

IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 4540/Mum/2017 (Assessment Year 2012-13)

ITO-15(1)(2) Room No.15B, Ground Floor, Aaykar Bhawan M.K.Road, Churchgate Mumbai-400020	Vs.	F.M.Land Developers Pvt.Ltd. Plot No.612, Near HPCL Petrol pump, Opp. Swastik chambers, V.N.Purav Marg PAN : AABCF5600P
(Appellant)		(Respondent)

Assessee by	Shri Vishwas Mehendale
Department by	Ms. Usha Gaikwad
Date of Hearing	24.05.2021
Date of Pronouncement	20 .07.2021

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the Revenue is directed against the order of learned CIT(A)-24 dated 27.03.2017 and pertains to Assessment Year 2012-13.

2. The grounds of appeal read as under :

1. "On the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in withdrawing the addition made u/s.68 of the Act, without appreciating that the case is related to the scam created by Pravin Jain group where the Investigation wing has carried out extensive enquiries to establish that the loan was given to provide accommodation entries hence the credit worthiness of the creditors is not established."
2. "On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in holding that the assessee has proved the identity, credit worthiness of share application and genuineness of transaction, ignoring the recent decision of the Hon'ble Supreme Court in the case of Navodaya Castle (P) Ltd (2015) 56 taxman.com 18 (SC) wherein the Apex Court has held that certificate of incorporation, PAN etc. were not sufficient for purpose of the identification of subscriber company when there is material to show that subscriber was a paper company and not a genuine investor."
3. Brief facts of the case are that the assessee company is engaged in the business of real-estate development. During the course of assessment, AO noted that assessee company has shown loan of Rs. 2.24 crores as loan from body corporates.

In order to verify the identity creditworthiness and genuineness of the loaners, notices u/s. 133(6) were issued to the companies at the address provided by the assessee. But the notices issued to the following parties were returned by the postal authority with the remark "Not Known".

S. No.	Name
01.	Atharv Business Pvt. Ltd.
02	Duke Business Pvt. Ltd.
03	Nakshatra Business Pvt. Ltd.
04	Olive Overseas Pvt. Ltd.
05	Sumukh Commercial Pvt. Ltd.

In view of these facts, during the course of hearing held on 13.03.2015, the AO asked the assessee to produce the key persons of the respective companies with their books of accounts and tank statements for verification. The case was adjourned for hearing to 20.03.2015 at 11.00 AM. Meanwhile, enquiries were conducted through the Inspector under his charge at all the address provided by the assessee. It was found that none of the premises as named by the assessee has never been occupied/engaged by any of the entities mentioned above.

The assessee, instead of complying the above requirements, filed a letter on 19.03.2015 stating that it has already filed the new addresses of the said companies vide their letter dated 03.03.2015 at page no. 104, 142, 218, 242 and 283. The AO verified the records, in view of the said claim of the assessee and it was seen that the information given in these pages are nothing but print outs of Company/LLP Master Data available at mca.gov.in/DCA Portal. He however observed from the records that the address mentioned in the page numbers given for all the five companies are

common and the same. Further, the AO also noted that the assessee has filed a separate chart for interest paid during the year wherein the addresses of the said companies are not the same as mentioned and as claimed by the assessee now i.e. as mentioned in the DCA Portal. The AO further observed that these details are to be read with the copy of the Form No.18 filed by the assessee, which shows that the address of the Registered Office of all the companies with effect from 1.12.2013, as Office No.211, 2nd floor, Near Sejal Glass, Balaji Arcade Premises, S.V. Road, Kandivali (West), Mumbai-400 067. He noted that all the submissions made by the assessee for the assessment purposes have been made after the said date of 1.12.2013. As the assessee was well aware of the change in address of these parties, the changed address should have been given in its submission made earlier.

Further, the AO observed that at page No. 103 of the said submission dt.03.03.2015 is of confirmation from M/s Tirupati Developers which bears the address at 52-C, 2nd floor, Raj Indl Commercial premises, Military Road, Marol without any mention about the change of address. Thus the AO inferred that it can be seen that the assessee has been showing different addresses without specifically mentioning the correct address to conduct and complete the enquiry. The assessee has not made any effort to produce the key persons of the various (five) companies stated above. Hence, AO held that it is not possible to verify the identity, genuineness and credit worthiness of these parties who are shown to have lent substantial amounts to the assessee " company.

