

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
MS. KAVITHA RAJAGOPAL, JM

ITA No. 1080/Mum/2023

(Assessment Year: 2012-13)

DCIT
Central Circle 5(1)
Room No.1928, 19th Floor,
AIR India Building,
Nariman Point,
Mumbai-400 021

Vs.

Hetal Nitin Shah
Legal heir of Nitin Rajmal
Shah
301, Chandramani,
Hanuman Road,
Vile Parle(E),
Mumbai-400 057

(Appellant)

(Respondent)

PAN No. AADPS5476M

Assessee by : Shri Jaiprakash Bairagra, AR
Revenue by : Shri Ashok Kumar Ambastha,
DR

Date of hearing: 16.11.2023

Date of pronouncement : 22.01.2024

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by the assessee against the appellate order passed by the Commissioner of Income-tax (Appeals)-53, Mumbai [the learned CIT (A)] for A.Y. 2012-13, dated 30th January, 2023, wherein the appeal filed by the assessee against the assessment order passed under Section 143(3) of the Income-tax Act, 1961 (the Act) dated 29th March, 2015, was allowed.

02. Therefore, the learned Assessing Officer is aggrieved with the appellate order and is in appeal before, raising following grounds of appeal:-

"i. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition made u/s.68 of the Income Tax Act, 1961 of Rs.2,50,00,000/- ignoring the fact that the assessee has failed to prove the capacity, credit worthiness of the loan givers and genuineness of the said loans and therefore the A.O. rightly treated the same as unexplained cash credit u/s.68 of the Act.

ii. The appellant craves to leave, to add, to amend and / or to alter any of the ground of appeal if need be."

03. Brief facts of the case shows that assessee is a individual engaged in the business of Civil Contractor carrying on government and semi government and other private work of road construction, road repairs, etc. Assessee Shri Nitin Rajmal Shah is a proprietor of Speco Infrastructure. He filed his return of income on 30 September 2012, at a total income of ₹3,02,63,658/-. This return was picked up for scrutiny.

04. The learned Assessing Officer noted that a survey under Section 133A of the Act was conducted in the case of RPS Infra Projects Limited on 26 November 2012, wherein several of the group companies have obtained accommodation entries as well as bogus purchase. Information was also received from the DGIT,



Investigation Wing, Mumbai on 12th March, 2015, that assessee has taken a loan from Arihant Exports of ₹1 crore and Karnavat Impex Pvt. Ltd. of ₹1.5 crores, wherein Mr. Rajendra Jain has admitted to have given bogus loan entries.

05. The notice was issued to the assessee with respect to the above loans to be treated as unexplained cash credit under Section 68 of the Income-tax Act, 1961 (the Act).
06. Assessee submitted that it has taken loan from both the parties for personal purposes and interest has been paid to that. The assessee also provided
 - i. copies of the bank statement of the parties along with
 - ii. their return of income
 - iii. their income tax permanent account number,
 - iv. ledger confirmation and
 - v. Financial statement of both the parties.
07. The assessee also submitted that he has taken loan by account payee cheque, interest have been paid through account payee cheques and further these loans have been repaid by account payee cheques. Assessee also requested LD AO to provide information received from

Investigation Wing and to ask the parties to make available for cross-examination.

08. The learned AO considered the submission of the assessee and rejected the same holding that one Mr. Rajendra Jain in a statement recorded under section 132 (4) of the IT act has admitted that the entities from whom the assessee has taken loan are controlled and managed by him. Proprietor of lender also confirmed the same in statement recorded under section 131 of the act. Accordingly the learned assessing officer held that alleged loan of Rs. 1 crore received from exports and ₹ 1.5 crore from Kanavati Impex Private Limited are added to the total income of the assessee under section 68 of the act. Accordingly the assessment order under section 143 (3) of the income tax act, 1961 was passed on 29/3/2015 wherein the total income of the assessee is assessed at ₹ 55,263,660/- against the total income returned by the assessee of ₹ 30,263,658/- wherein the addition under section 68 of the act of Rs. 2.5 crores was made.
09. Assessee aggrieved, preferred an appeal before the learned CIT – A wherein the main ground of appeal was that the addition has been made under section 68 of the income tax act ignoring the evidences filed by the assessee and merely on conjectures and surmises without bringing any facts to establish that the loan accepted are not genuine. It was further stated that the assessing officer has not given any material to show the allegation stated in the assessment order as well as of granting



opportunity of cross-examination to the assessee or to give any evidence as stated in the assessment order and therefore the assessment order is invalid.

