

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**MUMBAI BENCH “SMC” MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)**  
**AND**  
**MS. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)**

**ITA No. 1252/MUM/2023**  
**Assessment Year: 2011-12**

Smt. Lalitha Kothari  
2/4, Dr. Rajendra Prasad Nagar,  
Western Express Highway, Vile  
Parle East, Near Airport Side  
Service Road, Mumbai City,  
Maharashtra-400099.

**PAN NO. AACPL 3131 F**

**Appellant**

**Vs.**

The ITO Ward-25(2)(5),  
Kautilya Bhavan,  
Bandra Kurla Complex,  
Bandra (East)  
Mumbai-400051.

**Respondent**

**Assessee by** : Ritesh Jain  
**Revenue by** : Ms. Indira Adakil, DR

Date of Hearing : 04/07/2023  
Date of pronouncement : 10/07/2023

**ORDER**

**PER OM PRAKASH KANT, AM**

This appeal has been preferred by the assessee against order dated 13.02.2023 passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short ‘the Ld. CIT(A)’] for assessment year 2011-12, raising following grounds:

1. *On the facts and the circumstances of the case and as per law, the Ld. CIT(A) has erred in confirming the addition made by the Ld. Assessing Officer.*
2. *On the facts and the circumstances of the case and as per law, the Ld. CIT(A) has erred in confirming the*



*additions made by the Ld. Assessing Officer on account of unexplained investment u/s.69C of the Act amounting to Rs.29,10,000/-.*

3. *3. On the facts and the circumstances of the case and as per law, the Ld. CIT(A) has erred in confirming the additions made by the Ld. Assessing Officer without appreciating the fact that the addition was framed on issue unrelated to reopening when the Ld. AO has not made addition on the original issues of re-opening.*

2. Briefly stated facts of the case are that no regular return of income was filed by the assessee for the year under consideration. On specific information of the transaction of the assessee in multi commodity exchange and cash deposit in Kotak Mahindra Bank, the case of the assessee was reopened by way of notice issue u/s 148 of the Income-tax Act, 1961 (in short 'the Act'). In the course of assessment proceedings in relation to information of the commodity trading, the Assessing Officer found a loan of Rs.29,10,000/- from M/s Satyam Sai Builders Pvt. Ltd. which the assessee failed to justify in terms of section 68 of the Act as the assessee could not substantiate identity, creditworthiness and genuineness of the transaction in respect of loan. The Assessing Officer added the same as unexplained cash credit. The Assessing Officer further noted that in the case of said company, share application money was received by way of anaccommodation entry of Rs.1,25,00,000/- was added u/s 68 of the Act. On further appeal by the assessee, the Ld. CIT(A) upheld the addition observing as under:



“5.2.1. On perusal of the financials of M/s Satyam Sai Builders Pvt. Ltd.; the AO found that the company has paid up capital of Rs. 16,50,000/- as on 31.3.2011 and has declared loss of Rs. 10061/- for F.Y 2010-11. The company has taken unsecured loan of Rs. 29,10,526/- and advance loan to Lalita Kothari for Rs.29, 10,000/-. During the year it has shown receipt of share application money of Rs.1,25,00,000/- and advanced loans of Rs. 1,11,54,090/-. The appellant has mentioned that 'M/s Satyam Sai Builders' has been assessed u/s 143(3) of I.T. Act for both the A. Y. 2011-12 and A. Y. 2012-13 by ITO- Surat, wherein the entire Share Capital and Share Premium has been added as unexplained cash credit u/s 68 of I.T. Act and has been treated as its Income. The appellant has argued that in case of 'Satyam Sai Builders' the high net worth of the company has been duly established by the Income Tax Department itself. The AO concluded that though the loan transaction has been made through bank, the source of the loan of Rs.29, 10,000/- was from a party whose genuineness and creditworthiness was not proved and this was a bogus transaction without any authenticity and the AO treated the loan received by appellant to the tune of Rs.29,10,000/- as unexplained investment u/s 69C of the Act.

5.3. All the facts of the case, Grounds of appeal, statement of facts, online submissions of the appellant and the case laws cited and the assessment order are considered. During appellate proceedings, the appellant has submitted that 'M/s.Satyam Sai Builders (P) Ltd.' have settled the tax dispute arising on the count of addition in Form of Share Capital and Share Premium under the "The Direct Tax Vivad Se Vishwas Act 2020" introduced in the Union Budget 2020-21, M/s. Satyam Sai Builders (P) Ltd. have already filed the necessary form in this regard to the Principal Commissioner of Income Tax, Surat and have already received "FORM-5 Order For Full And final settlement of tax arrear under section 5 (2) read with section 6 of The Direct Tax Vivad Se Vishwas Act. 2020 (3 Of 2020) The Direct Tax Vivad Se Vishwas Rules, 2020" For The A.Y. 2012-13. The appellant has argued that in her case the "Source of Fund" is already considered as the income of the 'M/s. Satyam Sai Builders



*(P) Ltd.' so the expenditure incurred from the same cannot be treated as unexplained.*

*5.3.1. The case laws relied upon by the appellant have been perused and it is found to be distinguishable in facts. It is a fact that Law casts an obligation on the assessee to establish by cogent evidence the genuineness of the transaction, identity of the creditors and the credit worthiness of the creditor, to the satisfaction of the Assessing officer, so as to discharge the initial onus under Section 68 of the Act. It is for the assessee to prove by credible evidence that the transactions are genuine. In a recent judgment of the Honible Supreme Court in the case of Principal Commissioner of Income Tax (Central) -1 vs NRA Iron & Steel Ltd, 2019 SCCOnLine SC 311, wherein it has been held as under:*

*"This Court in the land mark case of Kale Khan Mohammad Hanif v. CIT and, Roshan Di Hattiv. CIT laid down that the onus of proving the source of a sum of money found to have been received by an assessee, is on the assessee. Once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness, then the AO must conduct an inquiry, and call for more details before invoking Section 68. If the Assessee is not able to provide a satisfactory explanation of the nature and source, of the investments made, it is open to the Revenue to hold that it is the income of the assessee, and there would be no further burden on the revenue to show that the income is from any particular source. 8.3. With respect to the issue of genuineness of transaction, it is for the assessee to prove by cogent and credible evidence, that the investments made in share capital are genuine borrowings, since the facts are exclusively within the assessee's knowledge.'*

*The Delhi High Court in CIT v. Oasis Hospitalities Pvt. Ltd., held that:*

*"The initial onus is upon the assessee to establish three things necessary to obviate the mischief of Section 68. Those are: (i) identity of the investors; Til*



*their creditworthiness/investments; and (iii) genuineness of the transaction. Only when these three ingredients are established prima facie, the department is required to undertake further exercise "*

*In Sumati Dayal v. CIT this Court held that*

*"if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory, there is prima facie evidence against the assessee, vis., the receipt of money, and if he fails to rebut the same, the said evidence being unrebutted can be used against him by holding that it is a receipt of an income nature. While considering the explanation of the assessee, the department cannot, however, act unreasonably"*

*In CIT v. P. Mohankala this Court held that:*

*"A bare reading of section 68 of the Income tax Act, 1961, suggests that (i) there has to be credit of amounts in the books maintained by the assessee; (j) such credit has to be a sum of money during the previous year; and (ii) either (a) the assessee offers no explanation about the nature and source of such credits found in the books or (b) the explanation offered by the assessee, in the opinion of the Assessing Officer, is not satisfactory. It is only then that the sum so credited may be charged to Income-tax as the income of the assessee of that previous year. The expression "the assessee offers no explanation" means the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. The burden is on the assessee to take the plea that, even if the explanation is not acceptable, the material and attending circumstances available on record do not justify the sum found credited in the books being treated as a receipt of income nature."*

*A Division Bench of the Bombay High Court in the case of Orient Trading Co. Ltd vs Commissioner of Income Tax*



(Central), Calcutta, 1962 SCC OnLine Bom 175 held as under:

*"When cash credits appear in the accounts of an assessee, whether in his own name or in the name of third parties, the Income-tax Officer is entitled to satisfy himself as to the true nature and source of the amounts entered therein, and if after investigation or inquiry he is satisfied that there is no satisfactory explanation as to the said entries, he would be entitled to regard them as representing the undisclosed income of the assessee. When these credit entries stand in the name of the assessee himself, the burden is undoubtedly on him to prove satisfactorily the nature and source of these entries and to show that they do not constitute a part of his business income liable to tax. When, however, entries stand not in the assessee's own name, but in the name of third parties, there has been some divergence of opinion expressed as to the question of the burden of proof.*

*In Radhakrishna Behari Lal v. Commissioner of Income-tax, the Patna High Court held that though when the cash credits stood in the assessee's name the burden of proof was upon him to show that the receipts were not of an income nature, the position was different in regard to sums which were shown in the assessee's books in the names of third parties. In the latter kind of cases the onus of proof was not upon the assessee to show the sources or nature of the amount of the cash credit, but the onus shifted on to the department to show by some material that the amount standing in the name of the third party did not belong to him but belonged to the assessee. This view was not accepted by the Andhra Pradesh High Court, where a contrary view was taken. In M. M. A. K. Mohideen Thamby & Co. v. Commissioner of Income-tax, that court held, dissenting from the Patna view, that with regard to the credit entries in the names of partners as well as credit entries in the names of third parties appearing in the accounts of the partnership, the burden is on the assessee to explain the entries and show positively their nature and sources.*



*In the absence of a satisfactory explanation, it is open to the department to infer that the moneys belonged to the assessee and represented his suppressed income. The same view was also taken in another case of the same High Court in Raghava Reddi v. Commissioner of Income-tax.*

*The view expressed by Subba Rao C.J. (as he then was) in Raghava Reddi v. Commissioner of Income-tax, at page 948 of the report, is as follows:*

*"We do not think that the question of burden of proof can be made to depend exclusively upon the fact of a credit entry in the name of the assessee or in the name of a third party. In either case, the burden lies upon the assessee to explain the credit entry, though the onus might shift to the Income-tax Officer under certain circumstances. Otherwise a clever assessee can always throw the burden of proof on the income-tax authorities by making a credit entry in the name of a third party either real or pseudonymous.*

*5.3.2 The principles which emerge where sums of money are credited as unsecured loan are:*

*i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus. li. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/ subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.*

*iii. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established. In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act.*



*In the instant case, it is noted that the party extending the unsecured loan 'M/s.Satyam Sai Builders (P) Ltd.' has been assessed u/s 143(3) of I.T. Act for both A. Y.2011-12 and A. Y. 2012-13 by ITO- Surat, wherein the entire Share Capital and Share Premium has been added as unexplained cash credit u/s 68 of I.T. Act and the party has opted for VSVS Scheme on these issues. The argument of the appellant that this fact establishes the genuineness and credibility of the 'M/s. Satyam Sai Builders (P) Ltd. is highly misplaced; on the other hand, this fact about the party cast undeniable doubts that the transactions entered by the appellant with the said party are under cloud of doubt and bogus. Thus, in the instant case, the appellant is found to have proved the Identity of the party extending the loan but has failed to prove the Creditworthiness and Genuineness of the transactions. I find no reason to interfere with the addition of Rs.29,10,000 u/s 69C of The I. T. Act, 1961 done by the AO. In the light of above discussion, the addition of Rs.29,10,000/- is upheld and appeal on Ground Nos. 1, 2 & 3 are dismissed."*

3. We have heard rival submission of the parties and perused the relevant material on record. Before us, the Ld. Counsel of the assessee has submitted that the said unsecured loan party has already declared the amount at Rs.1,25,00,000/- under the 'Direct taxes Vivad Se Vishwas Scheme' and paid the due taxes ,therefore, the source of credit extended to assessee stands explained. During the course of hearing the Ld. Counsel of the assessee was asked to provide evidence in support the addition which was declared corresponding to declaration under Vivad Se Vishwas Scheme along with relevant assessment and appellate orders in respect of said party. However, the Ld. Counsel of the assessee expressed inability in producing readily all those documents. In the facts and



circumstances of the case, we feel it appropriate to restore the matter back to the file of the Ld. CIT(A) with the direction that if the contention of the assessee that source of the unsecured loan extended to the assessee is established by way of addition accepted under Vivad Se Vishwas Scheme after due payment of the tax, then no addition for unsecured loan can be added u/s 68 of the Act. The grounds of appeal of the assessee are accordingly allowed for statistical purposes.

4. In the result, the appeal filed by the assessee is allowed for statistical purposes.

**Order pronounced in the open Court on 10/07/2023.**

**Sd/-**  
**(KAVITHA RAJAGOPAL)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(OM PRAKASH KANT)**  
**ACCOUNTANT MEMBER**

Mumbai;  
Dated: 10/07/2023  
Rahul Sharma, Sr. P.S.

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,  
(Assistant Registrar)  
**ITAT, Mumbai**