The AO further observed that it can be seen from the facts as discussed above that the assessee has not made any effort to prove that the loans shown to have been received are genuine and the parties are identifiable and having their credit worthiness. Hence AO held that the genuineness of the loan transactions are not

proved and it is the primary onus of the assessee to prove the genuineness of unsecured loans taken .

4. In this regard, the AO further placed reliance upon the following case laws on the issue of cash paid entries

i) C.Kant & CO.v. CIT[1980] 126 ITR 63 (Calcutta)

ii) Kale Khan Mohammad Hanif v CIT [1963] 50 ITR 1 (Supreme Court)

Thereafter, AO observed that considering the facts of this case and that the assessee has not discharged the primary onus to prove the genuineness and creditworthiness of the parties who are shown to have given the alleged unsecured loan amounting to Rs.1,84,00,000/- to the assess detailed below remains unproved:

S.No	Name	Amount
01.	Atharv Business Pvt. Ltd.	30,00,000
02	Duke Business Pvt. Ltd.	49,00,000
03	Nakshatra Business Pvt. Ltd.	50,00,000
04	Olive Overseas Pvt. Ltd.	45,00,000
05	Sumukh Commercial Pvt. Ltd.	10,00,000

Thereafter AO further mentioned that enquiries were conducted with regard to the letter from ICICI Bank Limited, APMC Branch, showing the repayments of the alleged loans in the years subsequent to the year ended 31.03.2012. It has been ascertained that the accounts with the AXIS Bank Ltd, Opera House Branch to which the repayments have been cleared were suddenly closed at a point of time which indicates that the parties close bank accounts and open *new* accounts, like changing

the addresses of the business concerns, regularly in order to avoid any kind of departmental enquiries.

Thereafter the AO noted that the assessee has now filed Affidavits affirming the alleged loan transactions from the directors of the above mentioned five Concerns involved in this case on 23.03.2015. He noted that Shri. Pravin Kumar Jain is the director of the companies mentioned at Sr.Nos.3, 4 and 5 in the above table, Shri Manish Jain is the director of company at Sr.No. 1 and Shri Jitendra Tater is the director of company at Sr.No.2.

He further observed that it is worthwhile to note here the similarities and peculiarities of the five Affidavits such as;

- i) All the stamp papers which have been used to file the affidavits are bought from the same vendor and on a specific date.
- ii) All the affidavits have been notarized by one common Notary ie Shri.S.M.H.Zaidi bearing Regn no. 3640.
- iii) All the three persons filing the affidavits have been identified by one common advocate Shri.R.p.Mani.
- iv) All the affidavits have been signed on one common date ie.20.03.2015.
- v) The wording of all affidavits is the same except the figures in amounts. Even the source of all the loans have been shown as same in all the five affidavits.

5. Thereafter, AO has noted that it was essential to discuss the background of the three above said persons. In this regard, he referred to the search action conducted in the case of Shri Praveen Kumar Jain in the statement obtained. Thereafter, AO has mentioned as under:-

Shri Praveen Kumar Jain and his associates have filed individual affidavits, all dated 15/05/2014 in the CBDT. The affidavits are in the nature of retraction of their statements given u/s 132(4) of the I T Act, 1961 during the course of the search proceedings carried out in the Praveen Kumar Jain group cases between 01/10/2013 and 08/10/2013. The details of the persons filing retraction are as under:

S.No.	Name of the asses see	PAN	Date of filing the affidavit	Relation with Praveen Kumar Jain
1	Praveen Kumar Jain	AADPJ5102D	15/05/2014	Self
2	Nilesh Parmar	AIXPP8680Q	15/05/2014	Accountant
3	Manish Jain	AGTPJ806F	15/05/2014	Cousin and accountant
4	Dinesh Chaudhary	AKFPC3048P	15/05/2014	Associate Broker
5	Ramesh Soni	AAKPS3473K	15/05/2014	Neighbor and associate broker
6	Jitendra Tater	ABNPT7484M	15/05/2014	Friend and associate broker

Out of the above list Shri.PravIn Kumar Jain, Shri.Manish Jain and shri. Jitendra Tater have connection with the case of the assessee.

The retraction affidavits filed by the parties were rebutted by the DDIT(Inv)-111(3), Mumbai, for the reason that the statements recorded u/s 31 of the I.T.Act on 11/10/2013 and in the statements recorded post search operations shri. Pravinkumar Jain had admitted that he was indulged in the activities of providing accommodation entries and also explained the modus operandi followed by him through various concerns controlled and operated by him.

Since, the alleged unsecured loans are shown to have taken by the assessee company from the concerns controlled by Shri.Pravinkumar Jain and his Associates, the genuineness and creditworthiness of the loan creditors are held to be non genuine for the reasons of findings as discussed in the foregoing paras. The fresh Affidavit affirming the loan transactions, filed by the assessee during the assessment proceedings from the alleged loan parties are rejected for the said reasons discussed in aforesaid paras.

In view of the above circumstances and facts of the case, the amount of Rs.1,84,00,000/- is treated as unexplained cash credit u/s 68 of the Act and is added to the total income of the assessee under the head " income from other sources"

6. Against the above order assessee is in appeal before the Ld.CIT(A). Ld.CIT(A) noted the contention of the assessee. Ld.CIT(A) noted that there was some force in the arguments of the AO that firstly, the statements were given by the very authors of

the fictitious firms/companies under oath under section 132(4)/131 of the Act during the course of search and seizure operations and in subsequent statements, admitting the activity of giving accommodation entries for purchases, loans and investment and share application money to various parties seeking such accommodation by following unethical practices to defraud the revenue. Secondly, the appellant is one of such companies who have taken such accommodation entries since some of the concerns floated by entry operators (about 79 such concerns) are very much appearing in the books of the appellant company. Thirdly, such unethical practices are not uncommon in the business community as is evident from a series of operations conducted by investigating agencies revealing similar practices. Lastly, the independent enquiry conducted by the AO by issue of notices u/s 133(6) did not yield much result as they returned unserved and as such he presumed that the documents were engineered as the entry operators are experts in crating such documents in support of their transactions.

7. However, Ld.CIT(A) thereafter opined that the transactions has been routed through the banking channels and the source cannot be doubted that even though the transactions was from tainted group that the AO has not gathered any additional/independent evidence to show that the transaction with the appellant company was sham, fictitious or artificial except believing the statements given by the entry operator that he has failed to gather evidence. Thereafter, he referred to the decision of ITAT in Anant Shelter Pvt.Ltd. (2012) 20 taxmann.com 153. Thereafter we referred to Hon'ble Supreme Court decision in Lovely Exports Ltd.(supra). Thereafter, he noted that assesee has given the details for prove the identity, genuineness and creditworthiness of the creditors as under:-

1. Confirmation of A/c. by the parties
2. Income tax returns of the parties for AY 2012-13
3. Bank statements of the parties showing the loan transactions
4. Audited Balance sheet & P & L A/c of the creditors along with the schedule wherein credit in the name of the appellant is outstanding in their books.

5. Payment of interest to creditors after subjecting the amount to TDS
6. Affidavit from the loan creditors.

8. He concluded as under:-

2.4.10 As seen from the above, the appellant has furnished all the details proving conclusively the three ingredients of identity and creditworthiness of the creditors and the genuineness of the transaction. The amounts were paid by the creditors from their running bank accounts which were accounted in the books of the appellant as well as the creditors as seen from the audited accounts filed. The transactions were also confirmed by all the creditors who are assessed to tax. Further, the appellant has paid interest through banks to the creditors by duly subjecting the interest amount to TDS. I find that the AO was in possession of good information in the form of investigation report, to begin with, but he could neither succeed to repudiate the evidences filed by the appellant nor he could gather independent evidence even to establish the surrounding circumstances not to speak of leading evidence to prove his hypothesis. In view of the above discussion I hold that the loan taken by the appellant from the above five parties cannot be doubted and the addition made by the AO u/s 68 of the Act cannot survive the test of appeal. I therefore, direct the AO to withdraw the addition.

9. Against the above order, revenue is in appeal before us.

10. We have heard both the parties and perused the record. Ld. Departmental Representative submitted that identity, genuineness and creditworthiness of the loan transactions have not at all been established. Just because the transactions through banking channels it does not provide the genuineness of the transactions. He submitted that AO's enquiry duly revealed that, the loan transactions is sham and bogus in nature and the loan providers are non-existent companies. He further submitted that Ld.CIT(A) has found some cogency in the AO points ,but has held that AO should have made some further enquiry. He submitted that it is settled law that powers of Ld.CIT(A) are co-terminus with that AO. If some more enquiry was required and it has incumbent upon the Ld.CIT(A) to compete the same himself. He submitted that no examination whatsoever about the creditworthiness of the parties

has been done. He further referred to the decision of Hon'ble Supreme Court in the case of Navodaya Castle (P) Ltd (supra)

11. Per contra Ld. Counsel of the assessee relied upon the order of Ld.CIT(A), he further submitted that assessee has submitted all the necessary documents to prove the identity, genuineness and creditworthiness of the transactions, he referred to several case laws from ITAT and decision of Hon'ble Supreme Court in Lovely Exports Ltd. and several case laws. In this regard case laws relied upon by him are as follows.

