no information on this aspect. Later in written submission in the paper book, the assessee has referred to the decision of Hi-Tech Residency (P) Ltd. (supra) claiming that the issue of absence of wrong agreement was dealt with by Hon'ble Delhi High Court. In this regard we may gainfully refer the aforesaid decision of Hon'ble Delhi High Court as under :-

"1. This is an appeal by the Revenue against an order dated 18th December, 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No.4707/Del/2012 for the Assessment Year ('AY') 2009-10.

2. While admitting the appeal on 18th December, 2016, the following questions were framed:

"(1) Whether on facts and circumstances of the case, ITAT erred in deleting the addition of Rs. 1,30,00,000 under Section 68 where assessee was not able to produce any of the Director, Shareholders or Principal Officer of the companies to which shares were allotted?

(2) Whether on facts and circumstances of the case, ITAT was justified in upholding the order of CIT (A) by reducing the addition under Section 68 to Rs. 5,01,000 on account of receipt of Unsecured loans of Rs. 1,00,01,000?

(3) Whether on facts and circumstances of the case and in law ITAT was justified in deleting the addition of Rs. 15,00,000 under Section 68 received as earnest money without any evidence of agreement?"

3. The Court has been taken through the order of the Assessing Officer ('AO') as well as Commissioner of Income Tax (Appeals) [CIT (A)] and ITAT.

4. The Court finds that the exercise for determining the identity, genuineness and creditworthiness of the investors of the share capital of the Assessee as well as lenders was undertaken in an elaborate manner by Comments from the AO were sought. Detailed reasons have been given by the CIT(A) to come to the conclusion that the Assessee had discharged its onus of establishing the identity, genuineness and creditworthiness of both the investors as well as the lenders. This has been concurred with by the ITAT in the impugned order which is again an extremely detailed one.

5. The concurrent factual findings of both the CIT (A) and ITAT have not been shown to be perverse by the Appellant. This is virtually the fourth stage of the litigation.

6. Question (1) is accordingly answered in the negative, i.e., in favour of the Assessee and against the Revenue. Question (2) is answered in the affirmative, i.e., in favour of the Assessee and against the Revenue. Question (3) is answered in the affirmative, i.e., in favour of the Assessee and against the Revenue.”

14. From the above we note that in the said case Hon'ble High Court has held that identity genuineness and creditworthiness of the investors of the share capital of the assessee as well as lenders was undertaken in an elaborate manner by learned CIT(A). Comments from the Assessing Officer were sought. Thereafter Hon'ble High Court has held that concurrent findings of both learned CIT(A) and the ITAT have not been shown to be perverse. We find that in the present case is distinguishable from the above case law. In the present case as we have noted above there is no elaborate exercised by learned CIT(A) to examine as noted above, rather learned CIT(A) has simply accepted papers submitted by assessee without any comment about the examination thereof. It is settled law that powers of learned CIT(A) are co-terminus with that of the Assessing Officer. If Assessing Officer had not done some further examination required it is incumbent upon learned CIT(A) to consider that himself. This view is support by Hon'ble Supreme Court in the case *Shri Kapurchand Shrimal vs. CIT* [1981] 131 ITR 451 (SC), where with reference to first appellate authority's order it was observed that it is the duty of the appellate authority to correct the errors in the orders of the authority below. In this view of the matter, in our considered opinion order of learned CIT(A) is not at all sustainable. We also note that various decisions of Hon'ble Bombay High Court and Hon'ble Supreme Court as referred by Assessing Officer's order above have not been dealt with by learned CIT(A) as well assessee in its submission. These case laws may be gainfully referred as under as they are germane :-

- Hon'ble Bombay High Court in the case of *Shri Naresh Pahuja* 54 taxmann.com 258, it has been held that merely routing of a gift through a banking channel would not by itself establish that gift was genuine. The Head note of the above cited judgement is reproduced hereunder;

"Section 63, read with section 254 of the Income-tax Act, 1961 – Cash credits (gift) - Assessment year 1995-96 - Assessing Officer made addition in income of assessee as income from undisclosed sources holding that gifts received by assessee from one 'K' were not genuine - Commissioner (Appeals) as well as Tribunal upheld findings of Assessing Officer – On rectification application, Tribunal held that there was no error apparent on record after recording that mere routing of a gift through a banking channel would not by itself establish that gift was genuine - Whether, therefore, finding of facts recorded by Tribunal could not be interfered with - Held, yes"

- Hon'ble Supreme Court in the case of Vijay Kunnir Talwar Vs. CIT (330 ITR 1) the following observations was made :

"All the authorities below, in particular the Tribunal have observed in unison that the assessee did not produce any evidence to rebut the presumption drawn against him under Section 68 of the Act by producing the parties in whose name the amounts in question had been credited by the assessee in his books of account. In the absence of any cogent evidence, a bald explanation furnished by the assessee about the source of the credits in question viz., realisation from the debtors of the erstwhile firm, in the opinion of the assessing officer, was not satisfactory. It is well settled that in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income tax as the income of the assessee of that previous year, if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the assessing officer, not satisfactory."

- Hon'ble Supreme Court in the case of CIT Vs. P. Mohankala (291 ITR 278) it has been held as under :-

"15. ... When and in what circumstances Section 68 of the Act would come into play? That a bare reading of Section 68 suggests that there has to be credit of amounts in the books maintained by an assessee; such credit has to be of a sum during the previous year; and the assessee offers no explanation about the nature and source of such credit found in the books; or the explanation offered by the assessee in the opinion of the Assessing Officer is not satisfactory. It is only then the sum so credited may be charged to income-tax as the income of the assessee of that previous year. The expression "the assessee offers no explanation" means where the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. It is true the opinion of the Assessing Officer for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the sine qua non for forming the opinion."

- Hon'ble Supreme Court in the case of CIT Vs. Orissa Corporation Pvt. Ltd. (159 ITR 78) held as under :

"25. ...The doubtful nature of the transaction and the manner in which the sums were found credited in the books of accounts maintained by the assessee have been duly taken into consideration by the authorities below. The transactions though apparent were held to be not real one. May be the money came by way of bank cheques and paid through the process of banking transaction but that itself is of no consequence."

No case has been made out that these decisions are duly explained in the case laws referred by learned CIT(A) or the assessee.

15. In this view of the matter in our considered opinion interest of justice the issue needs to be remitted to the file of learned CIT(A). Learned CIT(A) is directed to examine the issue afresh and decide as per law after examination of all the aspects of the assessee's claim and observation hereinabove. Needless to add assessee should be granted adequate opportunity of being heard.

16. In the result, Revenue's appeal is allowed for statistical purposes.

Pronounced in the open court on 22.6.2021.

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 22/06/2021

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.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

PS