

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "A" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठौड़ कमलेश जयंतभाई, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 738/JP/2019
निर्धारण वर्ष/Assessment Year : 2014-15.

Shri Ratan Lal Agarwal, 421, Harsh Villa, Mahaveer Nagar, Tonk Road, Jaipur.	बनाम Vs.	The ACIT, Central Circle-1, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. ABJPA 7333 C		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Manish Agarwal, (CA)
राजस्व की ओर से / Revenue by : Shri A.S. Nehra (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 16/03/2023
उदघोषणा की तारीख / Date of Pronouncement: 17/04/2023

आदेश / ORDER

PER: SANDEEP GOSAIN, J.M.

This appeal by the assessee is directed against the order dated 26.04.2019 of Id. CIT (A)-4, Jaipur passed under section 250 of the IT Act, 1961 for the assessment year 2014-15. The assessee has raised the following grounds :-

1. On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in confirming the addition of Rs. 4,18,48,000/- made by Id.AO u/s 68 of the Income Tax Act, 1961 arbitrarily without considering the submissions made and evidences adduced, thus the addition of Rs. 4,18,48,000/- so confirmed deserves to be deleted.
- 1.1 That the Ld. CIT(A) has further erred in ignoring the fact that assessee has duly discharged his burden cast on him by section 68 of the Act, by filing the vital documents in support of the identity, genuineness and creditworthiness of the concern from whom the appellant has taken the loan of Rs. 4,18,48,000/-, thus the addition so confirmed deserves to be deleted.

- 1.2 That, the Ld. CIT(A) further erred in ignoring the fact that the assessee has by producing complete details and evidences, has fully established the creditworthiness of the lender. Therefore, the addition of Rs. 4,18,48,000/- deserves to be deleted.
- 1.3. That, the Id. CIT(A) has further erred in confirming the addition relying upon the allegations of Id.AO and without controverting / pin pointing any discrepancies in the documentary evidences submitted by assessee.
2. That the appellant craves the right to add, delete, amend or abandon any of the grounds of appeal either before or at the time of hearing of appeal.

2. The brief facts of the case are that the assessee is an Individual and earning income from Salaries and Business. The assessee e-filed his return of income for the assessment year under consideration declaring total income of Rs. 7,60,000/- on 31.07.2014. The case of the assessee was selected for scrutiny under CASS and statutory notice under section 143(2) of the Act dated 31.08.2015 was issued on the assessee. Information under section 142(1) of the IT Act, 1961 was called for vide questionnaire dated 12.09.2016. Copy of reasons for selection of complete scrutiny was also provided to the assessee along with the letter dated 12.09.2016. In compliance to the notices, detailed explanation sought by the Id. AO were provided and assessment was completed under section 143(3) of the IT Act, 1961 after making addition under section 68 of the IT Act, 1961 to the tune of Rs. 4,18,48,000/- by assessing the total income at Rs. 4,26,08,050/-. Aggrieved by the order of the AO, the assessee preferred appeal before the Id. CIT (A), who rejected the appeal of the assessee. Now the present appeal has been filed before us against the order of Id. CIT (A).

3. Before us, the Id. A/R of the assessee submitted ground-wise submissions as under :-

“In all these grounds of appeal, assessee has challenged the addition of Rs.4,18,48,000/- confirmed by Id. CIT(A), made by Id.AO u/s 68 of the Income Tax Act, 1961 towards the loan taken from M/s Inner Mercantile Pvt. Ltd. as unexplained.

Facts pertaining to the grounds of appeal are that during the year under consideration, appellant had obtained unsecured loan from M/s Inner Mercantile (P) Ltd. in his proprietorship concern M/s Harsh Trade totaling to Rs. 4,18,48,000/- on various dates, which was alleged as unexplained by Ld. AO by presuming the lender company as shell company without rebutting the evidences filed by assessee which established the genuineness, identity and creditworthiness of the creditor company. Addition was made u/s 68 of the Income Tax Act, without any basis and only on presumption and surmises.

In this regard, at the outset it is submitted that Id.AO in a very casual manner observed that M/s Inner Mercantile (P) Ltd. is a shell company. No material whatsoever was brought on record in support of such observation of the Ld. AO and the sole reason for the same is that the notice issued u/s 133(6) to the said company returned unserved and the assessee has failed to produce the director of the said company during the course of assessment proceedings. In the assessment order, Ld. AO had referred some investigation, however neither it was stated as to in which case such investigation was carried out nor was any investigation report supplied. Even, it was not stated as to how such investigation revealed that M/s Inner Mercantile (P) Ltd. was a shell company. Your honours would appreciate that the very basis of making addition (if at all there was any basis) was neither referred in assessment order nor was disclosed to the assessee, thus assessee was deprived from adequate opportunity to prove his case.

During the course of assessment proceedings, show cause notice was issued by the Id. AO to the appellant considering that letter sent by the Id. AO to the company returned un-served and assessee was asked to establish the genuineness of credit in the name of company M/s Inner Mercantile Pvt. Ltd. and to also produce the director of the said company. In response to that the appellant furnished all the plausible evidences to prove (a) identity of the creditor (PAN: **APB 13**), (b) creditworthiness of the creditor : Balance Sheet and ITR (**APB 14-21**) and (c) genuineness of the transaction : Bank statements of the lender company (**APB 11-12**) and thus has established the transaction to be valid and genuine. The assessee further furnished duly signed confirmations obtained from the said party (**APB 7**).

