

THE INCOME TAX APPELLATE TRIBUNAL
"A" Bench, Mumbai
Shri B.R. Baskaran (AM) & Shri Rahul Chaudhary (JM)

I.T.A. No. 1410/Mum/2022 (A.Y. 2012-13)

ACIT-1(1)(1) Room No. 533 Aayakar Bhavan M.K. Road Mumbai-400 020. (Appellant)	Vs.	M/s. Adhiraj Constructions Pvt. Ltd. 303, Sharda Chambers Sir V.T. Marg, New Marine Lines, Mumbai-400 020. (Respondent)
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C.O. No. 100/Mum/2022 (A.Y. 2012-13)

M/s. Adhiraj Constructions Pvt. Ltd. 303, Sharda Chambers Sir V.T. Marg, New Marine Lines, Mumbai-400 020. (Appellant)	Vs.	ACIT-1(1)(1) Room No. 533 Aayakar Bhavan M.K. Road Mumbai-400 020. (Respondent)
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PAN : AACCA3372Q

Assessee by	Shri Rakesh Joshi
Department by	Shri Manoj Kumar Sinha
Date of Hearing	07.12.2022
Date of Pronouncement	27.12.2022

ORDER

Per B.R.Baskaran (AM) :-

The appeal filed by the Revenue and cross objection filed by the assessee are directed against the order dated 30.3.2022 passed by the learned CIT(A), National Faceless Appeal Centre, Delhi and it relate to A.Y. 2012-13.

2. The Revenue is aggrieved by the decision of the learned CIT(A) in deleting the addition of Rs. 7.20 crore made by the Assessing Officer under section 68 of the I.T. Act. In the cross objection the assessee is challenging the validity of reopening of the assessment.

3. Facts relating to the case are stated in brief. The assessment in the hands of the assessee for the year under consideration was completed under section 143(3) of the Act on 31.12.2014. The Revenue carried out search and seizure action in the hands of the companies controlled and managed by the Gautam Jain Group, wherein the Mr. Gautam Jain admitted that he and his group of companies are providing accommodation entries like bogus purchases and sales, unsecured loans etc. It was admitted that the accommodation entries of unsecured loans were provided through M/s. Karishma Diamond Pvt. Limited, M/s. Maniratnam Exim Pvt. and M/s. Marine Gems Pvt. Limited. It was noticed that the assessee herein has received funds from the above said three concerns as stated below :-

M/s. Karishma Diamond Pvt. Limited	Rs. 1,00,00,000/-
M/s. Maniratnam Exim Pvt.	Rs. 3,85,00,000/-
M/s. Marine Gems Pvt. Limited	Rs. 2,35,00,000/-
Total	Rs. 7,20,00,000/-

Hence, the Assessing Officer reopened the assessment of the year under consideration by issuing notice under section 148 of the Act dated 8.12.2016. Copy of the reasons recorded for reopening the assessment was furnished to the assessee. In response thereto, the assessee vide letter dated 6.10.2016 objected to the reopening of the assessment. The Assessing Officer disposed of the same, vide his order passed on 21.10.2016.

4. The assessee company is engaged in the business of construction and development of residential/commercial complex. Before the Assessing Officer, the assessee submitted that it has received the above said amount of Rs.7.20 crores as advance for sale of flats.

5. During the course of assessment the Assessing Officer referred to statement given by Mr. Gautam Jain during the course of search conducted in his hands, wherein the modus operandi adopted for providing

accommodation entries was explained. The Assessing Officer also referred to the note given by the Investigation Wing, wherein it was opined that the builders/person dealing in real estate, who wants to plough back their undisclosed cash in its business, approach these name lending concerns for issuing cheques. The Assessing Officer also issued notice under section 133(6) of the Act to the above said three concerns. The Assessing Officer received reply from M/s. Marine Gems Pvt. Ltd. and did not reply to the remaining two concerns. The Assessing Officer asked the assessee to furnish various details including copy of project plan, copy of approval/sanction letter received from the Municipal authority. The AO also asked the assessee to furnish documentary evidences to prove identity, credit worthiness and genuineness of the parties from whom advance was received.

6. The assessee submitted that it had received booking advances from the above said three concerns. Subsequently, these concerns cancelled the booking and hence the advances were returned back. The assessee submitted following evidences in support of above said explanations:-

- 1) Copy of letter of provisional allotment of residential unit 102 & 105 given to M/s Karishma Diamond Pvt Ltd dt. 07/12/2011.
- 2) letter of cancellation of allotment of residential unit 102 & 105 given to M/s Karishma Diamond P Ltd dt 07-12-2011.
- 3) copy of letter of provisional allotment of Unit no. ABC-201 given to M/s Marine Gems P Ltd dt. 08/06/2011.
- 4) letter of cancellation of allotment of Unit no. ABC-201 given to M/s Marine Gems Pvt Ltd dt. 04/02/2013.
- 5) copy of letter of provisional allotment of Unit No. ABC-202 & 205 given to M/s Maniratnam Exim P Ltd dt 08-06-2011.
- 6) letter of cancellation agreement of Unit no. ABC – 202 & 205 given to M/s Maniratnam Exim P Ltd dt. 25-09-2012.

The AO has also stated that the assessee has furnished following documents, vide its submission dated 09-12-2016:-

- i) receipts given against the amounts of advances/loans received from the parties in question.
- ii) Copies of bank statements reflecting payments and receipts.
- iii) Copies of letter given by these parties for cancellation of bookings from the above said three parties.
- iv) Copy of floor plan of P wing on plot no.32, Sector-5 at Kharghar.
- v) Copy of sample sale agreement of flat no.101 at 2A, Rohinjan, Panvel
- vi) Schedule of payments given to the above stated parties in question.
- vii) Copy of project approval letter (incomplete) which appears to be relating to residential project at Rohinjan, Raigad dated 23-04-2015.

The AO has further observed that the assessee has not submitted details of project approval letter of "Adhiraj Business Centre, Kharghar and complete document of "Samyama Project' at Rohinjan, Panvel, Copy of approved floor plan of 2nd Floor of building 2A, Samyama, Rohinjan, Panvel etc.

7. The AO also examined financial statements of the assessee and noticed that the projects of 'Samyama' at Panvel and Adhiraj Business Centre at Kharghar node was not started or initiated by the assessee company during this period. He also noticed that the approval letter for the Project Rohinjan, Panvel was received on 23-04-2015 only. The approval for Adhiraj Business Centre was received on 26-06-2012. The AO also noticed certain discrepancies between the plan and the booking made by the above said concerns. He also took the view that the selling rate per square foot quoted for these three parties are unrealistic. Accordingly, the AO took the view that the documents furnished by the assessee are not reliable. Accordingly, he rejected the claim of receipt of booking advance from the above said three concerns. Since Gautam Jain has admitted that he has provided only accommodation entries, the AO took the view that the advances received from the above said three concerns are bogus in nature and treated the

amount of Rs.7.20 crores as unexplained cash credit. In support of his decision, the AO relied upon the decision rendered by

- (a) Hon'ble Bombay High Court in the case of Shri Naresh Pahuja (54 taxmann.com 258), wherein it was held that mere routing of a gift through banking channel would not by itself establish that gift was genuine.
- (b) Jaipur bench of ITAT in the case of M/s Kachwala Gems vs. JCIT (ITA No.134/JP/2002 dated 10-12-2003 approved by Hon'ble Supreme Court in the case of M/s Kachwala Gems vs. JCIT (2006)(206 CTR (SC) 585, 288 ITR 10 (SC), wherein it was held that even payment by account payee cheque is not sufficient to establish the genuineness of purchases.

8. Before Ld CIT(A), the assessee reiterated its stand that it has received only booking advances from the above said three concerns. It was also submitted that the assessee has also proved the identity of the parties, credit worthiness of the parties and genuineness of transactions by furnishing following documents:-

- Copy of PAN and address of the parties.
- ITR Acknowledgement
- Financials of the said parties.
- Bank Statements of the respective parties highlighting payments made to appellant company.
- Ledger confirmations from the respective parties.
- Assessee's bank statement highlighting the amount received from the respective parties.

It was submitted that the assessee has discharged its burden placed upon its shoulders u/s 68 of the Act, but the AO has ignored this fact. The assessee also relied upon host of decisions including the decision rendered by Hon'ble Supreme Court in the case of CIT vs. Orissa Corporation P Ltd (159 ITR 78)(SC), wherein it was held that the Tribunal was justified in deleting the addition made u/s 68 of the Act if the assessee has discharged the initial burden and the revenue did not take any action on the information furnished by the assessee.

9. It was also submitted that it was common prevalent practice in those days to collect booking advances against flats even before starting of construction. With regard to discrepancies in the advance amounts, the assessee submitted before Ld CIT(A) that the AO has compared the booking advances received from the above said three parties with the amount repaid to them. It was submitted that there was no difference in the amount of booking advances received.

10. The Ld CIT(A), upon consideration of facts of the issue, evidences furnished by the assessee, case laws relied upon by the assessee, took the view that the addition of Rs.7.20 crores is not justified. Accordingly, he directed the AO to delete this addition. The revenue is aggrieved.

11. The Ld D.R submitted that the assessee has received bogus loan accommodation entries under the guise of advances against booking of flats, which fact has come out of the search conducted in the hands of Gautam Jain group. He submitted that the claim of "booking advances" has been disproved by the AO in the assessment order. He submitted that the notices issued to the three parties were not either responded or returned back. He submitted that these three parties have not finally purchased the flats and the advances have been returned back to them in the next year. Further, the projects for which the advances were claimed to have been given have not started by the assessee at all, at the time of receipt of advances. He further submitted that the cancellation letters have been given by these three concerns have been prepared in similar manner, which goes to prove that these documents are only make belief arrangements made by the assessee and lenders. Accordingly, he submitted that the assessee has only received bogus loans under the guise of booking advances. He submitted that the Ld CIT(A) has deleted the addition mainly on the reasoning that the AO has not made further enquiries on the claim and evidences furnished by the assessee. The Ld D.R submitted that the Mumbai bench of Tribunal, in the case of ITO vs. M/s Pravir Polymers Pvt Ltd (ITA No.2595/Mum/2019 dated

29-04-2022) has confirmed addition of accommodation loans taken by the assessee from entry provider.

12. The Ld A.R, on the contrary, strongly supported the order passed by Ld CIT(A). He submitted that it is a prevalent trade practice in Mumbai in the real estate industry to receive booking advances prior to launching of projects. It is primarily in the nature of seed capital for the builders. He submitted that this kind of practice was prevalent till the introduction of Real Estate Regulation Act (RERA). He submitted that the assessee had received booking advances from the above said three parties in the normal course of its business activities before RERA, which has been originally accepted in the assessment proceedings completed u/s 143(3) of the Act. However, the assessment has been reopened on the basis of statement given by the main person of the above said three companies, viz., Shri Gautam Jain. He submitted that the AO has extracted only certain portion of the statement given by Shri Gautam Jain and copy of entire statement was not given to the assessee, though the AO has relied upon those statements to make the impugned addition. Further, Shri Gautam Jain has given statement on provision of accommodation entries for bogus purchases and loans. He has not stated anything with regard to "booking advances" given by his group of companies. Further, he has not referred to the name of the assessee company as one of the beneficiaries of accommodation entries. Accordingly, he submitted the AO could not have placed reliance on the Statement given by Shri Gautam Jain as the same was not confronted with the assessee. With regard to non-receipt of reply in response to the notices issued u/s 133(6) of the Act, the Ld A.R submitted that the AO could have issued summons to them, instead of stopping at that stage. He submitted that the assessee has however, furnished confirmation letters and also their financial statements.

13. The Ld A.R further submitted that the assessee, as a seller of flats, is not expected to collect the financial details of the person who books the flats,

since it is a case of normal trading transaction. Hence the assessee has furnished all the correspondences, the details of payments, bank account copies etc in order to prove the receipt of booking advances. However, when the AO proposed to examine them in terms of sec. 68 of the Act, then the assessee has furnished financial details of the three creditors and established the identity and credit worthiness of the above said three parties and also showed that the advances were received through banking channels. Accordingly, he submitted that the assessee has discharged its burden placed upon its shoulders u/s 68 of the Act. He also submitted that the booking advances have been repaid in the subsequent years upon cancellation of booking by these three parties.

14. With regard to the decision rendered by Mumbai bench in the case of M/s Pravir Polymers P Ltd (supra), the Ld A.R submitted that the decision has been rendered on the facts prevailing in that case. He submitted that the Tribunal has noted that the Ld CIT(A) has accepted additional evidences in violation of Rule 46A; the assessee did not prove credit worthiness of all the creditors; there were serious errors in the finding of facts given by Ld CIT(A) etc. Accordingly he submitted that the above said decision of ITAT cannot be applied to the facts of the present case.

15. In the rejoinder, the Ld D.R submitted that the “booking advances” claimed to have been received by the assessee would also fall within the scope of sec.68 of the Act. With regard to the financial statements of the three creditors, the Ld D.R submitted that these companies did not have capital and their profitability was also very low. They have borrowed loans from some other companies and used the same to give loans to the assessee company. Accordingly, he submitted that it cannot be said that the credit worthiness of these three parties are proved. He further submitted that the repayment of loan or booking advance is not relevant for examining cash credits u/s 68 of the Act. He submitted that, in the case of Pravir Polymers P Ltd also, the addition was made on the basis of information received from

Investigation wing of the department and the same was confirmed by the Tribunal.

16. We heard rival contentions and perused the record. In the instant case, the addition has been made u/s 68 of the Act, wherein cash credits, which are essentially capital receipts, are deemed to be revenue receipts by legal fiction, if the assessee fails to prove the nature and source of cash credits. "Nature of cash credit" would mean that the assessee is required to show that it is not of revenue nature. In order to prove the sources, the assessee should discharge initial burden to prove the cash credits placed upon his shoulders of the assessee u/s 68 of the Act, the assessee is required to prove three main ingredients, viz., the identity of the creditor, the genuineness of the transactions and the credit worthiness of the creditor. If the assessee discharges the initial burden, then the burden would shift to the shoulders of the assessing officer, i.e., it is the responsibility of the AO to disprove the claim of the assessee by bringing evidences on record.

17. We shall now examine the facts prevailing in the instant case. It is noticed that it is not the case of the AO that the assessee did not discharge the initial burden placed upon it with regard to the advances received from three parties. There is no dispute that the assessee has furnished all the details relating to the three parties in order to discharge the burden placed upon it u/s 68 of the Act. However, it is the submission of the assessee that it has received only booking advances against sale of flats and not loans. Since the said claim has been rejected and the AO has proceeded to make additions u/s 68 of the Act, we prefer to examine the impugned addition in terms of sec. 68 only. We notice that the Ld CIT(A) has also observed that the AO has not pointed out any defect in the documents furnished by the assessee to prove the cash credits.

18. The AO has heavily relied upon the statement given by Shri Gautam Jain in order to come to the conclusion that these companies were providing

only accommodation entries, but the AO has not confronted the statement, which was the basis for making the addition, with the assessee. In our considered view, the said action of the AO is against the principles of natural justice. In any case, we notice that the assessing officer has failed to rebut the proofs adduced by the assessee with regard to the above said cash credits; meaning thereby, the AO has failed to discharge the onus shifted upon his shoulders.

19. We notice that the Ld CIT(A) has appreciated the facts prevailing in this case and accordingly deleted the addition. For the sake of convenience, we extract below the decision rendered by ld CIT(A):-

“7.1 Notice u/s 148 was issued on the basis of information received from DGIT(Inv.), Mumbai. A search and seizure action was carried out in the case of Gautam Jain Group. The beneficiaries of the accommodation entries taken were identified at the time of search. The accommodation entries so taken are in the nature of unsecured loans. The above group provide accommodation entries of unsecured loans against cash. As per the information, the above assessee company is one of the beneficiaries of the accommodation entries taken in F.Y. 2011-12 relevant to A.Y. 2012-13 and has taken accommodation entry amounting to Rs.7,20,00,000/-(unsecured loan) from the following parties:-

Sr. No.	Name of the party	Amount (In Rs.)
(i)	Karishma Diamond Pvt. Ltd.	75,00,000/-
(ii)	Maniratnam Exim Pvt. Ltd.	3,23,39,000/-
(iii)	Marine Gems Pvt. Ltd.	2,15,00,000/-
	Total	7,20,00,000/-

The AO noted that the revenue is not doubting all the deposits/unsecured loans but doubting the transactions for which genuineness could not be proved in view of activities being carried out by Shri Gautam Jain, which is nothing but providing accommodation entries only. Accordingly, addition of Rs. 7,20,00,000/- was made to the total income of the assessee on account of unexplained cash credit u/s 68 of the Act.

7.2 During the course of assessment proceedings, the appellant had explained that it did not received any loans but had received the amount in

form of 'advance against the booking of the residential units in the under construction building namely "Adhiraj Business Centre" at Kharghar and "Project Samyama" at Panvel. In order to justify the same, the assessee placed on record, the copy of allotment letters issued to the parties. However it was informed that in the subsequent year i.e AY 2013-14, the respective parties requested the assessee company to cancel their booking and refund the advance given by them at the time of booking.

7.2 The appellant has submitted before me that the following were produced before the AO.

1. Details of confirmation, assessment details and copies of Copy of bank account reflecting the payments and receipts as advance from the parties and Schedule of repayment given to the above stated parties in question
2. Copies of letter of provisional allotment of residential units
3. Letter of cancellation of allotment of residential unit
4. Copy of sample sale agreement
5. Copy of floor plan of P Wing
6. Copy of project approval letter

The appellant has shown that identity of all the persons who had purchased the residential units and given advance for purchase of the flats is proved. Their credit worthiness has been proved and the genuineness of the transactions has been proved as all payment are through banking channels. The AO has stated that the appellant has quoted rate of more than Rs. 11,500/- per sq. ft. For residential project as well as commercial units is unrealistic. However, no instances have been cited by the AO to show in which cases this has occurred. The AO also did not make any inquiries in this regard. The addition ultimately made by the AO was under Section 68

7.3 I have further perused the record and seen that copies of bank account ledger accounts, cash book and copies of letter of provisional allotment of residential unit and copies of cancellation of allotment of residential units, confirmation from parties from whom advances were received their PAN No., are all on record. In my view the AO should have given a finding in respect of each person who had given the deposit/advance/credit. To add up all without making proper inquiries is not the correct way to proceed. It is well-settled that under section 68 of the Act, the assessee has to prove three conditions, viz., (1) the identity of the creditor, (2) the "capacity" of such creditor to advance the amount, and (3) the genuineness of the transaction. If the above referred principles are applied to the facts of the case under consideration it can be seen that the appellant had discharged its onus of proving the identity of the persons, their credit worthiness and the genuineness of the transaction. The

appellant had given all alongwith details of payments made and identity of the persons making the payments and had explained the amount invested by each person in r/o advances received alongwith the details of the PAN No., the copies of bank accounts.

Further, it was also brought to the notice of the AO, that owing to cancellation of such bookings, the entire advance received by the assessee was repaid back to the respective parties. The assessee evidenced the same by providing the copies of bank statement and ledger confirmations. Thus, it can be seen that the entire amount is repaid back to the respective parties in the subsequent year.

7.4 On the other hand the AO has made no inquiry in respect of each person to show that the evidence submitted by the appellant was not correct. The AO has not made any inquiry in respect of the amounts which have been added to the income of the appellant. It was the duty of the AO to utilize the information to prove that the investment made by the persons was not genuine. Once the appellant had discharged its responsibility it was the duty of the AO to make inquires. Nowhere has AO stated that the documents produced by the appellant were not genuine. The has not brought any material on record to show that this money was the appellant's own undisclosed income. On perusal of the assessment order, it is seen that the entire focus of the AO was on the modus operandi adopted by Gautam Jain Group of cases to provide bogus accommodation entry of loan. The main reason for making addition u/s 68 was on the basis of information provided by the Investigation Wing. While the information provided by the Investigation Wing can be a starting point of an enquiry, it cannot be a conclusion reached by the AO. The moot point before the AO was to examine the application of section 68 in the case of the appellant. Instead of establishing that the explanation offered regarding the nature and source of credit in the books of the appellant is not satisfactory the AO went to discuss in detail the facts related with Gautam Jain group of cases. On the other hand, the appellant was able to establish the identity and the creditworthiness of the creditor as well as the genuineness of transaction. The appellant has furnished the evidences in support of its contentions and established the genuineness of the transaction and nature and source of the receipts. Reliance is placed on Hon'ble Delhi High court judgments for the proposition of discharge of primary onus in the cases of Dwarkadhish 330 ITR 298 and Gangeshwari Metals 214 Taxman 423 Oasis Hospitalities 373 ITR 119. Thus application of section 68 by the A.O. on those receipts is not justified. Accordingly, the addition of Rs. 7,20,00,000/- u/s 68 is hereby directed to be deleted. The ground No. 2 and 3 of appeal is allowed.”

20. We notice that the Ld CIT(A) has taken support of decisions rendered by High Courts in the case of Dwarakadish (supra), Gangeshwari Metals (supra) and Oasis Hospitalities (supra). There is no dispute that the assessee has discharged its burden placed upon it u/s 68 of the Act by furnishing all

relevant documents. As pointed out by Ld CIT(A), the AO has not found fault with those documents. We also noticed that two creditors have responded to the notices issued by the AO u/s 133(6) of the Act, but the AO has refused to consider them at all. Hence, it appears to us that the AO was swayed by the generalised findings given by the investigation wing and hence did not proceed the matter on the merits of each case. Hence, in the facts and circumstances of the present case, we have to hold that the AO has made the impugned addition on suspicions, surmises and conjectures only. We have also gone through the decision rendered by the co-ordinate bench in the case of M/s Pravir Polymers p Ltd (supra) and notice that the decision has been rendered in that case on the basis of peculiar facts available therein. In the absence of parity facts, we are of the view that the said decision will not have application to the present case.

21. In view of the foregoing discussions, we are of the view that the Ld CIT(A) was justified in deleting the addition of Rs.7.20 crores. Accordingly, we confirm the order passed by him on this issue.

22. We shall now take up the Cross objection filed by the assessee, wherein the assessee is challenging the validity of the reopening of assessment. Since we have confirmed the deletion of the addition, the legal issue urged by the assessee shall become academic in nature. Accordingly, we find it not necessary to adjudicate the same.

23. In the result, the appeal of the revenue and the cross objection filed by the assessee are dismissed.

Order pronounced in the open court on 27.12.2022.

Sd/-
(RAHUL CHAUDHARY)
JUDICIAL MEMBER

Sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 30/12/2022

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//

PS

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai