

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES “T”, MUMBAI**

**BEFORE SHRI SHAMIM YAHYA, AM AND SHRI LALIET KUMAR, JM**

ITA No. : 436/Mum/2021  
Assessment Year : 2010-11

ITO (International Tax)-Ward – 3(1)(1) Room No. 1628, 16 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai-400 021	Vs.	Philip Andrew Lobo Room No.1202, 12 <sup>th</sup> Floor, Vikas Park, Link Road, Mith Chowki Malad, Mumbai-400 064  PAN: AEBPL 7454 A
(Appellant)		(Respondent)

Appellant by : Shri Mahesh Saboo  
Respondent by : Shri Milind S. Chavan

Date of hearing : 23.02.2022  
Date of Pronouncement : 25.02.2022

**ORDER**

Per Laliet Kumar, JM :

This appeal by the Revenue is directed against the order of the learned Commissioner of Income Tax (Appeals)-57, Mumbai (‘ld.CIT(A) for short) dated 02.07.2020 and pertains to the assessment year (A.Y.) 2010-11. The grounds of the appeal raised are as under:

1. *“Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was justified in arriving at the conclusion that since money was coming from overseas the same has been earned abroad?”*
2. *“Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was justified in not appreciating the fact that mere repayment of loan of Rs. 44 lacs by the assessee does not provide credibility of genuineness to the transaction of borrowed loan, in the absence of identity and creditworthiness of loan lender?”*

3. *"Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) was justified in not considering the legal standpoint of section 68 of the Income Tax Act, 1961 wherein the onus lies on the assessee to prove the genuineness, identity and creditworthiness of the transaction?"*

4. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in not appreciating the principles laid down u/s 68 of the Income Tax Act, 1961 by the Honb'le Supreme Court in the case of NRA Iron & Steel Put Ltd vs. CIT(Central)-1 in SLP (Civil)No. 29855 of 2018 dated 05.03.2019 that the assessee is under legal obligation to prove the source and nature of loan transaction?"*

5. *"Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was justified in admitting the additional evidence during the course of appellate proceedings, in violation of Rule 46A of the I.T. Rules 1962 without giving opportunity to the Assessing Officer for making submission in respect of additional evidence."*

6. *"Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was justified in ignoring the decision of the Hon'ble Supreme Court in the case of New Delhi Television Ltd. V/s. DCIT (CA No. 1008 of 2020) dt. 03.04.2020 while ruling that as an order u/s. 147 Rws 143(3) was in existence at the time of reopening of assessment and no failure was on the part of the assessee the reopening was not correct."*

7. *"Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) was justified in quashing the reopened Assessment order without appreciating the fact that the case was reopened based on the additional evidence provided by Investigation Wing during the course of search proceedings In the case of Mr. Pravin kumar Jain (bogus accommodation entry provider)."*

8. *"Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) was justified in not appreciating that the nature of the entries in the bank account changed with the new evidence provided by the Investigation Wing found during the Search proceedings?"*

2. The Id. Departmental Representative (Id. DR for short) for the Revenue drew our attention to the order passed by the Assessing Officer, more particularly to paragraphs 6 and 7 which reads as under:

6. *In order to prove the genuineness of the transaction in the reassessment proceedings the assessee has filed letter dt 27.03.2016 alongwith following documents*

1. *Explanation of funds.*
2. *Ledger entries - Prerna Enterprises, Kritvi Enterprises, Reena Lobo (Source of Funds)*

- 3 Bank Statement of Philip Lobo.
4. Bank statement of Reena Lobo indicating source of funds.
5. Loan receives and given to Kritvi Enterprises.
- 6 Loan given to Prerna Enterprises

Further filed letter dt. 30.06.2017 describing the relations of Mr. Philip Lobo with Mr C.K Kothari and the reason for the Loan given and received during the period F.Y. 2009-10. He stated that all Loan transactions were made through banking channel.

7. The submission of the assessee has gone through thoroughly. However, loan transactions entered through banking channel does not solely prove the genuineness of the transaction. But, while verifying the loan transaction, the most important three issues to be clearly dealt with, which are i) identify. i) creditworthiness and ii) genuineness. in the present case advancing loan funds stated to be received from daughters from overseas without proving their capabilities for advancing huge loan is not acceptable. The onus was on the assessee to prove the creditworthiness, identity and genuineness with proper verifiable documentary evidences. However, vide letter dated 08.11.2017 the assessee has stated that whereabouts of Mr. Kothari is not known to him.

3. The Id. DR has also submitted that the Id. CIT(A) while deciding the issues, had recorded the finding in paragraph 2 (page 24) to the following effect:

2. **Addition Rs. 2,54,15,000/-**

*The investment /deposit under reference were already appearing in the bank account of assessee which was already disclosed before the A.O. during the second round of reopening.*

*In the second round of reopening the AO in its remand report has mentioned that these documents which were filed at the time of assessment proceedings as mentioned in the assessment order are now verified and found to be in order.*

*Therefore, it can be concluded that in the second round of reopening itself these bank accounts were duly examined by the AO. I have gone through the bank account and the details filed by the assessee and it was seen that the money, received in these accounts was coming from overseas account which were in the joint name of assessee and his daughter. Therefore, additions of Rs.2,10,15,000/- is directed to be deleted.*

*Regarding addition of Rs. 44 lacs it was seen that in effect assessee has advanced money to Shri Chhaganlal Kothari that is he has given a sum of Rs. 2,10,15,000/- through Shri. Chhaganlal Kothari and received Rs. 44 lacs through Shri. Chhaganlal Kothari. The assessee also repaid the said sum to Shri. Chhaganlal Kothari during the year itself.*

*Considering the overall facts of the case, I am of the opinion that assessee has discharged its Onus to the extent possible (as the case is very old and it was the 3<sup>rd</sup> round of reopening).*

