

IN THE INCOME TAX APPELLATE TRIBUNAL GUWAHATI BENCH, GUWAHATI

**BEFORE DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER
AND SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER**

**ITA No. 70/GTY/2020
Assessment Year: 2016-17**

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| Divyamala Prakash Flat No. 6A, Syndicate Marble, Six Mile Radhanagar, Guwahati-784036. PAN: BPMPP 6934 E (Appellant) | Vs. | ITO, Ward-1, Tezpur (Respondent) |
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Present for:

Appellant by : None
Respondent by : Shri Arun Bhowmick, JCIT

Date of Hearing : 02.11.2023
Date of Pronouncement : 29.11.2023

ORDER

PER SONJOY SARMA, JM:

This appeal of the assessee for the assessment year 2016-17 is directed against the order dated 14.01.2020 passed by the ld. Commissioner of Income-tax (Appeals) -1, Guwahati [hereinafter referred to as 'the ld. CIT(A)'].

2. The case of the assessee was fixed for hearing through virtual mode. However, there was no representation on behalf of the assessee. Though valid notice of hearing duly served upon the assessee fixed in the date of hearing but no one turned up. Therefore, there was no representation on behalf of the assessee nor any adjournment application has been received through physical mode/e-mail with the bench clerk. We, therefore, adjudicate the appeal of the assessee on the basis of material available on record with the assistance of ld. DR ex-parte qua. The assessee has raised the following grounds of appeal:

i. For that the assessment order passed u/s 143(3) is not based on correct facts and findings and is erroneous on points of law.

ii. For that on the facts and circumstances of the case as well as on the points of law, the ld. AO erred in making an addition of Rs. 33,50,000/- u/s 69A of the Income Tax Act, 1961 and the ld. CIT(A) also erred in confirming the same.

iii. For that on the facts and circumstances of the case as well as on the points of law, the ld. AO erred in disallowing the set off loss of Rs. 100542/- against income from business and profession and the ld. CIT(A) also erred in confirming the same.

iv. For that any other ground/grounds may kindly be allowed to be urged at the time of hearing.”

3. Brief facts of the case are that assessee filed her return of income by showing income of Rs. 3,07,931/-. The case of the assessee was selected for limited scrutiny under CASS followed by notice issued u/s 143(2) and 142(1) of the Act. The ld. AO directed the assessee to furnish the bank statement broker's ledger of security transactions for contract notes of all security transactions, profit & loss account of securities for the assessment year in question. In compliance to the same, assessee duly responded and furnishes the details as asked for. The ld. AO while framing the documents furnished by the assessee noticed that assessee has made payment of Rs. 33,40,000/- to M/s. Sharekhan, a brokerage company of securities. However, the assessee received a sum of Rs. 33,50,000/- from six persons on various dates by cheques as well as RTGS.

4. The ld. AO in order to verify the same further issued a letter dated 22.11.2018 to the assessee asking her to provide the names and address of the parties from whom such money was received. In compliance to the notices, ld. AR of the assessee furnished the names of

the persons from whom she had received such loan. He also provided ITR-V of returns filed on such persons before the ld. AO. While framing the assessment, the ld. AO in order to verify the transactions issued summons u/s 131 of the Act to the persons who provide unsecured loan to the assessee. However, in response to the summons no one turned up before the AO. Therefore, the ld. AO had taken adverse interference against the assessee adding a sum of Rs. 33,50,000/- in the hands of assessee as unexplained money by invoking section 69A of the Act. He also disallowed the setting off loss of Rs. 1,00,572/- against the income from business or profession.

5. Dissatisfied with the above order, assessee went into appeal before the ld. CIT(A) and assessee had made detailed submission along with filing additional evidence in support of her contention. The assessee has filed its submission before the ld. CIT(A) which is in following manner as under:

“Regarding addition of Rs. 33,50,000.00 (Ground No. 2)