- i) Orchid Industries Pvt.Ltd. vs DCIT CC-22, Mumbai [ITA No.1867/Mum/2012]
- ii) CIT vs Lovely Exports Pvt.Ltd.(supra)
- iii) Reliance Corporation Appeal NO.CIT(A)-44/ACIT-32(3)/ITA.98/15-16 dtd.26.05.2016
- iv) Rajesh H.Kachhara Appeal No.CIT(A)-29/IT-37/ACIT-18(3)/14-15 dtd.11.01.2016
- v) Diwali Developers Pvt.Ltd. Appeal No.CIT(A)-4/IT-66/ITO-2(1)(2)/14-15 dtd.04.04.2016
- vi) Smt.Asha Saraf Appeal No.CIT(A)-29/IT-24/ITO-18(1)(2)/15-16 dtd. 30.08.2016

12. Upon careful consideration we find that the issue in this case is bogus unsecured loans obtained by the assessee company. The enquiry of the assessing officer duly revealed that the identity of the loan givers was not established even after due enquiry by the assessing officer. The parties were not found to be not in existence at the given address by the inspector of the income tax department. Furthermore assessing officer has found that there was different addresses mentioned by the assessee at different places. That there was also some change in the address which was not intimated to the revenue Department. AO opined that not giving proper and exact address by the assessee was meant to thwart due enquiry. Finding the companies to be non-existent and correlating the case of Praveen Jain group of companies, he identified that three of the persons are directly related to the loan givers of the assessee company. Thereafter the assessing officer found that even the claim of the assessee that loan have been repaid were found to be of dubious nature. A subsequent enquiry revealed

that the accounts in which the amount were paid were duly closed immediately after withdrawal of the amount . In these circumstances the assessing officer added the aforesaid amount under section 68 of the IT act

13. Ld.CIT(A) on the other hand found cogency in the enquiry conducted by the assessing officer. However he was of the opinion that some more enquiry was required. He did not bother to mention how the assessing officer's enquiry about the lack of identity of the loan givers is rebutted. Thereafter without referring to any of his own examination of the documents and how he has found that the identity creditworthiness and genuineness was established he accepted the assessee's plea . He also found that just because the entries have been routed through bank accounts the transactions are sacrosanct, even as he noted that amount was received from what he himself called 'tainted group'. Here, Ld.CIT(A) has clearly misled himself. This opinion of Ld.CIT(A) in this regard is not sustainable as routing of entry through bank account is not conclusive proof that the transactions are sacrosanct when there are glaring evidences to show that these are bogus and sham transaction. The decision referred by the Ld.CIT(A) on the issue of share capital are not at all relevant here in the facts of the enquiry conducted by the assessing officer . Furthermore we are of the considered opinion that Ld.CIT(A) has failed to discharge the statutory duties cast upon him, as his powers are coterminous with that of the assessing officer. He has held that assessing officer should have made some more enquiry. In this regard we note that honourable Supreme Court in t he case of Kaporchand Shrimal 131 ITR 451 held that it is the duty of the appellate authority to correct the errors in the orders of the authorities below and remand the matter for further enquiry with without direction unless prohibited by law .

14. In this view of the matter and drawing support from the honourable Supreme Court decision as referred above, we are of the considered opinion that this issue needs to be remitted to the file of Ld.CIT(A) . Learned CIT appeal is directed to examine the issue afresh and make the necessary enquiry which in his opinion were further required and which are expected of him to establish the identity, creditworthiness and genuineness of the loan provider. The various case laws referred by the learned counsel of the assessee are not relevant at this juncture in this case as we have found that Ld.CIT(A) has not discharged his duties properly in view of the honourable Supreme Court decision mentioned by us hereinabove.

15. Accordingly the issue in the appeal stands remitted to the file of Ld.CIT(A). The Ld.CIT(A) shall take into account our observations hereinabove and decide as per law

16. In the result, this appeal by the revenue stands allowed for statistical purposes

Pronounced in the open court on 20.07.2021

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 20 /07/2021

Sr.PS. Thirumalesh

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