*The Assessing Officer, therefore, is directed to delete the addition of 44 lacs also.*

*In effect the technical ground of reopening is as well as substantial ground of addition are allowed.*

4. It was the contention of the Id. DR that while deciding the issue, the Id. CIT(A) has committed various mistakes including deciding the issue on the basis of the document freshly filed by the assessee during the appellate proceedings without calling for the remand report from the A.O. and, therefore, there was violation of Rule 46A of the Income Tax Rules. Further, it was submitted that the documents referred by CIT(A) were the documents and the remand report which were forming part of the earlier/ second round of reopening and once the third reopening was done by the department than the earlier remand reports were of no significance, hence cannot be relied upon by the Cit )A) for granting the relief. Thirdly, it was submitted that even on the basis of these documents namely, the bank account, etc. it cannot be proved that the amounts were available in the account of the assessee or his daughter at the relevant time, and prove creditworthiness/ genuineness of the transaction.

4.1 DR submitted, what was concluded by Assessing Officer in the remand report at page no. 8, during the second round can not be relied upon as non-resident status was not enquired by the CIT(A) in appellate proceedings as per the requirement of section 6 of IT Act. 4.1 He has relied upon page nos. 53 and 54 of the paper book filed by the assessee, where the bank statement of Ms. Reena Lobo is appearing.

4.2 Based on this, it was submitted that the order passed by the Id. CIT(A) requires interference as a huge amount were transferred from NRO/NRE account from Dubai to India, which was remained unexplained therefore, the appeal of the Revenue is required to be allowed.

5. Per contra, the Id. AR had submitted during the earlier rounds of litigation, remand proceedings and reassessment proceedings the documents were available with the Assessing Officer as well as before the Id. CIT(A). He had drawn our attention to paragraph 6 of the assessment order where it is mentioned as under:

*6. In order to prove the genuineness of the transaction in the reassessment proceedings the assessee has filed letter dt 27.03.2016 along with following documents*

*3. Explanation of funds.*

*4. Ledger entries - Prerna Enterprises, Kritvi Enterprises, Reena Lobo (Source of Funds)*

*3 Bank Statement of Philip Lobo.*

*4. Bank statement of Reena Lobo indicating source of funds.*

*5. Loan receives and given to Kritvi Enterprises.*

*6 Loan given to Prerna Enterprises*

*Further filed letter dt. 30.06.2017 describing the relations of Mr. Philip Lobo with Mr C.K Kothari and the reason for the Loan given and received during the period F.Y. 2009-10. He stated that all Loan transactions were made through banking channel*

6. It was the contention of the Id. AR for the assessee that from the perusal of paragraph 6 of the Assessing Officer, it is abundantly clear that not only the bank account with Philip Lobo (the assessee), the bank statement of his daughter (Reena Lobo) and other documents were available with the Assessing Officer. It was the contention of the Id. AR that once the funds from NRI's account (joint account of the assessee and his daughter) were transferred to the assessee's account, then the assessee has proved the source of the amount receivable in the account of the assessee and, therefore, the case of the assessee do not fall within the four corners of section 68. As per AR, section 68 is only applicable in the case of a resident. Once the amount is transferred and received from the account of a non-resident to the non-resident in India, then the same cannot be a subject matter of addition u/s.68. He also drew our attention to the various other findings recorded by the Id. CIT(A).

7. We have heard the rival contentions of the parties and perused the material available on record. In the present case, the case of the Revenue is that the Id. CIT(A)

had decided the issue without affording an opportunity of hearing to the AO, while deciding the issue on merit in favour of the assessee and for that purpose, the Id. CIT(A) has held as in paragraphs 2 (page no. 24 of the order supra). The reading of the order, clearly shows that the Id. CIT(A) had relied upon the remand report filled in the second round of litigation, without calling for a fresh report from the AO; hence there is a clear violation of rule 46 of IT Rules

8. In our considered opinion, the finding recorded during the second round of litigation, by AO, loses its significance and binding effect once the case is again reopened after the second round of litigation. The evidence/ remand report of the A.O. in the second round of litigation cannot be considered sacrosanct and proved against the Revenue or in favour of the assessee, in the subsequent report, as the reasons for reopening were entirely different. Had it be binding or of the same effect than, the Assessing Officer would not have made any assessment order against the assessee in the third round of litigation. In our view, whenever a judicial or quasi-judicial authority decides the issue on the basis of the documents/record, then it is the duty of the quasi judicial authority to confront the other side (in the present the Assessing Officer) and seek its views/ reply. In the present case, the Id. CIT(A) has decided the issue based on the material, which was confronted to AO without giving opportunity to the assessee. Thus, there is a clear violation of principle of natural justice and Rule 46A by the Id. CIT(A). In view of the above, we are of the opinion that the matter is required to be relegated/remanded back to the file of the Id. CIT(A) for a fresh adjudication of all the grounds of appeal without being influenced by our observation and in light of the above, the appeal of the Revenue is allowed for statistical purposes.

9. In the result, the appeal filed by the Revenue is allowed for statistical purposes.

Order pronounced on this 25<sup>th</sup> day of February, 2022.

Sd/-

**(SHAMIM YAHYA)**  
**ACCOUNTANT MEMBER**

- Sd/-

**(LALIET KUMAR)**  
**JUDICIAL MEMBER**

MUMBAI, Dt: 25.02.2022

Copy forwarded to :

1. The Appellant,
2. The Respondent,
3. The C.I.T.
4. CIT (A)
5. The DR, Bench, ITAT, Mumbai

BY ORDER

ASSISTANT REGISTRAR/SR. PRIVATE SECRETARY  
ITAT, Mumbai Benches, Mumbai

*Roshani, Sr. PS*