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

BEFORE SHRI ABY T VARKEY (JUDICIAL MEMBER) AND
SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)

ITA No. 1218/MUM/2019
Assessment Year: 2009-10

Cluster Properties Pvt. Ltd., 310, Chawda Commercial Centre, Chincholi Bunder Road, Malad (W), Mumbai-400064. **PAN No. AADCC 3116 H**	**Vs.**	ITO 12(1)(4), Aayakar Bhavan, Mumbai-400020.
Appellant		**Respondent**

Assessee by	:	None
Revenue by	:	Mr. Ujjawal Chavhan, DR
Date of Hearing	:	26/09/2022
Date of pronouncement	:	29/09/2022

ORDER

PER OM PRAKASH KANT, AM

This appeal by the assessee is directed against the order dated 21.01.2019 passed by the Ld. Commissioner of Income-tax (Appeals)-20, Mumbai [in short 'the Ld. CIT(A)'], for assessment year 2009-10, raising following grounds:

1. The learned CIT (A) has grossly erred both in law and on facts in confirming the order of assessment passed us 144 r.w.s. 147 of the Act on 21.12.2016 determining the income of the appellant at Rs. 8,00,05,000/- as against the income returned at NIL.

2. The Learned CIT (A) has grossly erred both in law and on facts in failing to appreciate that initiation of the reassessment proceedings us 147 of the Act is without satrsfying the statutory preconditions as envisaged us 147 of the Act, and hence initiation of the reassessment proceedings itself is bad in law.

2.1 The Ld. CIT (A) has grossly erred both in law and on facts in failing to appreciate that learned AO has initiated the reassessment proceedings without having any tangible material for the formation of reasons to believe that the income of the assessee has escaped assessment, and hence assumption of jurisdiction is bad in law.

2.2 The Learned CIT (A) has grossly erred both in law and on facts in failing to appreciate that proceedings us 147 of the Act has been initiated only for the purpose of verification of the source of loan, and to make roving and fishing enquiry, and hence initiation of the reassessment proceedings is without jurisdiction.

2.3 The Learned CIT (A) has grossly erred both an in law and on facts in failing to appreciate that since no notice u/s 148 of the Act was served on the appellant as such, order passed us 144 r.w.s. 147 of the Act is vitiated in law.

3. The Learned CIT (A) has grossly erred both in law and on facts in confirming the addition of Rs. 8,00,05,000/- as unexplained investment made under section 69 of the Income Tax Act.

3.1 That the learned CIT(A) while upholding the addition made w/s 69 of the Act has completely failed to comprehend that the aforesaid sum represents an amount purportedly given as loan to M/s Faith Finstock Pvt. Ltd. by account payee cheques and is duly reflected in the books of account of the appellant, and hence the provisions of section 69 of the Act has no application.

3.2 That the learned CIT(A) has erred in failing to appreciate that appellant has proposed to grant the aforesaid loan to MIs Faith Finstock Pvt. Ltd by issuing account payee cheque, and such a transaction was duly reflected in its books, however since the appellant could not arrange the funds in its bank and hence aforesaid transaction was duly reversed in its books of account, hence addition sustained by the learned CIT(A) is unsustainable in law.

3.3 The Learned CIT (A) has grossly erred both in law and on facts in failing to appreciate that under section 69 of the Act burden is on the revenue to establish that the assessee has made unexplained investment and hence addition made without discharging such burden is unsustainable in law.

4. The learned CIT (A) erred in confirming the charging of interest amounting to Rs.72,00.450/- u/s. 234A of the Income Tax Act, 1961.

5. The Ld. CIT (A) erred in confirming the charging of interest amounting to Rs.2,52,90,141/- u/s. 234B of the Income Tax Act, 1961.

6. The order passed by the learned CIT (A) is illegal, bad in law, ultra vires and contrary to the provisions of law and facts and is passed without application of mind and in violation of the principles of natural justice.

The above grounds of appeals are independent of, and without prejudice to each other.

2. Briefly stated, facts of the case are that the assessee filed return of income on 29.09.2009 declaring total income at ₹ Nil. The return of income filed by the assessee was processed u/s 143(1) of the Income Tax Act, 1961 (in short 'the Act'). Subsequently, on receipt of information from the Investigation Wing, Mumbai, the case of the assessee was reopened by way of issue of notice u/s 148 of the Act. The reassessment proceedings are completed u/s 147 r.w.s. 144 of the Act on 21.12.2016 after making addition of ₹800,00,000/- treating the loan given by the assessee to M/s Faith Finstock Pvt. Ltd. as unexplained investment. The assessment was completed ex-parte due to non-compliance of various notices issued u/s 142(1) of the Act.

3. Before the Ld. CIT(A), the assessee challenged legality of reassessment proceedings as well as addition made on merit. The Ld. CIT(A) rejected the contention of the assessee challenging the reassessment proceedings as well as confirmed the addition on merit.

4. Aggrieved, the assessee is by way of appeal before the Tribunal, raising the grounds as reproduced above.

5. Despite notifying none attended on behalf of the assessee. We may note that notices issued to the assessee at the address provided in the Form No. 36 filed by the assessee returned un-served by the postal authorities with the remark 'incomplete/insufficient address'. In earlier occasions also notices sent were returned back with similar comments. In the circumstances, we proceeded to hear the appeal *ex-parte* qua the assessee after hearing the arguments of the Ld. Departmental Representative (DR).