1.1 That Madam, during the financial year 2015-16 the appellant had received loans amounting to Rs. 33,50,000.00 (Rupees Thirty Three Lakhs Fifty Thousand only) from the persons as appended below:

| Sl No. | Name | Pan No | Date | RTGS/Cheque No | Amount |
|--------|--------------------------------------------------------------|------------|------------|----------------------------|-----------|
| 1 | Anowar Hussain Mangaldoi, Assam-784115 | ADXPH2881C | 11.02.2016 | SBINRS20160211251125885249 | 900000.00 |
| 2 | Mahamaya Saha Natunpatty Mangaldoi Assam-784115 | CPPPS2505Q | 01.02.2016 | UCBAH16032000407 | 300000.00 |
| 3 | Abdul Kuddus Ward No. 02, Mangaldoi Assam-784125 | AXPPK5119A | 12.02.2016 | PUNBRS2016021210017019 | 650000.00 |
| 4 | Alifuddin Ahmed Ward No. 5 Natunpara, Mangaldoi Assam-784145 | AGXPA9599F | 30.01.2016 | SBINRS2016013025377662 | 400000.00 |
| 5 | Arati Saha Natunpatty Mangaldoi | CPPPS2501L | 02.02.2016 | UCBAH16033016787 | 200000.00 |

| | | | | | |
|---|-------------------------------------------|-----------------|------------|-------------------------------------------|-----------|
| | Assam-784115 | | | | |
| 6 | Naitik Agarwalla Guwahati, Assam | AQJPA11.02.2016 | 11.02.2016 | Drawan on Axis Bank, Cheque No. 140460 | 900000.00 |

1.2 That Madam, the loan givers had paid the aforesaid amount to the appellant by Banking Channel only.

1.3 That Madam, the returns furnished by the Loan givers for the financial year 2015-16 stand accepted.

1.4 That Madam, from the perusal of the Bank Pass Book/Bank Statement of the loan givers, it is very much clear that they were having sufficient fund to make the Loan.

1.5 That Madam, the loan givers are Income Tax assessee and there PAN were duly furnished before ld. AO.

1.6 That Madam, the Assessing Officer merely on the ground that Loan Givers did not appear in response to notice issued to them u/s 131 of the I.T. Act, 1961 treated the loan amount as bogus and added the same as concealed income of the appellant. However, the copy of the loan Confirmations have been enclosed herewith for your kind perusal as the same was found only after the assessment was over, the same could not be submitted in course of assessment proceedings.

1.7 That Madam, the appellant do not have any legal authority over loan givers to enforce their attendance before ld. AO.

1.8. That Madam, the main plank on which the assessing officer made the addition was because the Loan Givers did not turn up before him. In such a case the Hon'ble Apex Court in the case of Orissa Corpn. (F) Ltd. (1986) 159 ITR 78 (SC) : 1986 TaxPub(DT) 1425 (SC) and the Gujarat High Court, in the case of Dy. CIT v. Rohini Builders (2002) 256 ITR 360 (Guj/ ; (2003) 127 Taxman 523 (Guj) : 2002 TaxPub(DT) 0305 (Guj-HC), has held that onus of the assessee (In whose books of account credit appears) stands fully discharged if the identity of the creditor is f established and actual receipt of money from such creditor is proved. In case, the assessing officer is dissatisfied about the source of cash deposited in the bank accounts of the creditors, the proper course would be to assess such credit in the hands of the creditor (after making due-enquiries from such creditor). In

arriving at this conclusion, the Hon'ble Court has further stressed the presence of word "may" in section 68. Relevant observations at pages 369 and 370 of this report are reproduced hereunder:-

"Merely because summons Issued to some of the creditors could not be served or they failed to attend before the assessing officer, cannot be a ground to treat the loans taken by the assessee from those creditors as non-genuine in view of the principles laid down by the Supreme Court in the case of Orissa Corporation (1986) 159 ITR 78 (SC) : 1986 Taxpub (DT) 1425 (SC). In the said decision the Supreme Court has observed that when the assessee furnishes names and addresses of the alleged creditors and the GIR numbers, the burden shifts to the Department to establish the Revenue's case and in order to sustain the addition the Revenue has to pursue the enquiry and to establish the lack of creditworthiness and mere non-compliance of summons issued by the assessing officer under section 131, by the alleged creditors will not be sufficient to draw and adverse inference against the assessee. In the case of six creditors who appeared before the assessing officer and whose statements were recorded by the assessing officer, they have admitted having advanced loans to the assessee by account payee cheques and in case the assessing officer was not satisfied with the cash amount deposited by those creditors in their bank accounts, the proper course would have been to make assessments in the cases of those creditors by treating the cash deposits in their bank accounts as unexplained investments of those creditors under section 69.

1.9 That, during the financial year 2015-16 the appellant received loan amounting to Rs.9,00,000.00 (Rupees Nine lakhs only) from Sri Naitik Aganval vide Cheque No. 140460.

1.10 That, the Loan Giver had paid the aforesaid amount by Cheque only.

1.11 That, the returns furnished by the Loan Giver for the financial year 2015-16 stands accepted and Loan made is disclosed in the income tax return of the Loan Giver.

1.12 That, from the perusal of the Bank Pass Book/Bank Statement of the Lender, it is very much clear that they were having sufficient fund to make the Loan.

1.13 That, the Lender is an Income Tax assessee and his PAN is ACLIPA4096M

1.14 That, the Assessing Officer merely on the ground that the appellant could not be submit the Loan confirmation as well as the name, address of the Lender treated the Loan amount as bogus and added the same as concealed income of the appellant. However, the copy of PAN card of the Loan Giver has been enclosed herewith for your kind perusal as the same was found only after the assessment was over, the same could not be submitted course of assessment proceedings.

List of cases relied upon

Jalan Timbers vs CIT (1997) 223 ITR 11 (Guwahati)

In the instant case, the amounts were shown in the income tax returns of the assessee. Besides, the creditors had also shown in the returns about giving of the loan to the assessee. Strangely, the income tax officer while making the assessment in respect of the three creditors above named accepted the returns. This itself will go to show that the amount received by the assessee was at least prima facie genuine. As the ITO had accepted the returns of the three creditors it should go to mean that the amounts given by those creditors were also genuine.

Rohini Builders vs Deputy Commissioner of Income Tax (2002) 76 TTJ(Ahd) 521:-

At para 7

It has also proved the capacity of the creditors by showing that the amounts were received by the assessee by the account payee cheques drawn from bank account of the creditors and the assessee is not expected to prove the genuineness of the cash deposited in the bank accounts of those creditors because under law the assessee can be asked to prove the source of credits in its books of account but not the source of the source held by the Hon'ble Bombay High Court in the case of *Orient Trading Co. vs CIT (1963) 49 ITR 723 (Bom)*. The above judgment of ITAT, stands confirmed by High Court in *DCIT vs Rohini Builders (2002) 256 ITR 360 (Guj)*

Shree Nemi Chand Kothari vs Commissioner of Income Tax, Assam in the Gauhati High Court – 264 ITR 254 (Gau)

At para -14:

“It, therefore, further logically follows that the creditor’s credit-worthiness has to be judged vis-à-vis the transaction which have taken place between the assessee to find out the source of money of his creditor and/or credit-worthiness of the sub-creditor for these aspects may not be within the special knowledge of the assessee.

At para -15:

“A person may have funds from any source and an assessee, on such information received may take loan from such a person. It is not the business of the creditor had agreed to advance the amounts were genuine or not. If a creditor has by any undisclosed source a particular amount of money in the bank there is no limitation under the law on the part of the assessee to obtain such amount of money or part thereof from the creditor by way of cheque in the form of loan and in such a case if the creditor fails to satisfy as to how he had actually received the said amount and happened to keep the same in the bank, the said amount cannot be treated as income of the assessee from undisclosed source.”

At para-16:

Since it is not the business of the assessee to find out the source(s) from where the creditors has accumulated the amount which he has advanced in form of the loan, to the assessee section 68 cannot be read to show that in the case of failure of the sub-creditors to prove their credit worthiness, the amount advanced as loan to the assessee by the creditor shall have to be read as a corollary as the income from undisclosed source of the assessee himself.

At para-19:

Once the assessee had established that he had received the said amount from the creditors aforementioned by way of cheques, the assessee must be taken to have proved that the creditor had the creditworthiness to advance the loans. Viewed from this angle, we have no hesitation in holding that in the case at hand, the AO had failed to show that the amount which he had come to the hands of the creditors from the hands of the sub-creditors had actually been received by the sub-creditors from the assessee. In the absence of any such evidence on record, the AO could not have treated the said amounts as income derived by the appellant from undisclosed sources.

Chainsukh Betala vs ACIT CIR-4 ITA No. 103 (Gau)/2005 (copy enclosed)

Last line para -10:

Allow the appeal of the assessee since the assessee brought on record the transaction recorded in the balance sheet receiving gift by cheque whereby identity of the parties are proved.

That Madam, Hon'ble ITAT Bench has set aside the case to ITO in the case of Surendra Kumar Jain (HUF)

That Madam, in view of above source of deposits in bank accounts stand fully disclosed and addition made under section 69 is liable to be deleted in full.

Under the above, it is prayed that the relief as claimed may please be allowed.

During the course of appellate proceedings remand report was received from the ld. Assessing Officer vide letter dated 17.10.2019. The comments of the ld. assessing officer on the contention of the appellant's submission is reproduced below:

"The assessee vide her submission before your honour has stated that the documents relating to loans received were not traceable as such the address of the loan givers could not be provided at the time of assessment. It has further been stated that documents were found recently.

The assessee had taken huge amounts of loans from 6 persons and yet it was claimed that the documents were not available during assessment. It was seen in course of assessment and on the basis of ITR-V submitted that the loan givers were persons with meager means and therefore was not in a position to give such loans. Summons issued to loan givers and sent to the registered mail IDs and by post were unattended. Even on inspector deputed to serve the notices was unsuccessful as the persons were untraceable. The assessee's submission before your honour that the documents of loans were not available at the time of assessment and is therefore being produced in appeal is not relevant as the alleged loans were received by cheque/RTGS and hence that the transactions had taken place was never in doubt. The persons were required to be examined on oath but the assessee was unable to provide traceable information of the loan givers implying that the persons were just name lenders who had been conveniently made to disappear. The assessee had provided no reason for such persons being untraceable at the time of assessment nor

has she brought anything on record repayments have been made. It may also mentioned here, the loan givers inspite of being persons of meagre means had given loans without charging any interest nor putting forward any time frame for making repayment. The likelihood of pressure being put on these ordinary persons who had given their names cannot also be ruled out.

Considering the above facts, it might be concluded that there was no sufficient course which prevented the assessee from producing evidence during assessment and therefore the additional evidence submitted may be rejected and the cases decided on merit.”

6. The ld. CIT(A) after considering the facts of the case decide the issue against the assessee dismissing the appeal of the assessee.

7. Now we take up issue no. 1 regarding the framing the assessment of the AO is erroneous on the point of law as the case of the assessee was selected under limited scrutiny and without converting into complete assessment and the assessment was framed. We notice from the assessment order passed from the ld. AO was selected for scrutiny for following issues namely: (i) whether the investment and income relating to the security transactions are disclosed (ii) whether the investment and income relating to securities (derivative transactions are duly disclosed). However framing the assessment, we find that both the issues duly complied by the assessee in compliance to the notices issued by the AO and assessee had furnished all the details which were asked for by providing bank details through which payments were made to share brokers namely M/s. Sharekhan to the tune of Rs. 33,40,000/- during the assessment proceeding. However, ld. AO without converting the limited scrutiny into complete scrutiny by going into one step ahead further issued a letter dated 22.11.2018 to the assessee provide the names and address of the parties from whom such money was received

in compliance to the notices furnished the details of names of the persons from whom assessee has received such amount and also furnished the ITR-V of such persons who made the payments to the assessee. The ld. AO after getting the necessary information in order to verify the transaction issued the summons u/s 131 of the Act to the respective person who disbursed unsecured loan to the assessee. However, in response to the summons issued by the AO, persons were never turned up before him and the ld. AO had taken an adverse interference against the assessee by adding a sum of Rs. 33,50,000/- in the hands of assessee as unexplained money invoking section 69 of the Act and also disallow the setting off loss to the extent of Rs. 1,00,572/- in the hands of assessee.

8. We notice from the facts of the case as discussed above find that the case of the assessee was selected for limited scrutiny for the specific purpose as specifically stated in the assessment order itself. The ld. AO had made enquiry on the point of notices issued and in this respect assessee also had furnished necessary submission as asked for. However, the ld. AO without converting the limited scrutiny into complete scrutiny issued notice to the assessee on 22.11.2018 raising new issues which is beyond the purview of the limited scrutiny and without obtaining necessary approval from the competent authority. Therefore, the order is bad in law. The assessee has challenged the issue before the ld. CIT(A). However, the ld. CIT(A) did not consider the same and sustained the order passed by the AO.

9. We have also taken the note of instruction No. 5/2016 dated 14.07.2016 the relevant part of which is reproduced as under :

" In order to ensure that maximum objectivity is maintained in converting a case falling under 'Limited Scrutiny' into a 'Complete Scrutiny' case, the matter has been further examined and in partial modification to Para 3(d) of the earlier order dated 29.12.2015, Board hereby lays down that while proposing to take up 'Complete Scrutiny' in a case which was originally earmarked for 'Limited Scrutiny', the Assessing Officer ('AO') shall be required to form a reasonable view that there is possibility of under assessment of income if the case is not examined under 'Complete Scrutiny'. In this regard, the monetary limits and requirement of administrative approval from Pr. CIT/'CIT/Pr. DIT/DIT, as prescribed in Para 3(d) of earlier Instruction dated 29.12.2015, shall continue to remain applicable.

Further, while forming the reasonable view, the Assessing Officer would ensure that:

- a. there exists credible material or information available on record for forming such view;*
- b. this reasonable view should not be based on mere suspicion, conjecture or unreliable source; and*
- c. there must be a direct nexus between the available material and formation of such view."*

10. A perusal of the above instruction of the CBDT shows that to convert the limited scrutiny into complete scrutiny, the Assessing Officer shall be required to form a reasonable view that there is a possibility of under statement of income and that view should be based on credible material or information available on record and such a view should not be based on mere suspicion, conjecture or unreliable resources and there should be a direct nexus between available material and formation of view. However, the above conditions are not fulfilled in this case. The AO has not referred to any credible or reliable material or information to form the view that there was a possibility of under assessment of income in this case. The AO has merely made certain disallowance on adhoc basis without pointing out any information or material available to him which has a direct nexus to show that there was possibility of under assessment of income.

11. In view of this, conversion of limited scrutiny into complete scrutiny is against the spirit of CBDT mandate which is binding on the AO. Therefore, the conversion of limited scrutiny into complete scrutiny being not valid, the consequential additions made by the AO on adhoc basis and further confirmed by the CIT(A) are not sustainable in the eyes of law. Same are ordered to be deleted.

12. Even on the merits also, we find that assessee has filed additional evidence before the Id. CIT(A) relates to the unsecured loan addition of Rs. 33,50,000/-. We note that the said sum has been received from the six parties namely Anowar Hussain, Mahamaya Saha, Abdul Kuddus, Alifuddin Ahmed, Arati Saha and Naitik Agarwalla find that assessee filed complete details including the Pan No of the persons who provided funds to the assessee. In the instant case once the appellant had produced all documents in order to establishing the identity and capacity of the creditors as well as genuineness of the transaction, the initial onus cast upon the assessee was discharged and the onus shifted to the AO to bring material on record to the effect that in spite of identity and creditworthiness of the creditor being proved, the transaction was still not genuine. However, the Id. AO has not made any further inquiries and has not brought any material on record to controvert the documentary evidences submitted by the assessee. On the similar issue the Hon'ble Supreme Court in the case of CIT vs Orissa Corpn. (P) Ltd. (1986) 159 ITR 78 125 Taxman 80F (SC):

In this case assessee gave the names and address of the creditors. It was in the knowledge of the revenue that the creditors were income-tax assesseees. The revenue apart from issuing notices under section 131 did not pursue the matter further. It did not examine the source of

income of the alleged creditors to find out whether they were creditworthy. Therefore, it was held that in these circumstances, assessee could not do any further and it had discharged the burden laid on it. The Hon'ble Supreme Court in para 13 & 15 held as below:

“The assessee had given the names and address of the alleged creditors. It was in the knowledge of the revenue that the said creditors were income-tax assessee. Their index number was in the file of the revenue. The revenue apart from issuing notices under s. 131 at the instance of the assessee did not pursue the matter further. The revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the allowed loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do any further. In the premises, if the Tribunal came to the conclusion that the assessee has discharged the burden that lay on him then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at no question of law as such arises. It cannot therefore be said that any question of law arose in these cases. The High Court was therefore right in refusing to refer the questions sought for.

13. From the perusal of the above finding of the Id. CIT(A) as well as the submission filed by the assessee before the lower authorities, we find that the alleged creditors are proved by the assessee. Therefore, their identity, creditworthiness and genuineness of the transaction cannot be doubted as all the transactions were made through banking channels and the assessee produced all the necessary supported documents before the authorities below by providing name and PAN no. of the assessee and therefore hardly remains any reason to doubt the genuineness, identity and creditworthiness of the transaction by the authorities below. Thus we after considering the above find that the addition made by the authorities below are not correct and we are

inclined to delete the same. Accordingly, ground no. 2 raised by the assessee is hereby allowed.

14. Since we decide the issue no. 1 & 2 in favour of the assessee. Therefore, the remaining issues are consequential in nature need not required to be adjudicated. In terms of the above, the appeal of the assessee is hereby allowed.

15. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 29.11.2023

Sd/-

**(MANISH BORAD)
ACCOUNTANT MEMBER**

Sd/-

**(SONJOY SARMA)
JUDICIAL MEMBER**

Kolkata, Dated: 29.11.2023
Biswajit, Sr. P.S.

Copy to:

1. The Appellant: Divyamala Prakash
2. The Respondent: ITO, Ward-1, Tezpur.
3. The CIT,
4. The CIT (A)
5. The DR

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata