

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "A", MUMBAI

BEFORE SHRI ABY T. VARKEY (JUDICIAL MEMBER)  
AND  
SHRI GAGAN GOYAL (ACCOUNTANT MEMBER)

I.T.A No.4259 /Mum/2018  
(Assessment year : 2014-15)

ITO-20(2)(3), Mumbai Room No.210, 2 <sup>nd</sup> Floor Piramal Chambers, Lalbaug Parel, Mumbai-400 012	vs	Mr. Khalid Mustafa Vasaiwala 5 <sup>th</sup> Floor, Room No.C/52, Gordon Hall Apartments, 10, Sofia Zuber Road Nagpada, Mumbai-400 008 <b>PAN : AAAPV5098F</b>
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessees represented by	Shri K Gopal, Adv./ Om Kandalkar
Department represented by	Shri Anil S Sant, Sr.AR

Date of hearing	26/04/2022
Date of pronouncement	29/04/2022

O R D E R

Per: Aby T. Varkey (JM):

This is an appeal preferred by the department, against the order of Ld.CIT(A)-32, Mumbai dated 09/03/2018 for assessment year 2014-15.

2. Grounds 1 & 2 are against the action of the Ld.CIT(A) deleting the addition of Rs.88,88,000/-.

3. Brief facts of the case as noted by the Assessing Officer are that he noticed from the bank account statements filed by the assessee that there were huge cash deposits at frequent intervals. According to him, the assessee had introduced cash of Rs.18 lakhs in his capital account for which he has stated that it is out of cash withdrawal. However, according to the Assessing Officer, there are many cash deposits which are unexplained and the assessee's explanation is very generic and not explaining each entry and accordingly, he made a table by giving the account number as well as the date of cash deposits totaling Rs.88,88,000/- which cash deposits, according to him, assessee failed to explain to his satisfaction. Therefore, he made an addition of Rs.88,88,000/- under section 68 of the Income-tax Act (hereinafter, the Act). Aggrieved, assessee preferred appeal before the Ld.CIT(A) who was pleased to delete the addition by observing as under:-

**5. DECISION:**

*I have given my careful consideration to the statement of facts and perused the material on record and duly considered the factual matrix of the case as also the applicable legal position.*

**Ground I - Addition of Rs.88,88,000/- as unexplained cash deposit**

*The appellant had deposited cash aggregating to Rs.88,88,000 during the year. The appellant had submitted a copy of the cash book and bank book evidencing the cash withdrawals and depositions to prove that the cash depositions were made from cash withdrawals only. The AO held that the appellant had not provided any explanation as well as the explanation was not satisfactory and accordingly, added the same to the total income of the appellant.*

*I have perused the details filed before me during the course of appellate proceedings. On a perusal of the cash book and bank book of M/s K.V. Realty, proprietorship of the appellant, it appears that the appellant had sufficient cash withdrawals and depositions are made from the same. The appellant also submitted that it had introduced capital into its proprietorship concern from the cash withdrawals of personal accounts. The details of the same were also submitted to the AO during the assessment proceedings.*

*The AO has noted that the cash deposition of Rs.50,00,000 on 24/10/2013 is not out of cash withdrawal made of Rs.50,00,000/- on 23/10/2013 is not convincing as the appellant is doing such transactions frequently. I have perused the bank statement and the cash book. The appellant has withdrawn cash and thereafter, immediately deposited the same into the bank account. The AO at no point of time has been able to prove or substantiate that the cash withdrawal is separate and the cash deposition is separate. He has just relied on his assumptions without corroborating or bringing on record any evidence to substantiate his non-conviction of the cash deposition. In Rajinder Singh Tur vs. Income Tax Officer ITA No.985/Chd/2014), the Chandigarh Tribunal has held that cash deposits into bank are allowed if the assessee has proved the source of funds and addition on the basis of suspicion and surmises is unjustified.*

*The detailed analysis of the bank statement with respect to the cash flow given by the appellant leaves no ambiguity that the appellant has explained the very nature of cash deposition made into the bank from the cash available with him.*

*In Kavita Chandra v. CIT(A) 398 ITR 0641 (P&H, the Hon'ble Punjab & Haryana High Court held that the cash deposits shall be treated as unexplained income u/s 68/69A in absence of linkage between cash withdrawn from the bank and cash deposited.*

*The appellant has substantiated its cash depositions from the cash withdrawals. It was for the AO to substantiate and prove that the explanation provided by the appellant is false and not acceptable. Here the AO has merely concluded that the explanation of the appellant was not satisfactory and made the additions. Once the appellant has discharged his onus of proving the bonafideness of the transaction then it is the duty of the AO to prove that the explanation is false and not acceptable. The AO has failed to prove the same. After perusing the details filed by the appellant, I find no infirmity in holding that the cash depositions have been made from the cash withdrawals and the appellant has sufficient cash balance to justify the cash depositions. Accordingly, the addition made by the AO is hereby deleted. This ground of appeal is **allowed.**"*

4. Aggrieved by the aforesaid decision of the Ld.CIT(A), Revenue is before us.
5. We have heard both the parties and perused the record. We note that assessee is a builder and developer. He is a proprietor of M/s K.V. Realty and a partner in a firm. The Assessing Officer noted that there were several instances of cash deposits in his bank accounts, so he confronted the assessee to explain the

source of the deposits. Pursuant to the same, assessee replied by filing submissions. However, the Assessing Officer was not satisfied with the deposits made on few dates (details of which has been stated in the assessment order), the total comes to Rs.88,88,000/-, the assessee had filed before the Ld.CIT(A), the source of deposits of cash on the dates on which the Assessing Officer had found fault with the assessee, which is as under:-

Date	Amount	Source
21.05.2013	7,00,000	Out of balance as appearing in cash book
23.05.2013	7,00,000	Out of cash balance as appearing in cash book
24.05.2013	42,000	Out of cash balance as appearing in cash book
04.07.2013	3,00,000	Out of cash balance as appearing in cash book
24.09.2013	5,00,000	Out of cash balance as appearing in cash book
24.10.2013	50,00,000	This amount was withdrawn from his account No.30818461494 with State Bank of India on 23.10.2013
13.11.2013	4,909,000	Out of cash balance as appearing in Cash Book
05.12.2013	25,000	Out of cash balance as appearing in Cash Book
22.01.2014	22,000	Out of cash balance as appearing in Cash Book

It is noted that the assessee also filed copy of his account with SBI account No.30818461494 as well as cash book for the period 01/04/2013 to 31/03/2014 which also forms part of the paper book. The Ld.CIT(A), after going through the cash book and after verifying the same, found that assessee had sufficient cash balance from which he has deposited cash into his bank account. After going through the cash book submitted before the Ld.CIT(A), the Ld.CIT(A) has recorded a finding of fact that assessee had sufficient cash withdrawals and deposits are made from the same. The Ld.CIT(A) has found that Rs.50 lakhs was withdrawn on 23-10-2013 which was deposited back on 24/10/2013. The Ld.CIT(A) has found

that assessee has discharged his onus of proving the source of deposits made in his bank accounts. During the hearing, the learned DR could not find fault with the reconciliation / cash flow statement filed before us by the assessee which is placed at pages 55 to 68 of the paper book, and we find that the source of money deposited, which has been found fault with by the Assessing Officer, has been fully explained by the assessee. In such a scenario, we do not find any infirmity in the order passed by the Ld.CIT(A); so we confirmed the same and dismiss these grounds of appeal of the Revenue.

6, Grounds 3 & 4 of the Revenue is against the action of Ld.CIT(A) deleting the addition of Rs.50 lakhs under section 68.

7. Brief facts of the case as noted by the assessing Officer is that he noticed from the reply filed by the assessee in respect of loan confirmation about the new loans taken by the assessee. He noted that the assessee has taken a loan of Rs.50 lakhs from Mr. Abdulkadar Vadgama. According to the Assessing Officer, pursuant to the showcause notice issued regarding this issue, the assessee had filed only the loan confirmation but neither produced copy of ITR V filed nor produced him before the Assessing Officer. Therefore, according to the Assessing Officer, assessee failed to prove the genuineness of the loan taken. So he added it under section 68 of the Act. Aggrieved, the assessee preferred appeal before the Ld.CIT(A), who was pleased to delete the same by noting that the assessee had provided complete name, address and PAN of the lender in the loan confirmation submitted by him before the Assessing Officer. According to the Ld.CIT(A), had the Assessing Officer not satisfied with assessee's details given in respect of this lender, then he should have initiated enquiry against the lender on the basis of details provided by the assessee. According to the Ld.CIT(A), as per

section 68 of the Act, the initial burden is on the assessee to prove the identity, genuineness and creditworthiness of the creditor. According to the Ld.CIT(A), by producing the confirmation from the lender, the details of PAN, address, assessee has already submitted. Therefore, according to the Ld.CIT(A), the assessee has discharged the onus of proving the identity, genuineness and creditworthiness of the creditor. Accordingly, he gave relief to the assessee. Aggrieved, Revenue is before us.

8. We have heard both the parties and perused the records. We note that the assessee has taken loan of Rs.50 lakhs from Shri Abdul Kadar Ali Vadgama on 19/06/2013, through cheque No.8,33,979 and the returned the same on 02/07/2013 vide cheque No.833983 and 833964 Rs.25 lakhs. The assessee had filed confirmation from Shri Abdul Kadar Ali Vadgama which shows that the assessee had taken the money on 19/06/2013 and returned it on 02/07/2013. The assessee had filed the confirmation of the party which is seen placed at page 49 of the paper book, which also contains the PAN of the lender (AADPV7541E). We also note at page 50, the bank statement of the lender is found placed wherein we note that the opening balance as on 14/06/2013 is shown to be 1,37,732,277/- and the transaction on 19/06/2013 and 12/07/2013 has been taken note of. The assessing officer has made the addition simply because the assessee failed to produce the lender. Merely because the assessee failed to produce the lender, cannot be the ground for disbelieving the transaction. The Ld.CIT(A), on the aforesaid facts, discussed, has rightly deleted the addition, which does not need any interference from our side. Therefore, we confirm the order of the Ld.CIT(A) and dismiss the grounds raised by the Revenue.

9. Ground 5 is against the action of the Ld.CIT(A) deleting R.29,94,481/- which was added by the Assessing Officer under section 2(22)(e) of the Act terming the same as deemed dividend.

10. Brief facts as per the Assessing Officer is that the assessee has taken a loan of Rs.1,07,66,483/- from M/s Hicons Dovelopers Pvt Ltd (hereinafter M/s HDPL) in which the assessee is a director. According to the Assessing Officer, M/s HDPL is a private limited company, which admittedly, is not a company in which public is substantially interested and the assessee is a director of the said company. From perusal of the notes annexed to and forming part of the accounts of the company, he noticed that the assessee is holding 1/6% of shares in it. Therefore, according to the Assessing Officer, assessee is a beneficial owner of shares carrying not less than 10% of voting power in the company (M/s HDPL). The Assessing Officer called for the return of M/s HDPL and observed that it had reserves and surplus to the tune of Rs.23,41,062/- and Rs.29,94,481/- as on 31/03/2013 and 31/03/2014, respectively. From the said figures, Assessing Officer concluded that /s HDPL possessed accumulated profit on the date of loan. The Assessing Officer further notes that though the assessee has attempted to make this transaction of him receiving the amount / loan appear as a commercial transaction, according to him, the same is not in the nature of a trading advance. According to the Assessing Officer, M/s HDPL from whom assessee borrowed funds, is not in the business of advancing or money lending and thus, the advance is not in regular course of business activity and, therefore, he was of the opinion that the loan given to the assessee is deemed dividend and since the reserves and surplus of the company is at Rs.21,91,481/- as on 31/03/2014, he restricted the addition

(deemed dividend) to Rs.21,91,481/-. Aggrieved, the assessee preferred appeal before the Ld.CIT(A), who was pleased to delete the same. Aggrieved, the Revenue is before us.

11. We have heard both the parties and perused the records. We note that the facts narrated by the Assessing Officer is not correct. Certain relevant facts have not been appreciated by the Assessing Officer, therefore, he has made the addition. We note that the Ld.CIT(A) has taken the correct facts regarding the transaction in question. It is noted that the assessee, in order to purchase a flat being constructed by M/s HDPL (project Hicon Meadows– Bandra) paid a sum of Rs.1,43,02,000/- in the year 2010. The assessee subsequently paid a further sum of Rs.50 lakhs on 19/10/2013. Later, the Assessing Officer noted that M/s HDPL has not commenced project at Bandra (Hicon Meadows– Bandra). Therefore, he demanded the money back from HDPL and received the same on 01-07-2013. Subsequently, they deposited a cheque of Rs.50 lakhs on 23/10/2013 towards flat cancellation, which the assessee did not agree and the same was transferred back to them (M/s HDPL) on 24/10/2013 and hence, the assessee contended that it is not a loan, but a commercial transaction for purchase of flat (in Hicon Meadows– Bandra) and, therefore, it was contended that the said transaction between assessee and M/s HDPL cannot be termed as deemed dividend under section 2(22)(e) of the Act. It was also brought to the notice of the Assessing Officer that the other small advances aggregating to Rs.7,66,483/- were partly towards TDS reimbursement and TDS payments made on behalf of assessee by M/s HDPL and not in the nature of loans or advances, so it will not be covered under section 2(22)(e) of the Act. However, as noted above, the Assessing Officer have not understood the contentions made by the assessee, did not accept the transaction

to be commercial in nature. We note from the financials submitted by M/s HDPL which is notes annexed to and forming part of the accounts as on 31/03/2013, it is noted that the amount of Rs.1,43,02,000/- has been reflected in the name of M/s Khalid Vasaiwala (the assessee, in this case) under the head, 'advance for sale of flats' out of the total amount of Rs.30,04,62,842/- which was collected by M/s HDPL as advance for sale of flat from various persons. Therefore, it is noted that the amount of Rs.50 lakhs given back to the assessee on 23/10/2013 towards flat cancellation which was returned on 24/10/2013 was purely a commercial transaction as well as Rs. 50 lakhs given on 19/10/2013 and returned back on 01/07/2003. Therefore, the Ld.CIT(A) rightly held that the said transaction between the assessee and M/s HDPL does not fall in the ken of section 2(22)(e) of the Act. For that, we also take notice of the CBDT circular No.19 of 2017 dated 12/07/2017 in respect of section 2(22)e) of the Act (trade advance) wherein the CBDT has held at para 3 as under:-

*"3. In view of the above it is, a settled position that trade advances, which are in the nature of commercial transactions would not fall within the ambit of the word "advance" in section 2(22) (e) of the Act. Accordingly, henceforth, appeals may not be filed on this ground by Officers of the Department and those already filed, in Courts/Tribunals may be withdrawn not pressed upon."*

112. In the light of the aforesaid CBDT circular which was binding on the Assessing Officer as well as the department and on our factual finding that the transaction was purely commercial in nature does not attract section 2(22)(e) of the Act, therefore, we do not find any infirmity in the action of the Ld. CIT(A) in deleting the addition. Ground 5 of the Revenue stands dismissed.

13. In the result, appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 29<sup>th</sup> April, 2022.

Sd/-

sd/-

(GAGAN GOYAL )

(ABY T. VARKEY)

ACCOUNTANT MEMBER

JUDICIAL MEMBER

Mumbai, Dt : 29<sup>th</sup> April, 2022

Pavanan

**प्रतिलिपि अग्रेषित Copy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,  
Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

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**ITAT, Mumbai**