5.1 As far as challenging validity of the reassessment is concerned, the Ld. CIT(A) in para 4.4.1 of the appeal has held as under:

> *"4.4.1 I have considered the appellant's contention. The appellant has contended that the AO did not apply his mind to the information received from the investigation. I find that the appellant has not furnished copy of the reasons for reopening recorded by the AO. I find that the appellant did not furnish its return of income in response to the notice u/s. 148 and, therefore, it was not entitled to the reasons recorded u/s. 148. As per the decision of the Hon'ble Supreme Court, an assessee becomes entitled to a copy of the reasons recorded after filing its return of income in response to notice us. 148. Since, in this case the appellant did not file its return of income in response to the notice us. 148, it was not entitled to the copy of reasons recorded. Therefore, the appellant's allegation that the AO failed to apply his mind before reopening the assessment is totally baseless. The appellant does not even know what reasons were recorded by the AO and, therefore, it is not in a position to comment on the reasons recorded. In view of the above, the ground of appeal is dismissed."*

6. We find that assessee did not even file return of income, in response to notice u/s 148 of the Act and therefore, the objection of the assessee that no reasons were provided are without any basis. In terms of decision of the Hon'ble Supreme Court in the case of **GKN**

Driveshaft (India) Ltd. v. ITO 259 ITR 19 for obtaining the reasons recorded, the assessee is required to file return of income in response to notice u/s 148 of the Act. In the circumstances, we do not find any error in the order of the Ld. CIT(A) on the issue-in-dispute and accordingly, we uphold the same.

6.1 As far as the grounds raised relating to merit of the addition is concerned, we find that the Assessing Officer issued various notices to the assessee to substantiate claim however, no compliance was made and assessment order was passed u/s 144 of the Act. The Ld. CIT(A) examined the evidence filed during the course of appellate proceedings, however, he rejected the contention observing as under:

> *"5.4 Decision on ground of appeal No. 2 & 3:*
>
> *5.4.1 I have considered the rival contentions. The appellant has contended that the loan given is reflected in the appellant's books of accounts. However, it was found that the payment was not reflected in the appellant's bank statement (Axis Bank). When asked to explain why the transaction is not reflected in the bank statement,*

the AR stated that the appellant had issued a cheque to M/s Faith Finstock Private Limited with instruction to not the present the cheque in the bank unless advised by the appellant. As per the appellant's contention, it did not advise M/s Faith Finstock Private Limited to present the cheque during the P.Y. 2008-09. This means that, the appellant was aware that the cheque was not presented by M/s Faith Finstock Private Limited in the bank. That being the case, the appellant had no reason to debit the account of M/s Faith Finstock Private Limited and credit the account of Axis Bank. In fact, considering the mutual understanding between the appellant and M/s Faith Finstock Private Limited, the cheque did not exist, so to say. The appellant was well aware that no loan was, in effect, given to M/s Faith Finstock Private Limited.

5.4.2 The appellant's letter to Faith Finstock Private Limited confirming that Rs. 8 Crores was receivable from Faith Finstock Private Limited as on 31.03.2009 on account of Unsecured Loan has to be examined in the light of the facts mentioned in para 5.4.1 above. Both the appellant and Faith Finstock Private Limited were aware, as per appellant's version, that loan transaction through cheque had not taken place; that neither was the money debited to appellant's bank account nor was the money credited to the bank account of M/s. Faith Finstock Private Limited. Therefore, both the appellant and M/s. Faith Finstock Private Limited were aware that the sum of Rs. 8 crores was not due from M/s. Faith Finstock Private Limited.

5.4.3 In the confirmation issued by the appellant stated as under:

"We hereby confirm that balance receivable from Faith Finstock Private Limited as on 31.03.2009 is Rs. 8 Crores on account of Unsecured Loan given. PAN of our company is AADCC 3116H."

5.4.4 Thus, the appellant has confirmed that the amount of Rs.8 Crores was receivable from M/s. Faith Finstock Private Limited. This implies that the appellant had paid the sum of Rs.8 Crores. The mere issue of cheque, with instruction not to present it in the bank, does not amount to a loan given and the amount does not become due to the person who issues the cheque. Therefore, the issue of the cheque to M/s. Faith Finstock Private Limited did not result in any loan to that party.

5.4.5 Therefore, only inference that can be drawn is that the loan referred to in the confirmation issued by the appellant arose from some transaction other than the cheque transaction recorded in the appellant's books. Since, by appellant's own admission no such loan was paid through the bank account, it is implied that Rs. 8 crores was paid by cash which was not recorded in the appellant's books of accounts. Therefore, the addition of Rs. 8 crores made by the A0 is confirmed. Accordingly, I dismiss grounds of appeal No. 2 & 3."

6.2 In view of the detailed finding of the Ld. CIT(A) on the issue of loan transaction and non-rebuttal of the same by the assessee, we find that the order of the Ld. CIT(A) on the issue-in-dispute is justified and accordingly uphold the same. The grounds raised by the assessee are accordingly dismissed.

7. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open Court in 29/09/2022.

Sd/-	**Sd/-**
(ABY T VARKEY)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 29/09/2022
Dragon Legal/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//

(Sr. Private Secretary)
ITAT, Mumbai