010. The learned CIT – A held that during the assessment proceedings the assessee has given the details regarding the identity, creditworthiness and genuineness of the entire transaction and the corresponding parties and therefore the assessee has discharged his primary onus by giving the bank statement, income tax returns, permanent account number is, Ledger confirmation and financial statements of the lender. The learned assessing officer has not pointed out any deficiency in the above statement of the appellant without making any independent enquiry or specific discrepancies other than the statements recorded by the investigation wing. He further noted that the transactions have taken place through bank accounts, assessee has paid interest thereon as and has not claimed any benefit of deduction on account of the interest and further entire sum has been repaid in the calendar year 2014 much before the information was received from the office of investigation wing Mumbai. It was further held that proviso to section 68 requiring to prove the source of source was inserted with effect from 2013 – 14 and does not apply to the assessment year under consideration and therefore even if the source of credit in the counterparty may remain suspicious it cannot be the basis of confirming the addition. Accordingly, the addition was deleted.



011. The learned CIT – A further noted that during the course of hearing before him it was informed by the letter dated 7/12/2022 that the appellant has passed away on 30/5/2021 and the order is deemed to have been passed in pleading the legal heir of the assessee. Despite that the learned CIT – A passed the order in the name of the deceased assessee on 30/1/2023.
012. When the appeal was heard earlier it was found that the form number 36 filed by the learned AO has made the respondent who is a deceased assessee and therefore such appeal filed by the revenue is not valid. Now the revised form number 36 and additional ground of appeal as been filed by the learned assessing officer by filing amended form number 36 wherein Hetal N Shah legal heir of the assessee has been made the respondent and additional ground is raised holding that in terms of provisions of section 159 of the act the appeal of the revenue may be admitted.
013. On careful consideration of the fact that the revenue has revised form number 36 and as the learned CIT – A despite knowing that the assessee has passed away passed the appellate order in the name of deceased assessee, the revised form number 36 is accepted and the appeal of the revenue is now found to be valid. Therefore, the arguments of the assessee with respect to the invalidity of the appeal of the learned assessing officer are dismissed. Accordingly, additional ground filed by the revenue is allowed.



014. With respect to the merits of the case, the learned departmental representative vehemently supported the order of the learned assessing officer and submitted that the loan taken by the assessee is not genuine and therefore learned CIT – A is not correct in deleting the addition.
015. The learned authorized representative submitted that assessee has discharged its initial onus cast upon the assessee by submitting the bank statement of the lenders, the acknowledgement of the return of income filed for assessment year 2012 – 13 of the lenders, the confirmation of the lenders and the financial statements of the lender. It was further stated that these loans have been repaid and such repayment confirmation is also furnished he further referred to paper book filed by him containing 407 pages wherein up to page number 38 – 141 of the paper book he referred to various evidences submitted by him. He also referred to his written submission placed before the learned CIT – A which is placed at page number 142 – 161 of the paper book and further relied upon the several judicial precedents starting from page number 162 – 407 of the paper book.
016. His main arguments were that the assessee has discharged its onus by furnishing all the evidences placed before the learned assessing officer in the form of confirmation, bank account, return of income, confirmation, even then said of the repayment of loan. The learned assessing officer has not made any inquiries on



these evidences supplied by the assessee. These are rejected without verification. The learned assessing officer has made the addition merely based on the statement of third party recorded behind the back of the assessee without even giving copy of the statement of such parties and not adhering to the request of the assessee to grant cross-examination of those entities. It was further stated that the statements, which are relied upon by the AO, have been retracted by those parties it was not considered by the AO. Further, the loans have also been repaid. It was submitted that when the assessing officer has not supplied the statement of the persons who which were relied upon by the assessee and failed to give an opportunity to cross examine the same is a clear violation of the principles of natural justice and therefore the issue is squarely covered in favour of the assessee by the decision of the honourable Supreme Court in case of Andaman Timbers industries (281 CTR 241). Further reliance was placed on the decision of other honourable High Court's in 151 taxmann.com 486. The assessee further stated that that when the loan is repaid that no addition can be made under section 68 relying on the decision of the honourable Bombay High Court in case of principal Commissioner of income tax versus Skylark build in ITA number 616 of 2016. He further stated that when the statement given by the parties have been retracted, it loses its evidentiary value and therefore no cognizance can be taken of the same. In such circumstances, the assessing officer should have examined those persons and



given an opportunity to the assessee of cross-examination. For this proposition, he relied upon the decision of the honourable Supreme Court in case of Mehta Parikh & co VS CIT 30 ITR 181 and of the coordinate bench in ITA number 5783/M/2017. The learned authorized representative further relied on the decision of the honourable Delhi High Court in case of 191 taxman 51 (Delhi) (322 ITR 396) wherein it has been held that wherein it has been held that when there is a violation of the principles of natural justice as the statements recorded and not provided to the assessee or the material is not provided to the assessee and further cross examination of the person on whose statement the assessing officer has relied upon was not granted then such deficiencies would amount to denial of opportunity and consequently the order of the addition would be fatal to the proceedings. Accordingly submitted that the order passed by the learned assessing officer making the addition is invalid and the addition has been clearly deleted by the learned CIT – A as assessee has discharged its onus cast upon under section 68 of the act.

017. We have carefully considered the rival contention and perused the orders of the lower authorities. The allegation against the assessee is that assessee has obtained a loan on 18/file/2011 from Arihant exports of Rs. 1 crore that have been repaid by the assessee on 18/1/2014 of ₹ 35 lakhs and on 21/6/2014 of 65 lakhs. Further from Karnavati Impex Private Limited assessee has taken a loan of ₹ 1.5 crores on 9/file/2011 which has been repaid on



19/6/2014 of ₹ 35 lakhs, and 50 lakhs and further repayment of ₹ 65 lakhs was made on 24/6/2014. During the course of assessment proceedings the learned assessing officer found that these are the two entities wherein entry operator is found to be behind these two entities who have confirmed in a statement under section 132 (4) of the act and further confirmed by proprietor of one of the entities that these are merely accommodation entries. This was the information available with the assessing officer and therefore a show cause notice was issued to the assessee. The assessee during the course of assessment proceedings submitted the bank statement, return of income, confirmation and financial statement of the parties from whom the loans have been taken. The assessee also produced before the AO the fact that the above loan has been repaid and which has been confirmed by those parties. Assessee further stated that the above loans have been taken through bank accounts and has paid interest thereon. The learned assessing officer did not consider and examine any of the evidences submitted by the assessee and merely relying on the statement made the addition. The assessee also showed that loan taken from Arihant exports has the total assets of Rs.51.92 crores as per the balance sheet submitted it has also the sundry creditors of 51.91 crores. In case of the loan taken from company the total assets of that, company is amounting to ₹ 59.20 crores. The assessing officer has made the addition based on the statement of the parties wherein the statement were retracted later on by filing an



affidavit which was submitted before the learned CIT – A and the assessing officer such retraction is for filed by the affidavit dated 10/10/2013 before the assessment order is passed. In view of this, the statement loses its relevance it have been retracted. In such a situation needs to be found out that whether assessee has discharged its initial onus or not as shown under section 68 of the income tax act. If the assessee has discharged its onus, it is for the assessing officer to examine such evidences and throw back the onus on the assessee back. It can be done by making adequate enquiry and proving that the evidences placed by the assessee of identity and creditworthiness of the parties and the genuineness of the transaction are not valid. In the present case, the assessee has placed all these evidences showing the identity and creditworthiness of the parties as well as the genuineness of the transaction along with the repayment of the loan. The learned assessing officer has not carried out any enquiry on such evidences. Therefore, the assessee has discharged initial onus cast upon him under section 68 of the act, therefore the addition under section 68 cannot be sustained.

018. Further, the assessee has repeatedly asked before the assessing officer to give the evidences against the assessee on which the AO wants to rely. The AO has not given such evidences to the assessee. Even the opportunity of cross-examination was also not given. Therefore, the evidences have been used behind the back of the assessee. In such circumstances the decision of the honourable Delhi High Court in 322 ITR 396 (Delhi) clearly

applies to the facts of the case wherein it has been held that once the result violation of the principle of natural justice in as much as seized material is not provided to the assessee nor is cross-examination of the persons on whose statements the assessing officer has relied upon is granted then such deficiencies would amount to denial of opportunity and consequently would be fatal to the proceedings.

019. Honourable Supreme Court in case of Andaman Timber Industries vs. Commissioner of C. Ex., Kolkata-II (02.09.2015 - SC) : MANU/SC/1250/2015 has held that :-

"5. 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.

6. 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. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17-3-2005 [2005 (187) E.L.T. A33 (S.C.)] was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

7. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the show cause notice."

020. Honourable Supreme Court in case of Principal Commissioner of Income Tax (Central) - 1 vs. NRA Iron



and Steel Pvt. Ltd. (05.03.2019 - SC) :
MANU/SC/0325/2019 has held that :-

"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 CIT v. Precision Finance Pvt. Ltd. MANU/WB/0087/1993 : (1994) 208 ITR 465 (Cal):

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

This Court in the land mark case of Kale Khan Mohammad Hanif v. CIT MANU/SC/0292/1963 : (1963) 50 ITR 1 (SC) and, Roshan Di Hatti v. CIT MANU/SC/0192/1977 : (1977) 107 ITR (SC) 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."



021. It is evident that in case when the amendment made initial documents proving the identity and creditworthiness of the land as well as the genuineness of the transaction, the learned officer has not made any enquiry at all which is the primary and foundation for invoking the provisions of section 68 of the income tax act as held by the honourable Supreme Court. This mandatory in assessing officer should have made any enquiry and thereafter if assessee fails to prove to the satisfaction of the assessing officer and the necessary ingredients of provisions of, then only in the assessing officer is empowered to make the addition. In the present case before us the assessee officer has not made any enquiry unlimited submitted by the assessee but has simply relied upon the statement recorded by the investigation wing which were subsequently retracted. And even those statements along with the opportunity of cross-examination of the persons making statement was not allowed to assessee. In view of this, we are not in a position order of the assessing officer.
022. The learned CIT – A while allowing the appeal of the assessee has also categorically held that assessee has discharged his onus cast upon him under section 68 of the act by proving the identity and creditworthiness of the lender along with genuineness of the transaction by producing the confirmation, Ledger, bank statement of the lender and the income tax returns. The assessee has also produced the evidence of repayment of loan. Thus, initial onus is discharged by the assessee. The AO has not thrown back the onus of the above three ingredients back



on the assessee by making adequate enquiry or throwing back the evidences available and also granting assessee and a point unity of cross-examination. Therefore the learned CIT – A has held that assessee has discharged initial onus cast upon section 68 of the act which has not been discredited by the assessing officer by making adequate enquiry and further the assessing officer has violated the provisions of the principles of natural justice by not granting the evidences available with the AO for making evidence and not granting an opportunity of cross examination of the statement of the persons used by the AO. Nothing was shown to us that the order of the learned CIT – A is not sustainable. Accordingly we confirm the order of the learned CIT – A in deleting the addition under section 68 of the income tax act by the assessing officer.

023. In the result, we admit the appeal of the AO as it has been replaced by bringing the legal heir of deceased assessee on record but dismissed the appeal on the merits of the addition.

Order pronounced in the open court on 22.01. 2024.

Sd/-
(KAVITHA RAJAGOPAL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated:22.01. 2024

Sudip Sarkar, Sr.PS/Dragon

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. CIT



4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai