

**IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR**

**BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER**

I.T.A. No. 212/Asr/2019
Assessment Year: 2015-16

Assistant Commissioner of Income Tax, Circle-1, Jammu	Vs.	Mohd. Ashraf Sheikh, 11, Omar Colony, Near Malik Market, Narwal, Jammu [PAN: BKJPS 6328B]
(Appellant)		(Respondent)

Appellant by : Sh. Vinay Jamwal, CA

Respondent by: Smt. Ratinder Kaur, Sr. DR

Date of Hearing: 12.07.2023

Date of Pronouncement: 26.07.2023

ORDER

Per Dr. M. L. Meena, AM:

This appeal has been filed by the Revenue against the order of the Ld. Commissioner of Income Tax (Appeals)-1, Ludhiana dated 29.01.2019 in respect of Assessment Year 2015-16.

2. The Revenue has raised the following grounds of appeal:

- “1. *Whether in the facts and circumstances of the case and in law the Ld. CIT(A) was in error in deleting the addition made by the AO on account of unverified sundry creditors without appreciating the facts of the case and material brought on record which remained uncontroverted.*
2. *Whether in the facts and circumstances of the case and in law the Ld. CIT(A) was in error in not appreciating the law laid down by the Hon'ble Supreme Court of India in the case of NRA Iron and Steel Pvt. Ltd., where the Apex Court while discussing genuineness of share capital laid down the general principles that would apply to judge the genuineness of a transaction, creditworthiness etc.*
3. *Whether in the facts and circumstances of the case and in law the Ld. CIT(A) was in error in holding that onus had shifted to AO without appreciating that assessee had failed to discharge the primary onus that rested upon it.*
4. *Whether in the facts and the circumstances of the case and in law, the Ld. CIT(A) was in error in placing reliance on affidavits filed by the assessee which do not qualify as evidence.*

The appellant craves leave to amend or add any one or more grounds of appeal.”

3. Briefly, the facts as per record are that the AO has noted that the assessee has shown large sundry creditors in the course of scrutiny proceeding. The AO has provided sufficient opportunities to the appellant assessee to prove the identity of creditor, creditworthiness and genuineness of transactions with supporting evidences, such as the bank statement and

ITR of the disputed creditors. However, the assessee failed to prove the creditworthiness and genuineness of the creditor to the satisfaction of the AO in respect of the following creditors:

SI No.	Name of the assessee	Amount advanced	
(a)	Jan wani Mohammed	40,00,000	Rs. 30 lacs from Bhawani Singh and Rs. 10 lakhs from Shri Kuldeep Singh
(b)	Mahammed Ramzan Ganie	1900000	
(c)	Bashir Ahmed Munshi	1200000	
(d)	Bilal Ahmed Kakroo	700000	
(e)	Shri Mir ShakeelAhmed	700000	
(f)	Mohd Mushtaq Ahmed	1595000	
(g)	Abdul Wahid Zargar	200000	
(h)	Smt Shamina Zohara	300000	
(i)	Namaz U1 Haq	3250000	
(j)	Ali Akhtar	900000	
(k)	Shri Ghulam Mohammad Bhat	4100000	
(l)	Manzoor Ahmed Bhat	850000	
(m)	Mahammad Hussain	500000	
(n)	Talat Parveen	3700000	
(o)	Shri Tarvez Khan	550000	
(P)	Shri Zahoor Steel Works	1100000	
	Total	25545000	

3.1 The AO has mentioned that though the assessee has tried to make an attempt by providing simple certificate to certify the mode of transaction entry, yet the assessee has failed to the prove the identity of creditors by not providing any documents such as ITR, PAN and bank account

statement. In the absence of proper source of income, the creditworthiness of the above mentioned creditors has not been proved. Accordingly, the AO held that these credits cannot be accepted as genuine and hence addition of a sum of Rs. 25545000/- was made u/s 68 of the Income Tax Act, 1961 to the return income of the assessee.

4. The assessee being aggrieved with the Assessment Order, went in appeal before the Ld. CIT(A) who has granted relief to the assessee by observing as under:

“4. In the appellate proceedings, the appellant, through his Authorized Representative reiterated the arguments made before the AO and again submitted copies of the receiving bank certificates in respect of the persons who had made the advances for purchase of land parcels, which advances were reflected as sundry creditors in the accounts of the appellant. In addition to the above, notarized affidavit from the said persons affirming payment of the respective amount as advance for land through banking channel in the account of the appellant, was filed. The said affidavits also confirmed that sale deed of the respective parcels of land have not yet been registered before the Registering Authority.

*5. In addition to the above, reference was made of the decision rendered by the Hon'ble High Court of Delhi in the case of **CIT Vs. Kamdhenu Steel & Alloys Ltd. & Ors.[2012] 248 CTR 33** and other judicial precedents to canvass the proposition that the appellant had fully discharged its onus of explaining the credit in his accounts.*

6. On a careful consideration of the aforesaid facts and evidences brought on record before the AO as well as in the present appellate proceedings, the AO's action of treating the advances received by the customers of the appellant as deemed income within the meaning of section 68 of the Act in the face of overwhelming evidence regarding the existence, credit worthiness and the

genuineness of the credit transactions, cannot be countenanced. It is a fact on record, which has not even been disputed by the AO that the appellant deals in real estate in terms of selling land parcels to desirous customers. As per the regular practice of the appellant, advances were received prior to the execution of the sale deed of the land parcels. It was also categorically pointed out before the AO, which remained undisputed, that none of the aforesaid advances were in cash and that without exception all the advances were received in the appellant's bank account maintained with J & K bank through the banking channels of the customers. Certificates to this effect from the appellant's banker in respect of each of the receipt of the aforesaid advances was adduced before the AO during the course of the assessment proceedings. Such evidence not only established the existence of the customers/advance givers but also established the genuineness of the credit transactions, besides proving the credit worthiness of the customers in as much as the disputed advances were transferred through the customers' bank accounts. The appellant, thus, cannot be said to have been in any default in discharging his onus with regard to explaining the credit in his accounts. It is a well established principle of law that in any matter, the onus brought upon a taxable entity/assessee is not static. Though the initial burden is upon the assessee, once he proves the identity of the credits and shows the genuineness of the transaction by showing that the money in the bank is by account payee cheques or by draft etc., then the onus to disprove the same rests/shifts on the person challenging the same. The AO, without challenging the certificates produced before her as suspect or rendered in sufficient, demanded more proof from the appellant, even when the other credits in the bank account purported to have been received through the customers as advances were accepted as genuine on being supplemented by the affidavit from the customers. In the appellate proceedings, the appellant re-submitted the bank certificates in case of each of the disputed credits, which were supplemented by notarised affidavits, in original, from the customers, affirming the payment of respective amount as advance for purchase of land and further confirming that the registration has not yet been effected, justifying the averment of sundry creditors in the accounts on account of such advances from the customers. The credits in the appellant's accounts on account of such advances from his customers cannot at all be considered as unexplained for the deeming provision of section 68 to be invoked. In the circumstances, the AO's action in treating the aforesaid credit of Rs.2,55,45,000/-as unexplained and, thus, deemed income within the meaning of section 68 of the Act, cannot be sustained. The disputed addition to the returned income is directed to be deleted. It is ordered accordingly.”

5. The department being aggrieved with the impugned appellate order, is in appeal before us. The Ld. DR for the Department has submitted that the Ld. CIT(A) was in error on facts and law in deleting the addition made by the AO on account of unverified sundry creditors without appreciating the facts of the case and material brought on record which remained uncontroverted by the appellant assessee and that he has not appreciated the principle laid down by the Hon'ble Supreme Court of India in the case of "PCIT Vs. NRA Iron and Steel Pvt. Ltd.", 412 ITR 161 (SC) where the Apex Court while discussing genuineness of share capital laid down the general principles that would apply to judge the genuineness of a transaction, and creditworthiness of the creditor. He further submitted that the Ld. CIT(A) was in error in holding that onus had shifted to AO without appreciating the primary facts that assessee had failed to discharge the primary onus that rested upon it the reliance placed on affidavits filed by the assessee are self-serving which do not qualify as evidence in absence of substantiating the content of the affidavits with corroborative documentary evidences. He prayed that the impugned order of the CIT(A) may be reversed and that assessment order be restored.

6. Per contra, the Ld. AR for the Assessee has supported the impugned order. He submitted that he had received advances from the buyers against Land Parcels and all such advantage were received either through account payee check or bank transfer only and none of the advances were received in cash. The learning they are submitted that some of the buyers from whom the advances received were not cooperated with the assess as the government had put on hold the execution of sale deeds of such land parcels gayer Mumpkin Khat Dari against which the buyers had given part payments as advance is common therefore the assessee provided bank certificates specifying the name date and amount transferred to the assessee for justifying that the payment received were genuine and buyers were identified. The learned council for the SC submitted that after consistent pursuance with the said buyers from whom the advance is received the assessee had managed to obtain affidavits and bank statements oblique bank certificates in all the cases which were subject matter of addition under section 68 of the income tax at 1961. He contended that the sad bank statements oblique banks certificates and affidavits submitted for the CIT (Appeals) is specifying specifically mentioned the name, address, purpose and amount paid to the assessee

by the buyers. The learned AR reiterated the submissions citations filed before the CIT (Appeal). Council for the assesses further submitted that Supreme Court Judgement in the case of PCIT vs Nra iron and steel Pvt Ltd (supra) is distinguishable on facts of the case as in that case assessing officer conducted detailed inquiry an identity of the parties was under serious doubt Christoph however, nothing of that sort has done in this case. He prayed that the CIT appeal order may be sustained.

7. We have heard the rival contentions, perused the material on record, impugned order, written submission and case law cited before us. Admittedly, the persons who had made the advances for purchase of land parcels, from the appellant assesse were reflected as sundry creditors in the books of accounts of the appellant. It is seen that the assessee has been given several opportunities by the AO, the appellant has failed to explain source of income in respect of the disputed creditors by its failure to prove the identity of the creditors, creditworthiness and genuineness of the transaction by way of any documentary evidences such as ITRs, PAN and bank statement of the creditors before the AO. Merely filing Simple certificate certifying the mode of transaction entry is not sufficient to prove the source of income and in turn the credit worthiness of the disputed

creditors on record. Meaning thereby that the assessee has failed to discharge is primary onus in respect of the disputed creditors before the AO.

8. The Ld. AR has reiterated the same arguments before the CIT(A) and before us what was made before the AO. He focused on the copies of the bank certificates in respect of the persons who had made the advances for purchase of land parcels, which advances were reflected as sundry creditors in the accounts of the appellant besides notarized affidavit from the said persons affirming payment of the respective amount as advance for land through banking channel in the account of the appellant before the Ld. CIT(A) wherein it was also confirmed that sale deed of the respective parcels of land have not yet been registered before the Registering Authority. The observation of the Ld. CIT(A) that facts and evidences brought on record before the AO as well as in the present appellate proceedings, the AO's action of treating the advances received by the customers of the appellant as deemed income within the meaning of section 68 of the Act, in the face of overwhelming evidence regarding the existence, credit worthiness and the genuineness of the credit transactions,

cannot be countenanced is factually incorrect as no such evidences of notarized affidavits and ITRs of the creditors were filed before the AO.

9. The observation of the Ld. CIT(A) that evidence not only established the existence of the customers/advance givers but also established the genuineness of the credit transactions, besides proving the credit worthiness of the customers in as much as the disputed advances were transferred through the customers' bank accounts and that the appellant, thus, cannot be said to have been in any default in discharging his onus with regard to explaining the credit in his accounts are not in conformity to law. In our view, the principle of law is that in any matter, the primary onus lies on a taxable entity/assessee in respect of the unexplained amount found credited by way of advances or deposits irrespective of the nature of business of the assessee. The Ld. CIT(A) rather alleging the AO, that without challenging the certificates produced before her as suspect or rendered insufficient, demanded more proof from the appellant, even when the other credits in the bank account purported to have been received through the customers as advances were accepted as genuine on being supplemented by the affidavit from the customers are based on wrong

premise without either being rebutted to the AO or controverted the finding of fact given by the AO.

10. From the above, it is evident that the disputed addition of deemed income on account of unexplained creditors u/s 68 of the Act is made by the AO against the unverified sundry creditors after considering the facts of the case and material brought on record which remained uncontroverted by the appellant assessee. The Ld. CIT(A) has not appreciated the facts of the case in view of the principle laid down by the Hon'ble Supreme Court of India in the case of "PCIT Vs. NRA Iron and Steel Pvt. Ltd.", 412 ITR 161 (SC) where the Apex Court while discussing genuineness of share capital laid down the general principles that would apply to judge the genuineness of a transaction, and creditworthiness of the creditor, as under:

"8.1 The issue which arises for determination is whether the Respondent / Assessee had discharged the primary onus to establish the genuineness of the transaction required under Section 68 of the said Act.

Section 68 of the I.T. Act (prior to the Finance Act, 2012) read as follows:

"68. Cash credits- Where any sum is found credited in the book 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 Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the Assessee of that previous year" (emphasis supplied) The use of the words "any sum found credited in the books" in Section 68 of the Act indicates that the

section is widely worded, and includes investments made by the introduction of share capital or share premium.”

8.2 *As per settled law, the initial onus is on the Assessee to establish by cogent evidence the genuineness of the transaction, and credit-worthiness of the investors under Section 68 of the Act.*

The assessee is expected to establish to the satisfaction of the Assessing Officer:

- *Proof of identity of the creditors;*
- *Capacity of creditors to advance money; and*
- *Genuineness of transaction*

Proof of Identity of the creditors; CIT v. Precision Finance Pvt. Ltd. (1994) 208 ITR 465 (Cal).

Capacity of creditors to advance money; and • Genuineness of transaction This Court in the land mark case of Kale Khan Mohammad Hanif v. CIT3 and, Roshan Di Hatti v. CTT4 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.*

[1963] 50 ITR 1 (SC) [1977] 107 ITR (SC) The Delhi High Court in CIT v. Oasis Hospitalities Pvt. Ltd. 5, 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; (ii) 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.” It has been held that merely proving the identity of the investors does

not discharge the onus of the assessee, if the capacity or credit-worthiness has not been established.”

In Shankar Ghosh v. IT06, the assessee failed to prove the financial capacity of the person from whom he had allegedly taken the loan. The loan amount was rightly held to be the assessee’s own undisclosed income.

11. *The principles which emerge where sums of money are credited as Share Capital/Premium are:*

- *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.*
- *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.*
- *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.”

11. In the present case, the assessee has failed to establish genuineness of the transaction, and credit-worthiness, before either of the authorities below and the assessee has not been able to provide a satisfactory explanation of the nature and source, of the investments made, by the creditors in the form of advances against the alleged purchases of land parcels which haven’t been even registered in their name. In our view the it is the case of the AO to hold that it is the income of the assessee, and the initial and primary onus is not discharged by the appellant assessee and

therefore, the Ld. CIT(A) was not justified in holding that the assessee has discharged its burden by submitting bank statements/certificates and affidavits of the creditors. The Ld. AR for the appellant has failed to rebut the contention of the department and the latest judgement of Hon'ble Apex Court "PCIT Vs. NRA Iron and Steel Pvt. Ltd.", (Supra), although delivered on bogus share capital but squarely applicable to the facts of the instant case of raising bogus funds through creditors against sale of land parcels without sale/purchase transactions. The part citations relied by the assessee and the CIT(A) are considered by the Hon'ble Apex Court and other are distinguishable on peculiar fact of the instant case.

12. It is pertinent to mention that the Ld. CIT(A) has deleted the addition base on affidavits of confirmations from creditors to show that entire amount had been paid through normal banking channels, and hence discharged initial onus under section 68 for establishing credibility and identity of shareholders. However, we found that the Ld. CIT(A) did not even either advert to cause field enquiry under co-terminus power equal to the AO or else called for a remand report from the AO in rebuttal which revealed that assessee failed to discharge primary onus to establish identity of the creditors from whom advances being received against the

land parcels without sale transaction. In our view, entire transaction with the creditors seemed bogus, and lacked credibility. Merely because assessee had filed all primary evidence, it could not be said that onus on assessee to establish creditworthiness of creditors stood discharged.

13. The Hon'ble SUPREME COURT OF INDIA in another case of "Assistant Commissioner of Income-tax vs. Kantilal Exports Surat" [2023] 150 taxmann.com 172 (SC) has held that order passed by High Court was to be set aside and order of Tribunal confirming addition was to be restored by observing vide para 9 that the High Court could not have deleted said addition by relying on affidavits of typist and a Chartered Accountant and accepting submission on behalf of assessee that there was a typographical error in audit report as under:

Before the Assessing Officer, though it was the specific case on behalf of the assessee that the figure of 4.30 lakhs was a typing mistake, except the statement of the assessee, no further material was produced before the Assessing Officer. Therefore, the Assessing Officer proceeded further with the assessment taking into consumption of 4.30 lakhs carats. That thereafter, considering the figure of yield in different assessment years, the Assessing Officer came to the conclusion that the percentage of the yield would be ranging between 10-18 per cent. That thereafter, the Assessing Officer specifically gave the finding that taking into consideration the figures on record for the relevant year under consideration, the yield would come to 24 per cent. Therefore, taking into consideration the average yield in the last assessment years, the Assessing Officer treated the same as unexplained income and made the additions of Rs. 17.50 crores under section 69C. The Tribunal has concurred with the said findings. As observed hereinabove, solely relying upon the statements of the Typist and the Chartered Accountant, the High Court has reversed the findings of the Assessing Officer as well as

the Tribunal. The High Court has also not properly appreciated and considered the fact that the affidavits were filed for the first time before the Tribunal. The High Court has also not at all considered the conduct on the part of the assessee, which came to be considered in detail by the Tribunal in para 10 of the order passed by the Tribunal. It was found that there has been search in the case of the assessee and its group concern on 7-1-1999 which was concluded on 23-3-1999 and during the course of the search, duplicate cash book, ledger and other books showing the unaccounted manufacturing and trading arrived at by the assessee in diamonds were found. The Tribunal has also noted that the huge addition was made in the case of assessee's group in the block assessment on the basis of the books so found. Therefore, it was found that the assessee was maintaining the books of account outside the regular books. The aforesaid has not at all been considered by the High Court, while passing the impugned order. [Para 9]

14. Thus, the Ld. CIT(A) was in error in holding that onus had shifted to AO without appreciating the primary facts that assessee had failed to discharge the primary onus that rested upon it, by relying on affidavits filed by the assessee which were self-serving and which do not qualify as evidence in absence of substantiating the content of the affidavits with corroborative documentary evidences. Following the latest judgement of the Hon'ble Apex Court in case of "Assistant Commissioner of Income-tax vs. Kantilal Exports Surat" (Supra), the Ld. CIT(A) ought to have confirmed the addition made by the AO, u/s 68 of the Act.

15. Considering the peculiar factual matrix and the judicial pronouncements, we hold that merely because assessee had filed all primary evidence, it could not be said that onus on assessee to establish creditworthiness of disputed creditors stood discharged. Accordingly, in our

considered view, Assessing Officer was justified in passing assessment order making additions under section 68 for the creditors of the appellant assessee.

16. In view of above discussion, we hold that the order passed by the Ld. CIT(A) is infirm and perverse to the facts on record. Therefore, the impugned order of the CIT(A) passed u/s 250 of the Act is reversed and that Assessment order is sustained.

17. In the result, the appeal of the Revenue is allowed.

Order pronounced in the open court on 26.07.2023

Sd/-
(Anikesh Banerjee)
Judicial Member

Sd/-
(Dr. M. L. Meena)
Accountant Member

GP/Sr.PS

Copy of the order forwarded to:

- (1) The Appellant:
- (2) The Respondent:
- (3) The CIT(Appeals)
- (4) The CIT concerned
- (5) The Sr. DR, I.T.A.T.

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By Order