As regards, identity of the creditor is concerned, your honours would appreciate that M/s Inner Mercantile (P) Ltd. is a private limited company incorporated under Companies Act, 1956 (incorporated on 07.02.2012) and has a valid PAN issued by the Income Tax Department (**APB 13**). It is also relevant to state that the lender company is operative company and has never been declared as shell company by the Ministry of Company Affairs (MCA) and regularly filing its financial statements etc. on the online portal of the MCA. Its financial statements are duly audited by the chartered accountant, which were furnished before the AO. Such financial statements were also submitted by the said company before the Registrar of the Companies alongwith its annual return. Thus, it is quite evident that identity of the said creditor company is duly established and merely because the notice u/s 133(6) issued by the AO was returned un-served, cannot be made as a basis to not to accept the identity of the said company as against the plethora of evidences furnished before the Id. AO. There may be a number of reasons for notice getting un-served which includes shifting of office to other place, office being closed for that time or incomplete address mentioned on the letter. Hence identity of the creditor is not at all doubtful.

As regards, creditworthiness of the creditor is concerned, it is submitted that in normal case the assessee is required to submit the PAN No. and ward / circle where the creditor is assessed alongwith confirmation all these details were submitted to Id. AO. However in the present case, as there was some doubt to the AO due to non-service of letter u/s 133(6) and her requirement to produce the director and as the director, being located outside Jaipur, had shown his reluctance and as the assessee being borrower and thus in subdued capacity was unable to compel the director of lender company to appear before Id. AO of the assessee. However, the assessee has not only furnished the PAN of the said company but also the copy of ITR of relevant A.Y. 2014-15 and moreover the copy of Balance Sheet as well as Profit & Loss A/c of the said company. Even so much so that copy of Bank statement of the said concern was also furnished before the Id. AO.

On perusal of the Balance Sheet and other financial statements, it is seen that said creditor company had sufficient funds as Reserve & Surplus amounting to Rs. 36,36,90,414/- as on 1.4.2013 i.e. the first day of the previous year during which the loan was granted to the appellant (**APB 18**). It would be worthwhile to mention here that Id.AO herself at page 4 para 6.6 of assessment order had observed that the said company had Reserves amounting to Rs. 36,36,39,628/-, which by itself implied that sufficient funds were available with lender company, out of which the said company has advanced only a sum of Rs. 4,18,48,000/- to the assessee. Thus, the creditworthiness of the said creditor company is clearly established beyond doubt from the financial statements produced before the AO.

Now coming to the genuineness of the transaction, from perusal of financial statement of the said company, it is seen that Schedule 9 contained "Short Term Loans & Advances" totalling Rs. 21,39,99,802/- as on 31.03.2014. From further perusal of the details of Short Term Loans & Advances at Schedule 9, it is seen that name of assessee is appearing, wherein debit balance of Rs. 4,47,43,000/- has been shown against the

assessee (**APB 19**). Further, loan was given through banking channels and from perusal of the copy of bank statement of the said concern furnished before the Id. AO, it is seen that this amount has been duly debited in the bank statement of the said company (**APB 11-12**). Further there was sufficient bank balance with the said company as and when the amounts were lended to the appellant. Further, there was not a single cash deposit entry in the bank statement of lender.

Thus Id. AO was not at all justified in brushing aside these evidences wherein creditworthiness and genuineness of the transactions is fully proved beyond doubt, only on the plea that the said company did not have sufficient profits during the year, more particularly inspite of the fact that the company had sufficient funds from which it has given advance to the assessee.

During the course of appellant proceedings, the Id. CIT(A) has conducted spot enquiries through Investigation Wing Kolkatta to ascertain the physical existence of the lender company. The report so received from the office of Adl. CIT (Inv.) Kolkatta is reproduced at page 17-18 of the appellate order wherein the spot enquiry conducted by one of the Inspector attached to office of ADIT(Inv.) Unit-5 is referred (**APB 38-41**).

From perusal of Inspector's report, it is evident that Inspector has made spot enquiry from one Sh. Ratanlal Garwal resident of building where M/s Inner Mercantile Pvt. Ltd. is registered. Sh. Ratanlal Garwal, who was residing in the said building for past 35 years, accepted that M/s Inner Mercantile Pvt. Ltd. was in existence at Ground floor till 5-7 years back. However, he has supposedly not witnessed any business activity and based on this, the Inspector concluded that lender company was not existing at the premises way back in F.Y.2013-14. He further stated that he also made enquiries from two other shopkeepers, namely Shri Gopal Choudhary Prop. M/s Sanjay Trading Co. and Shri Lalit Sharma Prop. M/s Lalit Sharma & Sons who also give same version.

In this regard it was submitted to the Id. CIT(A) that Sh. Ratanlal Garwal accepted that M/s Inner Mercantile Pvt. Ltd. did exist in said building few years back. In fact, Inspector has not controverted the statement of Sh. Ratanlal Garwal to this extent however, he drew adverse inference from part of the statement that company existed there till 5-7 years back, without realizing that person may tend to make marginal deviation about period more particularly when he had to speak before a Govt. Authority, that too without any pre-information and rather suddenly and that too on a matter which is about 5 years old. The inspector had visited in 2018 whereas the transaction pertained to F.Y. 2013-14 which is falling about 5 years (+/- 1 year) back and is broadly similar period. Thus even as per the version of Shri Ratanlal Garhwal the company existed in F.Y. 2013-14 on the said address and inference drawn by Inspector is not correct.

With respect to the observations of Inspector that the two other shopkeepers denied witnessing any business activity in the said company, it is submitted that on receipt of such enquiry report appellant contacted with the lender company and has supplied the copy of the report submitted by the Income Tax Inspector and asked the company about the real state of affairs. In turn the officials of Inner Mercantile Pvt. Ltd. approached to these shopkeepers who both denied giving any such statement and stated that they had told Income Tax officers that company M/s Inner Mercantile Pvt. Ltd. existed in the said building, however, it appears that officers did not record the statements as orated by them. In support of the same, the lender company has been able to collect the affidavit of both the shopkeepers which were submitted to the Id. CIT(A) also. In the said affidavits both the shopkeepers clearly affirmed on oath that they never denied the existence of the lender company at given address and further stated that they were not allowed to read the statements before signing the same **(APB 36-37)**. With the said affidavits, a detailed reply was also submitted before the Id. CIT(A)

[APB 32-35] who failed to appreciate the same in true perspective and simply observed at para 6.8 that these affidavits are identically worded and staged managed. At this juncture your kind attention is invited to the fact that assessee has no relationship with these shopkeepers and the affidavits were collected by the lender company whose office was situated in same building and possibly the company official might have cooperated those shopkeepers in preparation of the affidavits. However, the contents of the affidavits that the company was in existence at the given address and the inspector deputed for making spot inquiry has not recorded the correct version deposed by these shopkeepers remained uncontroverted.

Further a request made for providing the opportunity of cross examination of the persons whose statements were relied upon by the assessing officer to hold the lender company as shell company was also not provided either by Id. AO or by Id. CIT(A) which is clear violation of principle of natural justice as has been held by the Hon'ble Supreme Court in the case of **CCE Vs. Andaman Timber Industries, (324) ELT 641 (Case law PB 1-4)** as under:

*"6. **According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee.** It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally*

untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above."

It is thus submitted the assessee with all plausible evidences has established that the sport report so obtained by Id. CIT(A) is defective and could not be relied upon however, Id. CIT(A) has not appreciated these facts and upheld the action of the AO who observed the lender company as is non-existence and shell company. It is once again reiterated that the lender company is still an 'active' company as per online portal of MCA which fact was also submitted alongwith the documentary evidences and the directors of the lender company have no relationship with the assessee and due to the fact that the assessee had borrowed the funds cannot compel the directors to appear in person before the Id. AO during the course of assessment proceedings. Thus the non-attendance of the directors cannot be the sole basis for holding the lender company as shell company more particularly when the lender company was having sufficient creditworthiness and regular bank account which was opened by the bankers after obtaining due evidences with respect to the place of business etc. In the light of the above, it is

submitted that the lender company is having separate legal entity, duly registered under the Companies Act and is regularly assessed to income tax where the department has never doubted its financials submitted by the lender company.

It is also relevant to state that the view taken by the Id. AO in the case of the appellant is totally contrary to the view taken in the case of other group assessee's whose assessments were also completed for the same assessment year i.e. A.Y. 2014-15 wherein they have also taken loans from M/s Inner Mercantile Pvt. Ltd. and while completing their assessments by the Id. AO on one or two days prior or subsequent to the order passed in the case of the appellant, such borrowings have been accepted as genuine. The copies of the ledger account of M/s Inner Mercantile Pvt. Ltd. as appearing in the books of accounts of those assessee's alongwith copies of their assessment orders completed are enclosed in **Paper Book Pages 40 to 51** and relevant details are tabulated as under:

Name of assessee	A.Y.	Date of assessment order	Amount of loan	Paper book Pages	Remarks
Harsh Stock Portfolio Pvt. Ltd.	2014-15	31.12.2016	3,71,00,275.00	42, 43, 46-49	Treated genuine
Ratan Lal Agarwal	2014-15	31.12.2016	4,18,48,000.00	Order under appeal	Treated as non-genuine
Harsh Agarwal	2014-15	28.12.2016	3,25,60,000.00	44, 45, 50-51	Treated genuine

It is thus submitted that once the existence of the lender company is accepted in other cases of the same group where substantial loan amount of around Rs. 7 crores were accepted as genuine and no doubts were raised either about the identity or creditworthiness of the lender company by the same incumbent officer in the same time frame where assessments were completed u/s 143(3) then under identical circumstances contrary view taken

in the case of the appellant is not only surprising but raised serious doubts about the manner in which addition have been made in the present case that too on the very same day and such addition in the case of appellant being contrary to Id. AO's own finding of rightly treating the lender company as genuine in other two assesseees of same group to which the appellant belongs, deserves to be deleted.

At this juncture, kind attention of your honours is invited to provisions of section 68, which read as under:

68. Where any sum is found credited in the books⁷⁸ of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the ⁷⁹[Assessing] Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.

On perusal of above, it is evident that assessing officer can make addition u/s 68 only under two circumstances, i.e. :

- (i) appellant does not offer any explanation about nature and source of such credit or
- (ii) explanation offered by appellant is not upto the satisfaction of Ld. AO.

In other words, whenever appellant provides explanation, before rejecting the same Ld. AO has to record dissatisfaction as to why the explanation furnished by appellant is not acceptable.

In the instant case, appellant has not only offered explanation regarding nature and source of credits but also substantiated the same with documentary evidences in the shape of ITRs, Confirmations, Balance Sheet, Bank Statement of lender which were not at all doubted by Ld. AO but she made mere assumptions and hypothetical allegations.

It is further submitted that to come out of rigors of section 68, an assessee has to prove identity and creditworthiness of the creditor and genuineness of the transaction. In the instant case, assessee has established all the three conditions as under:

- Identity of creditor : is established as the lender is a company incorporated under Companies Act and holding PAN. Copy of PAN as well as ITR was furnished **(APB 13)**.
- Creditworthiness : Copy of audited financial statements as well as bank statement was furnished where the loan given to applicant is duly evident **(APB 11-12)**.
- Genuineness : Loan was received through banking channels. Assessee has furnished confirmation from the party as well as financial statements, wherein loan taken by assessee is appearing **(APB 7, 15 & 19)**.

It is also a matter of fact that nowhere in the assessment order, Ld. AO has established that the money paid by such company was that of appellant.

Reliance is placed on:

Phool Singh Vs. ACIT (ITAT Delhi) in ITA No. 2901/Del/2014, wherein it has been held by Hon'ble ITAT that:

"Merely because 133(6) notices issued to the party returned un-served though it was the same address, which was supplied by supplier while filing its income tax return, no fault can be put on the shoulder of assessee."

Further, so far as non production of director of the said company for verification is concerned, as submitted above, the lender company is located outside Jaipur and due to the fact that the borrower is always in subdued capacity and vis-à-vis the lender and borrower cannot compel the lender to appear, therefore, it was beyond our control to produce the director before Ld. AO, which fact was not appreciated by Ld. AO nor by Id. CIT(A).

In this regard, kind attention of your goodself is invited to the judgement delivered by Hon'ble jurisdictional High Court in the case of **CIT vs M/s Bhawani Oil Mills P. Ltd.**, wherein it has been observed that :

*"On perusal of the order passed by the ITAT, we find that mere non appearance of eight other persona in response to the notice given of the Assessing officer, by itself cannot be a reason to discard their version particularly when one of them had appeared and admitted advancement of loan. Even if others have subsequently filed their confirmations supported by their affidavits, it cannot be assumed that they would not have made same statements, if they had appeared in response to the notice issued by the Assessing Officer. **Assessing Officer was required to have examined those confirmations and the contents of the affidavits on their merits treating as if they were statements given to him. Their version contained in the affidavits could not be treated as of lesser importance than the statement given by one of the creditors i.e. Sh. K.K. Sharma before the Assessing Officer.** Although, it is another matter that the Assessing Officer would be entitled to evaluate reliability of such version on its merit."*

With respect to the merits of the case, reliance is placed on judgement of **Hon'ble Bombay High Court in the case of Pr. CIT vs M/s Paradise Inland Shipping Pvt. Ltd.** TAX APPEAL NO. 66 OF 2016 wherein it has been categorically held that

"once the Assessee has produced documentary evidence to establish the existence of such companies, the burden would shift on the Revenue- Appellants herein to establish their case. In the present case, the Appellants are seeking to rely upon the statements recorded of two persons who have admittedly not been subject to cross examination. In such circumstances, the question of remanding the matter for re-examination of such persons would not at all be justified. The Assessing officer, if he so desired, ought to have allowed the Assessee to cross examine such persons in case the statements were to be relied upon in such proceedings. Apart from that, the voluminous documents produced by the Respondents cannot be discarded merely on the basis of two individuals who have given their statements contrary to such public documents."

It is also brought to the kind notice of the hon'ble bench that Id.AO has relied upon some judicial pronouncements, which lay out the guidelines that assessee needs to prove identity, creditworthiness and genuineness of the credits in order to get out of the rigours of provisions of section 68. Your goodself would appreciate that assessee has already discharged his onus by furnishing all the details and in fact Id. AO has not pointed out a single discrepancy in details so filed and has not rebutted the evidences so furnished before her.

The AO has referred to the case of CIT Vs. Durga Prasad More 82 ITR 540 (SC) and also the case of Sumati Dayal Vs. CIT 214 ITR 801 (SC). The facts of both the cases are quite different and distinguishable from the case of the assessee. More over in the case of Durga Prasad More, the taxing authority proved that the documents furnished were self serving statement and were not reliable. In the case of Sumati Dayal, as per the AO true nature of the transactions have to be ascertained in the light of surrounding circumstances. In the instant case of the assessee appellant, the true nature of the transaction of loan has been duly established by the assessee before the Ld. AO. The facts of other case relied upon by the AO namely CIT Vs. Independent Media Pvt. Ltd. 210 Taxmann 14 (Delhi), as mentioned by the AO are that persons in whose name share capital was introduced in the company, had given statement before the Investigation Wing that they were giving accommodation entry. However the facts of the instant case of the appellant are quite different as there is no investigation or enquiry proving the said creditor company allegedly providing accommodation entry.

Further almost all the remaining cases relied upon by Ld. AO were of private limited company where the said company had received share application or share capital and the company took the plea that being a company, it cannot produce more evidence beyond share application form and payment details through cheque, in these facts the courts held that being

private limited company, the share applicant would be normally known persons and higher onus is required to be placed on such companies than the limited companies. However the facts in the instant case of appellant are quite different, as the appellant is individual and more over the appellant has produced even the copy of ITR, copy of Balance Sheet and Profit & Loss A/c and even the copy of bank statement of the said creditor company.

Ld. AO has further relied upon certain judgements on "preponderance of human probabilities". In this regard, it is submitted that such cases cannot at all be relied upon to draw adverse inference in the case of assessee as assessee's transaction is supported by all the requisite documentary evidences and not a single evidence was brought on record to hold that the amount received by assessee as unsecured loan was actually its own undisclosed money routed through such lending company in the guise of unsecured loan.

In this regard, reliance is placed on decision of **Hon'ble Special bench of Mumbai ITAT** in the case of **ITO Vs. M/s. GTC Industries Limited Tobacco House**, reported in **164 ITD 1**, where the Hon'ble Special Bench of ITAT after considering all the aspects of "preponderance of human probabilities" and other issues has held that :

"46. It is quite a trite law that suspicion how so ever strong may be but cannot be the basis of addition except for some material evidence on record. The theory of 'preponderance of probability' is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee."

The aforesaid judgement of Hon'ble Special Bench was followed by **Hon'ble Kolkatta ITAT** in the case of **Mahendra Kumar Baid Vs. ACIT dated 18.08.2017.**

In case of **Dhakeswari Cotton Mills Ltd. Vs. CIT 26 ITR 775** Hon'ble Supreme Court held that there must be something more than bare suspicion to support the assessment u/s 23(3).

It is once again submitted that at page 10 of assessment order, Id.AO has observed that "Thus, in case of private limited companies higher onus is cast upon them to explain even source of source of the share application money/ share premium." In this regard, it is submitted that Id.AO has again misconstrued the facts of the case as assessee is an individual and has taken a loan and therefore requirement of proving source of source as per proviso to section 68 is not applicable on the assessee.

Your honours would appreciate that by furnishing all the documentary evidences in the shape of ITR of lender, confirmation of party, Financial statements of lender and copies of bank statements of lender appellant has discharged the onus casted upon him and further by filing the affidavits of the shopkeepers to prove the spot inquiry made by income tax inspector as not proper which affidavits remained uncontroverted therefore, under these circumstances it is humbly prayed that the addition of Rs.4,18,48,000/- deserves to be deleted.

Reliance is also placed on the following:

187 Taxman 338 Aravali Trading Co. Vs. ITO (Raj.)

Assessment year 1993-94 – Whether once existence of persons in whose names credits are found in books of assessee is proved and such persons own such credits with assessee, assessee is not required to prove sources from which creditors could have acquired money to be deposited with it – Held, yes – Whether merely because depositors' explanation about sources wherefrom they acquired money is not acceptable to Assessing Officer, it cannot be presumed that deposits made by such creditors are moneys of assessee itself – Held, yes – Whether in order to fasten liability on assessee by including

such credits as its incomes from unexplained sources, a nexus has to be established by revenue that sources of creditors' deposit flow from assessee – Held, yes.

57 ITR 532 (SC) P. Seetharamamma

87 ITR 349 (SC) Daulat Ram Rawatmull

It was held that the fact, that as assessee was not able to satisfy the Authority as to the source of the source, from which the creditor of assessee derive the money would not justify the addition being made in respect of such credit in the hands of assessee.

Balbir Sing Tomar (Dr.) V/s ACIT (Raj. HC) 20 TW 546

Where the creditors are regular assessees and have also filed their affidavits no addition of such cash credits can be made unless there is sufficient material to disprove the genuineness.

257 ITR 281 CIT Vs. Heerala Chagan Lal (Raj.)

Cash Credits- Finding by Tribunal that identity of creditor had been established- Amount representing cash credits not includible in total income of assessee- Income Tax Act, 1961.

24 TW 318 Sheon Narain Moharilal Vs ACIT (ITAT, Jaipur)

No addition of cash credit can be made simply on the basis of presumption in the absence of any contrary evidence.

24 TW 146 Sideway Investment Pvt. Ltd. V/s DCIT (ITAT, Jaipur)

Establishing the identity of the creditor, proving the genuineness of the transaction and the source of the credit appearing in the books of creditor is sufficient to discharge the onus for explaining the genuineness of the cash credit.

27 TW 393 Pradeep Kumar Himmatramka Vs ITO (ITAT, Jaipur)

Whether filing of confirmations and disclosure of the amounts of advance in the income tax returns by the depositors can be treated as sufficient compliance of the provisions of section 68 for explaining the genuineness of cash credits? Held yes.

128 TTJ 708 Shanti Kumar Chordia Vs. Asstt. CIT (JP 'A')

Income – Cash credit – Genuineness – Amounts having been received through account payee cheques, creditors being assessed to tax and their confirmations also having been filed through belatedly, no addition under section 68 was called for.

[2010] 5 taxmann.com 60 CIT Vs. Kishori Lal Construction Ltd. (Delhi)

The onus cast on the assessee stands discharged where the assessee is able to establish the three ingredients of section 68 i.e. (a) the identity of the creditor, (b) the genuineness of the transaction, and (c) creditworthiness of the creditor.

43 DTR 449 Tulip Hotels (P) Ltd. Vs. Dy. CIT (Mumbai 'E') (TM)

Burden of proof and genuineness – Assessee having duly established the identity of the creditor, his creditworthiness and also genuineness of the transaction, the addition under s. 68 towards unexplained credit is liable to be deleted.”

4. On the other hand, the Id. D/R supported the orders of the revenue authorities.

5. We have heard rival contentions of both the sides, perused the material available on record and gone through the orders of lower authorities and also the case laws relied on by both the parties before us. The facts related to the issue under consideration are that appellant obtained unsecured loan from M/s Inner Mercantile (P) Ltd. in the name of his proprietary concern namely M/s Harsh Trade, on various dates totaling to Rs. 4,47,43,000/-. The appellant furnished PAN details, confirmation of the copy of account and other details before the AO to prove the veracity of the loan so taken. However, the AO, without rebutting these evidences, presumed the lender company as 'shell company' without bringing any material on record in support of such presumption / observation. The AO mentioned that notice

issued u/s 133(6) to the said company had returned unserved and has further noted that assessee has failed to produce the director of the said company during the course of assessment proceedings. AO has referred to some investigation, however, as per the Id. AR of the appellant neither it was stated as to in which case such investigation was carried out nor investigation report was ever supplied to the appellant. As per the Id. AR of the appellant, even it was not stated by the AO as to how such investigation revealed that M/s Inner Mercantile (P) Ltd. was a 'shell company'. It was submitted by the Id. A/R that in response to show cause notice issued by the AO considering that the letter sent to the company returned unserved and assessee was asked to establish genuineness of the credit in the name of lender company and also to produce the directors of the said company, the appellant furnished all the plausible evidences to prove (i) identity of the creditor by giving PAN details, (ii) creditworthiness of the creditor by furnishing its Balance Sheet and copy of ITR and (iii) genuineness of transaction by furnishing bank statement of the lender, apart from furnishing the usual evidence in relation to any loan, namely, duly signed confirmation from the said party. As regards identity of the creditor, it was submitted by Id. AR that the company is a private limited company incorporated on 07.02.2012 under Companies Act and is having a valid PAN issued by Income Tax Department. Moreover the lender company is not a defunct company as it has been filing its financial statements regularly on the portal of Ministry of Corporate Affairs (MCA) and moreover it has never been declared as 'shell company' by the MCA. The financial statements are duly audited by the chartered accountant and these are also submitted before the Registrar of Companies along with its annual return. Thus it was submitted that identity of the said lender company is duly established and

merely because notice u/s 133(6) issued by the AO was returned unserved, cannot be made as a basis to not to accept the identity of the said company as against the plethora of evidences furnished before the AO. There may be a number of reasons for the notice returning unserved which includes shifting of office to other place or office being closed for that time or incomplete address mentioned on the letter. It was submitted that in view of overwhelming evidences identity of the creditor is not at all doubtful.

5.1 As regards, creditworthiness is concerned, it was submitted by the Id. A/R that in normal course, the assessee is required to submit PAN details and Ward / Circle where the creditor is assessed along with a confirmation from the creditor. All these details were duly submitted before the AO. However, in the present case as there were some doubt in the mind of AO due to non-service of notice u/s 133(6) and her requirement to produce the director which could not be materialized as directors were located outside Jaipur and has shown reluctance, the appellant company furnished copy of Balance Sheet as well as Profit & Loss account of the said company and also further furnished copy of ITR of relevant assessment year i.e. of AY 2014-15. Even so much so that copy of bank statement of said company was also furnished before the AO. It was submitted by Id. A/R that being the borrower of the money and thus assessee, being in subdued capacity, was unable to compel the director of the lender company to appear before the AO of the assessee. It was also submitted that perusal of the Balance Sheet reveals that the creditor company had sufficient funds as reserve and surplus was amounting to Rs. 36,36,90,414/- as on 01.04.2013, whereas the said company has advanced only a sum of Rs.

4,47,43,000/- to the assessee. It was thus submitted by AO that creditworthiness of the said company is clearly established beyond doubt from the financial statement produced before the AO and also furnished before us.

5.2 As regards, genuineness of the transaction, it was submitted by Id. A/R that from perusal of the schedule 9 of the Balance Sheet containing "Short term loans and advances" totaling to Rs. 21,39,99,802/-, it is seen that name of the appellant is appearing showing debit balance of Rs. 4,47,43,000/- (APB 19). Moreover the loan was received through banking channels and from perusal of the copy of bank statement of the said company so furnished (APB 11-12), it is clearly revealed that this amount has been duly debited in the bank statement of the said company. Moreover, it was submitted that the company had sufficient bank balance and there was no any cash deposit entry prior to giving loan to the appellant. It was submitted by Id. A/R that these evidences have not at all being rebutted by AO and addition so made by considering the part loan as unexplained only on presumption and surmises is uncalled for and deserves to be deleted.

5.3 It was submitted by Id. A/R that Id. CIT(A) has also not appreciated these overwhelming evidences presumably considering that on enquiry made through Investigation Wing, Calcutta about the existence of the lender company at the given address, the Inspector making spot enquiry had reported to have asked from one Shri Ratan Lal Garwal who was residing in the building for last 35 years. As per the Inspector report, Shri Ratan Lal has stated that M/s Inner Mercantile (P) Ltd. was in existence at ground floor till 5 – 7 years back however, he has supposedly not witnessed any business activity afterwards. Inspector has further stated in his report

that he has also made enquiries from two other shopkeepers namely Shri Gopal Choudhary Prop. M/s Sanjay Trading Co. and Shri Lalit Sharma Prop. M/s Lalit Sharma & Sons, who also gave the same version.

5.4 It was submitted by Id. A/R that Shri Ratan Lal Garwal did accept that M/s Inner Mercantile (P) Ltd. existed in the said building few years back. The Inspector drew adverse inference from the part of the statement of Shri Ratan Lal Garwal that company existed here till 5 – 7 years back without realizing that person may tend to make marginal deviation about the period more particularly when he had to speak before a Government Authority and that too without pre-information; rather suddenly and that too on a matter which is about 5 years old. The Inspector had visited in 2018, whereas the transactions pertained to FY 2013-14 which is falling about 5 years (+ / - 1 year) back and is broadly the similar period. Thus even as per the version of Shri Ratan Lal Garwal, the company existed in FY 2013-14 on the said address and inference drawn by Inspector is not correct. As regards the two other shopkeepers from whom some enquiry was made by the Inspector, it is submitted by the Id. A/R that on receipt of such enquiry report appellant contacted the lender company and supplied them the report of Inspector and asked the company about the true and real state of affairs on the issue. In turn, officials of the lender company approached those shopkeepers both of whom denied giving any such statement and stated that they have told Income Tax official that company M/s Inner Mercantile (P) Ltd. existed in the said building, however it appears that officials have not recorded the statement as orated by them. In support of the same lender company has collected affidavits of both the shopkeepers which were submitted before the Id.

CIT(A) also. In the said affidavits, both the shopkeepers clearly affirmed on oath that they never denied existence of lender company at the given address and further stated that they were not allowed to read the statement before signing the same (APB 36-37). Detailed reply was submitted before Id. CIT(A) alongwith said affidavits, however the Id. CIT(A) did not appreciate the same in proper perspective and simply observed at para 6.8 that these affidavits are identically worded and are thus stage managed. It was submitted by Id. A/R that the assessee has no relationship with these shopkeepers and these affidavits were collected by lender company whose office was situated in the same building and possibly the company officials might have cooperated with those shopkeepers in preparation of these affidavits, leading to broadly same language. However, the contents of affidavits that the company was in existence at the given address and the Inspector deputed for making spot enquiry has not recorded the correct version orated by these shopkeepers, remained uncontroverted. It was submitted by Id. AR that considering the affidavits of these two shopkeepers and also considering the enquiry from Shri Ratan Lal Garwal the existence of the company at the given address for the given year cannot be denied and thus adverse view so taken by the Id. CIT(A) deserves to be rejected.

5.5 The Id. A/R has also mentioned two important aspects on the issue under consideration. Firstly, that the same AO has passed the assessment orders, one on the same day (i.e. on 31.12.2016) and other three days prior (i.e. 28.12.2016) to the date of order of Ratan Lal Agarwal (31.12.2016), wherein loan from the same lender company namely M/s Inner Mercantile (P) Ltd. has been taken and these

loans have been considered as genuine, without any adverse view being taken on these loans received from same M/s Inner Mercantile (P) Ltd. It was submitted by Id. AR that once the existence of lender company is accepted in other cases of the same group where substantial loan amounting to around Rs. 7 crores were taken from the same company and accepted as genuine without raising any doubts about the identity or creditworthiness of the same lender company by the same assessing officer in the same timeframe then under identical circumstances contrary view taken in the case of appellant is not only surprising but raised serious doubts about the manner in which addition has been made in the instant case of appellant. Therefore, such contrary view taken by AO in instant case of appellant as against the view taken in other two cases deserves to be rejected and consequent addition so made deserves to be deleted. Another important point raised by the Id. AR is that the loan taken by the appellant from the said lender company is totaling to Rs. 4,47,43,000/- as is evident from the copy of confirmation so filed before the AO and also before us (APB-7), whereas the AO has only treated Rs. 4,18,48,000/- as unexplained and added the same without adding the entire amount of Rs. 4,47,43,000/-. Thus it is either a case where AO has accepted part of the loan as genuine or it reflects the casual and mechanical manner in which order has been made in the instant case. Be it as it may, either way the addition so made by the AO deserves to be deleted. On being asked by the bench, it is informed by the Id. A/R that the loan has been repaid in subsequent years gradually to the lender company; in FY 2015-16 Rs. 41 lacs, in FY 2018-19 Rs. 3,83,67,557/- and in FY 2019-20 balance amount of Rs. 24,25,443/- has been repaid and thus finally account has been squared off.

5.6 The Id. A/R has also taken support from Hon'ble Supreme Court judgement in the case of CCE Vs. Andman Timber Industries and other judgements of various High Courts. On the other hand, Id. AR has submitted in the written submission in detail as to how the cases referred by AO are not applicable in the instant case of the appellant.

5.7 On the other hand, Id. CIT D/R relied upon the order of AO and also the finding given by Id. CIT(A). He further argued that the AO has issued the summon which returned unserved and the enquiries made by Id. CIT(A) resulted into the fact that the company is not in existence at the given address. He thus prayed that the lower authorities has rightly made and confirmed the loan and the same be uphold.

5.8. On perusal of the assessment order, it is noted that AO has considered the lender company namely M/s Inner Mercantile (P) Ltd. as 'shell company' and Id. A/R has argued that AO without any basis and without any material being brought on record, has just presumed the company to be 'shell company'. For considering this issue the order of AO was perused carefully and it was noticed that at para 5.2 (Page 2 of the assessment order), the AO has observed about this company being 'shell company'. For the sake of clarity the same para is reproduced below:-

"5.2 During the A.Y. 2014-15, the assessee has received unsecured loan from the following company in his proprietorship concern M/s Harsh Trade:-

<i>Sl.No.</i>	<i>Name & Address</i>	<i>Amount (Rs.)</i>
<i>1</i>	<i>M/s Inner Mercantile Pvt. Ltd.</i>	<i>4,18,48,000/-</i>

Investigation revealed that that this investor or lender was a company of no means and had been filing income on very low or negligible income. The high value banking transactions could not be co-related with any actual or tangible

business activity. It was found to be merely completing the paper formalities and using the banking channels to route the money which does not make these transaction ipso facto genuine. At best it qualifies them to be a paper/shell companies attempting to cloak the accommodation entries as genuine business transaction."

The basis of this finding has been on subsequent pages namely page 3 and 4 of the order. On perusing the details it is seen that letter u/s 133(6) so sent by the AO was returned unserved and considering this alongwith two more points, the AO has observed the company to be 'shell company'. The other two things are namely that there are no tangible or intangible assets of the company and profit of the company as seen from the profit & loss account (submitted by the Id. AR of the appellant) is very meager, though AO has herself mentioned in same para 6.6 of the order that company has got reserves and surplus to the extent of Rs. 36,36,90,414/-. It is thus seen that only on the basis of aforesaid observations the AO tried to infer that the lender company is 'shell company'. As against it, Id. AR has furnished the details and evidences firstly by way of PAN details and confirmation of the account from the lender company in order to prove the genuineness of the loan taken from the lender company. Moreover as notice u/s 133(6) sent by AO was returned unserved and AO wanted the director of lender company to appear before her which was not materialized as director being located from Jaipur and reluctant to appear before AO, the Id. AR furnished various further details and evidences before the AO in order to substantiate his claim. The balance sheet and profit & loss account of the lender company for AY 2014-15 and copy of the ITR was furnished before the AO. Moreover the copy of bank account of the lender company was also furnished to further substantiate about loan being genuine. Moreover, the Id. AR has submitted

that this company is not the defunct company and is active as it has been filing its financial statements on the online portal of Ministry of Corporate Affairs. Moreover, the company has never been declared a 'shell company' by the MCA. Other argument of the AO of profit being so meager is not of much relevance considering that she has herself rightly mentioned about reserve and surplus to the tune of Rs. 36,36,39,628/-. Other argument of no any tangible asset of the company is also not so relevant so as to treat the company as 'shell company', as there are many companies which have been accepting deposits and giving loans and these companies do not generally have physical assets in their balance sheet. Thus it is clear that the finding of the AO of the lender company namely M/s Inner Mercantile (P) Ltd. as 'shell company' on the basis of the aforesaid observations does not stand to merit in view of the discussion made as above regarding the observations of the AO and accordingly this finding of the AO of treating the company as 'shell company' is rejected and deserves to be ignored. It is seen that AR has brought to our notice that as on today no amount is outstanding and the loan was gradually repaid in various years and was completely repaid as of 31.03.2020. This also supports the aforesaid finding of existence of the company not being in doubt.

5.9 Now coming to the issue as to whether the loan so taken from the lender company M/s Inner Mercantile (P) Ltd. fulfils the parameters of genuineness as generally prescribed by the decisions of various courts. It is seen that the appellant has to prove (i) identity of creditor, (ii) creditworthiness of the creditor and (iii) genuineness of the transaction. In the instant case the appellant has proved the identity of creditor by not only furnishing the PAN details but also submitting that

company is not defunct and has been regularly filing its financial statement on online portal of MCA. The Id. AR has rightly pointed out that the non-service of notice u/s 133(6) may be due to shifting of office to other place or office being closed for that time. Thus identity and existence of lender company cannot be said to be non-genuine. The Id. CIT(A) on the basis of adverse inspector report about existence of the company has given its observation about company not being in existence. We are of the opinion that Id. CIT(A) has not properly appreciated the facts and report of the inspector alongwith the affidavits of the two shopkeepers filed by the Id. AR before the Id. CIT(A). As regards statement of Shri Ratan Lal Garwal is concerned, it is clear that he has not denied about the existence of M/s Inner Mercantile (P) Ltd. rather he has said that the company was working there. It was only the period for which he said that company was working till 5 – 7 years back but if his statement is seen in the background of the fact that same was given before a Government Authority without any pre-information and on some matter which is about 5 years old, there may be bound to the some marginal variation in the period. And it is the same case here. Now coming to the version of two shopkeepers, it is seen that in the affidavits of both the shopkeepers furnished before the Id. CIT(A), they have deposed about company M/s Inner Mercantile (P) Ltd. being working at the given address and statement so recorded by inspector being not as to what is orated by them and these affidavits remaining uncontroverted, the earlier report of the inspector cannot be given cognizance to the extent so as to over-ride the contents of affidavits. Thus considering the facts and in the circumstances of the case existence and identity of the lender company cannot be said to be non-genuine. Now coming to the creditworthiness of the lender company, the Id. AR has rightly pointed out

that the company had reserve and surplus amounting to Rs. 36,36,39,628/-, whereas advance given to the appellant is only to the tune of Rs. 4,47,43,000/-. Now coming to the genuineness of the transaction, the Id. AR has rightly pointed out that from perusal of the balance sheet of the lender company, it is seen that schedule 9 contained 'short term loans and advances' totaling to Rs. 21,39,99,802/- as on 31.03.2014 and on further perusal of details, it is seen that name of the assessee is appearing wherein debit balance of Rs. 4,47,43,000/- has been shown against the assessee (APB 19). It is seen that loan has been given through banking channels and from perusal of the copy of bank statement of the lender company so furnished before AO and also before us (APB 11-12), it is seen that amount has been duly debited in the bank account of the said company. We have also noted the submission of the Id. AR that there is no immediate cash deposit prior or even after to the giving of loan by the lender company to the assessee.

5.10 It has been brought to our notice of us by the Id. A/R that the same assessing officer for the same assessment year in other two cases of the group has accepted the loan received from the same lender company namely M/s Inner Mercantile (P) Ltd. as genuine without any adverse view related to existence of the company or creditworthiness of the company and without any adverse view regarding treating the lender company as 'shell company' in these two cases. Further as against the total loan of Rs. 4,47,43,000/- the AO has doubted the loan of Rs.4,18,48,000/- only and treated the balance as genuine though the facts and circumstances remained the same. Thus contrary view so taken by the same assessing officer on the same day or after three days in the assessment order passed in the instant case of

appellant treating the lender company M/s Inner Mercantile (P) Ltd. as non-existing and not creditworthy for giving loan against the view taken in these two cases treating the same lender company namely M/s Inner Mercantile (P) Ltd. as genuine and having worthiness capable of giving loan, deserves to be rejected and consequent addition so made in the instant case of appellant deserves to be deleted.

5.11 Considering the overall facts as discussed herein above and in the circumstances of the case, the addition so made by the Id. AO by treating the loan from lender company namely M/s Inner Mercantile (P) Ltd. as non-genuine is hereby deleted.

6. In the result, this appeal of the assessee is allowed.

Order pronounced in the open court on 17/04/2023.

Sd/-
(राठौड़ कमलेश जयंतभाई)
(RATHOD KAMLESH JAYANTBHAI)
लेखा सदस्य / Accountant Member

Sd/-
(संदीप गोसाईं)
(SANDEEP GOSAIN)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 17/04/2023.

Das/

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shri Ratan Lal Agarwal, Jaipur.
2. प्रत्यर्थी / The Respondent- The SCIT, Central Circle-1, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 738/JP/2019}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar

