

IN THE INCOME TAX APPELLATE TRIBUNAL

NAGPUR BENCH, NAGPUR

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND

SHRI K.M. ROY, ACCOUNTANT, MEMBER

ITA No.97/Nag./2019

(Assessment Year : 2014-15)

Sufalam Infra Project Ltd
125, Abhyankar Road, Sitabuldi, Nagpur Appellant
PAN – AAQCS2011N

v/s

Pr. Commissioner of Income Tax
(Central) Nagpur Respondent

Assessee by : Shri Kapil Hirani, Adv &
Shri Mukesh Agrawal, CA
Revenue by : Shri Kailash C. Kanojiya, CTI DR

AND

ITA No.46/Nag./2021

(Assessment Year : 2014-15)

Asstt. Commissioner of Income Tax
Central Circle 1(1), Nagpur Appellant

v/s

Sufalam Infra Project Ltd
125, Abhyankar Road, Sitabuldi, Nagpur Respondent
PAN – AAQCS2011N

Assessee by : Shri Kapil Hirani, Adv &
Shri Mukesh Agrawal, CA
Revenue by : Shri Kailash C. Kanojiya, CTI DR

AND

CO No.6/Nag./2023

IN

ITA APPEAL No. 46/NAG/2021

(Assessment Year : 2014-15)

Asstt. Commissioner of Income Tax
Central Circle 1(1), Nagpur

..... Appellant

v/s

Sufalam Infra Project Ltd
125, Abhyankar Road, Sitabuldi, Nagpur
PAN – AAQCS2011N

..... Respondent

Assessee by : Shri Kapil Hirani, Adv &
Shri Mukesh Agrawal, CA

Revenue by : Shri Kailash C. Kanojiya, CTI DR

Date of Hearing – 24/06/2024

Date of Order – 29 /07 /2024

ORDER

[1] **ITA 97/NAG/2019**

PER K.M. ROY, A. M.

The present appeal has been preferred by the assessee challenging the impugned order dated 08/10/2018, passed under section 263 of the Income Tax Act, 1961 ("*the Act*") by the learned Pr. Commissioner of Income Tax, Range-2, Nagpur, [*learned PCIT*"], for the assessment year 2014-15.

2. The assessee has raised following grounds of appeal:–

“1] That on the facts and in the circumstances of the case, the learned Pr.C.I.T. (Central) has erred in cancelling the assessment order

passed u/s 143(3) and resorting the same to A.O. by invoking the provisions of Sec. 263 of the IT Act.

2] That on the facts and in the circumstances of the case, the learned Pr.C.I.T. (Central) has erred in treating the assessment order passed by A.C.I.T u/s 143(3) as erroneous and pre-judicial to the interest of revenue particularly in view of fact that the A.O. has passed the order after considering all the facts of the case and also after making proper enquiries in respect of claims made by the assessee.

3] That order u/s 263 of I.T.Act is bad in law and the same is liable to be cancelled.

4] That any other grounds that may be raised during the course of hearing of the appeal”

3. In this connection, the order under Section 263 of I.T. Act, 1961 is reproduced below;

“ORDER U/S 263 OF INCOME TAX ACT, 1961

Return of income was filed on 22/09/2014 declaring total income of Rs.3,74,72,758/-. Assessment u/s 143(3) r.w.s. 153A was finalised on 30/12/2016 determining total income of Rs. 3,74,72,758/- for the A.Y. 2014-15.

*Assessee is a Company and engaged in the business as a Builder Property Developers. On perusal of balance sheet as on 31/03/2014, it is seen that assessee company has issued 2,00,000 shares (40%) to M/s Anubhav Vinimay Pvt. Ltd having value of Rs. 100 per share. The balance sheet of assessee showed receipt of Rs. 2,00,00,000/- as share capital from M/s Anubhav Vinimay Pvt. Ltd. The Balance Sheet M/s Anubhav Vinimay Pvt. Ltd showed advance of loan amounting to Rs. * 2,00,00,000/- to assessee. Thus, the loan given by M/s Anubhav Vinimay Pvt. Ltd to was converted into share capital.*

During the course of assessment proceedings of Shri Sanjay Agrawal and Radha Madhav Developers for A.Y. 2014-15 after thorough investigation, it was held that M/s Anubhav Vinimay Pvt. Ltd was a paper company, engaged in providing the accommodation entries and

not engaged in any sort of business activity. Therefore certificates etc. Even shell companies have these documents. If the assessee is not able to produce the brains behind these companies and the documents with respect to their financials, the transaction cannot be regarded as genuine. The expression 'nature and source' appearing in section 68 has to be understood as a requirement of identification of source and its genuineness. It is also a settled legal position that the onus of the assessee, of explaining nature and source of credit, does not get discharged merely by filing confirmatory letters, or demonstrating that the transactions are done through the banking channels or even by filing the income tax assessment particulars. The facts of the case cannot be considered in isolation with the ground realities. It will, therefore, be useful to understand as to how the shell entities, which the loan creditors are alleged to be, typically function, and then compare these characteristics with the facts of the case and in the light of well settled legal principles. A shell entity is generally an entity without any significant trading, manufacturing or service activity, or with high volume low margin transactions- to give it colour of a normal business entity, used as a vehicle for various financial manoeuvres. A shell entity, by itself, is not an illegal entity but it is their act of abatement of, and being part of, financial manoeuvring to legitimise illicit monies and evade taxes, that takes it actions beyond what is legally permissible. These entities have every semblance of a genuine business- its legal ownership by persons in existence, statutory documentation as necessary for a legitimate business and a documentation trail as a legitimate transaction would normally follow. The only thing which sets it apart from a genuine business entity is lack of genuineness in its actual operations. The operations carried out by these entities, are only to facilitate financial manoeuvring for the benefit of its clients, or, with that predominant underlying objective, to give the colour of genuineness to these entities. These shell entities, which are routinely used to launder unaccounted monies, are a fact of life, and as much a part of the underbelly of the financial world, as many other evils. Even a layman cannot be oblivious of these ground realities.

The assessee has received an amount of Rs 2 crores as share capital from M/S Anubhav Vinimay Pvt Ltd. In the balance sheet of Anubhav Vinimay the same is reflected as loan to assessee. From the

Assessment order it is observed that the AO has not enquired either the creditworthiness of the lender nor the genuineness of the transaction. The AO should have examined the balance sheet and Profit and loss account from the date of inception of the M/s Anubhav Vinimay Pvt. Ltd till the current year to see whether the subscriber to share capital had capacity to give the large amount of Rs 2 crores. It is more often observed in such cases that the year in which loan is advanced the return shows large income or large receipt of money to be advanced further and in earlier years there is minimum or no income with marginal or no activity. It is observed that no enquiry by the AO in this regard is made. Hence the order of the AO on account of impugned mistake has become prejudicial as well as erroneous to the interest of the revenue.

Section 263 of the Act stipulates as under:

Revision of orders prejudicial to revenue.

263 (1) The [Principal Commissioner or]Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the[Assessing] Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he, may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

[Explanation 1.] - For the removal of doubts, it is hereby declared that, for the purposes of this sub- section,-

(i) an order of assessment made by the Assistant Commissioner [or deputy Commissioner] or the Income tax Officer on the basis of the directions issued by the [Joint] Commissioner under section 144A;

(ii) an order made by the [Joint] Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the [Principal Chief Commissioner or] Chief Commissioner or [Principal Director General or] Director

General or [Principal Commissioner or] Commissioner authorised by the Board in this behalf under section 120;

b)" record" shall include and shall be deemed always to have included] all records relating to any proceeding under this Act available at the time of examination by the [Principal Commissioner or] Commissioner;

(c) where any order referred to in this sub- section and passed by the Assessing Officer had been the subject matter of any appeal, [filed on or before or after the 1st day of June, 1988] the powers of the [Principal Commissioner or] Commissioner under this sub-section shall extend [and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal.]

[Explanation 2. For the purpose of this section, it is hereby declared that an order passed by the assessing Officer shall be deemed to be erroneous in so far as it is prejudiced to the interests of the revenue, if, in the opinion of the principal Commissioner or Commissioner, -

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under Section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.]

[(2) No order shall be made under sub- section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.]

(3) Notwithstanding anything contained in sub- section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give

effect to, any finding or direction contained in an order of the Appellate Tribunal, the High Court or the Supreme Court.

Explanation. In computing the period of limitation for the purposes of sub- section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.

w.e.f. 1st June, 2015 by Finance Bill 2015, Explanation 2 to Section 263 was inserted to declare the law which reads as under;

'[Explanation2.- For the purposes of this section, it is hereby declared that an order passed by the Assessing officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the principal Commissioner or Commissioner, -

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or (

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person."

The meaning of "Explanation" as inserted in the act whereby the Hon'ble Supreme Court in the case of Sundaram Pillai v. Pattabiram reported in [1985] 1 SCC 591, whereby Fazal Ali, J culled out from earlier cases the following as objects of an explanation to a statutory provision [Reference page 214-215, principles of statutory Interpretation by Justice G. P. Singh, 13th Ed.):-

(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful;

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.

It is profitable at this stage to refer to the Memorandum to finance Bill 2015 and notes to clauses to finance Bill, 2015 which are as under:

Memorandum to Finance Bill 2015

Revision of order that is erroneous in so far as it is prejudicial to the interests of revenue.

The existing provisions contained in sub-section(1) of section 263 of the Income tax Act provides that if the Principal Commissioner or Commissioner considers that any Order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making an enquiry pass an order modifying the assessment made by the Assessing officer or cancelling the assessment and directing a fresh assessment.

The interpretation of expression 'erroneous in so far as it is prejudicial to the interests of the revenue' has been a contentious one.

In order to provide clarity on the issue it is proposed to provide that an order passed by the assessing officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the principal Commissioner or Commissioner, -

- (a) the order is passed without making inquiries or verification which should have been made;*
- (b) the order is passed allowing any relief without inquiring into the claim;*
- (c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*
- (d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.*

This amendment will take effect from 1st day of June, 2015."

"Notes on Clauses Finance Bill 2015

Clause 65 of the Bill seeks to amend section 263 of the Income-tax Act relating to revision of orders prejudicial to revenue.

The existing provisions contained in sub-section (1) of section 263 of the Income tax Act provides that if the Principal Commissioner or Commissioner considers that any Order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being or of heard and after making an enquiry pass an order modifying the assessment made by the Assessing officer or cancelling the assessment and directing a fresh assessment.

It is proposed to amend sub-section (1) of the aforesaid section to insert an Explanation so as to provide that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,-

- (a) the order is passed without making inquiries or verification which should have been made;***
- (b) the order is passed allowing any relief without inquiring into the claim;*

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person."

This amendment will take effect from 1st day of June, 2015."

Now, as can be seen above, the amendment to section 263 of the Act by insertion of Explanation 2 to Section 263 of the Act is declaratory & clarificatory in nature and is inserted to provide clarity on the issue as to which orders passed by the AO shall constitute erroneous and prejudicial to the interest of Revenue, it is, inter-alia, provided that if the order is passed without making inquiries or verifications by AO which, should have been made or the order is passed allowing any relief without inquiring into the claim; the order shall be deemed to be erroneous and prejudicial to the interest of Revenue. The Hon'ble Supreme Court in the case of Malabar Industrial Company Limited v. CIT (2000)109 Taxman 66 (SC) held that if the AO has accepted the entry in the statement of account filed by the taxpayer without making enquiry, said order of the AO shall be deemed to be erroneous in so far as it is prejudicial to the interest of the Revenue. In my considered opinion, the facts of the case of the assessee company are similar to the facts in the case of Malabar Industrial Co. Limited whereby no enquiry/verification is made by the AO whatsoever with respect to receipt of loan/share capital in terms of credit worthiness of lender and genuineness of transaction. Moreover, now Explanation 2 to Section 263 of the Act is inserted in the statute which is declaratory and clarificatory in nature to declare the law and provide clarity on the issue whereby if the A.O. failed to make any enquiry or necessary verification which should have been made, the order becomes erroneous in so far as it is prejudicial to the interest of revenue.

A proviso added from 01-04-1988 to Section 43B of the Act from 01-04-1984 came up for consideration in Allied Motors Private Limited v. CIT (1997) 91 taxman 205(SC) before Hon'ble Supreme Court and it was given retrospective effect from the inception of the section on the reasoning that the proviso was added to remedy

unintended consequences and supply an obvious omission so that the section may be given a reasonable interpretation and that in fact the amendment to insert the proviso would not serve its object unless it is construed as retrospective. In CIT v. Podar Cement Pvt. Limited (1997) 92 Taxman 541(SC), the Hon'ble Supreme Court held that amendment introduced by the Finance Act, 1987 in so far the related to Section 27(iii), (iiia) and (iiib) which redefined the expression owner of house property', in respect of which there was a sharp divergence of opinion amongst the High Courts, was clarificatory and declaratory in nature and consequently retrospective. Similarly, in Brij Mohan Das Laxman Das v. CIT (1997) 90 Taxman 41 (SC), explanation 2 added to section 40 of the Act was held to be declaratory in nature and, therefore, retrospective. (Reference Page 569-570, Principles of Statutory Interpretation by Justice G.P. Singh, 13th Ed.).

The written submissions of the assessee and the facts as emerging from the records are carefully considered. From the records it is observed that the AO has not made any enquiry regarding the receipt of Rs.2 crores as share capital. The creditworthiness of the lender nor the genuineness of the transaction is examined by AO.

From the record, it is evident that the AO has not carried out any such factual verification. This has made the assessment orders for the A.Y. 2014-15 prejudicial in as much as erroneous to the interest of Revenue. Hence, the AO needs to carry out detailed verification on this issue before accepting the claim of the assessee. The provisions of sec 263 of the I.T. Act are clear in as much as an order passed by an AO is deemed to be erroneous in so far as it is prejudicial to the interests of Revenue if in the opinion of the Pr. CIT, the order has been passed without making enquiries regarding the claim made. In the light of the above discussion, it is evident that there was lack of enquiry and application of mind on the part of the AO which has rendered the assessment order erroneous in so far that it is prejudicial to the interests of revenue. The view taken by the AO is an erroneous and not a possible or plausible view. The Allahabad High Court in the case of Bhagavandas (272 ITR 267) and P.T. Lakshar Ram (272 ITR 309) and the Madras High Court in the case of Ashok Leyland Ltd. (260 ITR 599) have held that action u/s 263 is valid where the assessment order is passed without conducting proper

enquiry. Reliance is also placed on the decision of the Supreme Court in the case of Malabar Industrial Co. Ltd. (243 ITR 83), wherein it was clearly held that the Commissioner of Income tax is within his jurisdiction to set aside the assessment order if it is passed without examination of the relevant details.

The Hon'ble Supreme Court while dismissing the assessee's appeal in the case of Daniel merchants(P) Ltd SLP No.23976/2017 dated 29/11/2017 against Calcutta High Court has held inter-alia as under:

"In all these cases, we find that the Commissioner of Income tax had passed an order under Section 263 of the Income tax Act, 1961 with the observations that the Assessing Officer did not make any proper inquiry while making the assessment and accepting the explanation of the assessee(s) in so far as receipt of share application money is concerned. On that basis the Commissioner of Income Tax had, after setting aside the order of the Assessing Officer, simply directed the Assessing Officer to carry through and detailed inquiry. It is this order which is upheld by the High Court. We see no reason to interfere with the order of the High Court."

The argument of the assessee that his accounts are tax audited so his claim should be accepted is devoid of merit. The Hon'ble Mumbai ITAT in the case of Clariant Chemical India Ltd (TS 344 ITAT-2012(Mum)) while distinguishing the Hon'ble Supreme Court judgment in Reliance Petroproducts have held that institution of Assessing Officer will become redundant if claims are decided on basis of Tax Audit Report. The argument of the assessee stands dismissed.

In view of the above facts, I am of the considered opinion that the order u/s 143(3) passed on 30/12/2016 by the Asstt. Commissioner of Income Tax, Central Circle, 1(1) is erroneous and prejudicial to the interest of the revenue and the same is set aside for framing fresh assessments on the issue dealt above and by giving an opportunity of being heard to the assessee. The assessments to be completed within the stipulated time frame by conducting necessary enquiries. Further, the AO is directed to initiate penalty proceedings as per the Act, wherever applicable.

(Reena Jha Tripathi)
Pr. Commissioner of Income Tax (Central)
Nagpur”

4. It is also gainful to consider the assessment order dated 30/12/2016, to have a clear understanding of the case.

“ASSESSMENT ORDER

Return of income U/s 139(1) of the I.T. Act, 1961 was filed on 22/09/2014 by the assessee showing total income of Rs.3,74,72,758/-

2. A Search and seizure operations u/s.132 of the Income-tax Act, 1961, was conducted in the Bajoria - Agrawal group of cases of Nagpur on 02.12.2014 in which assessee was also covered by issuing warrant U/s 132.

3. Notice u/s 153A of the IT Act was issued dated 20/05/2015 which was served on 25/05/2015 for filing the return of Income. Another, Notice u/s. 142(1), was issued on 21/07/2016, which was served on 22/07/2016. In response to the notice U/s 153A, the assessee has filed the return of income on 10/08/2016 declaring total income of Rs.3,74,72,758/-.

4. Notice U/s 143(2) of the I.T. Act, 1961 dated 11/08/2016 alongwith questionnaire was issued and served to the assessee, requiring the assessee to furnish the details/explanations.

5. In response to which Shri Mukesh Agrawal, C.A. and Authorized Representative of the assessee attended from time to time and filed the details called for. During the course of assessment proceedings, the assessee has filed computation of income, Profit and loss account, balance sheet and other details.

6. After going through the various details, submitted during the course of scrutiny proceedings and discussion with the A.R. the return of income of the assessee is accepted.

7. In view of the above, the total income of the assessee is computed as under:-

Total income as per return Rs.3,74,72,758/-.

Total Assessed Income Rs.3,74,72,758/-.

8. Assessed accordingly u/s 143 (3) r.w.s. 153A of the I.T. Act 1961. Interest u/s.234A, 234B, 234C & 234D is charged as applicable. Demand notice and challan are issued.

This order is passed with prior approval u/s. 153D of the Act, vide No.JCIT/CR-1/App.u/s.153D/Bajoriya-Agrawal Gr./2016-17 dated 30-12-2016 issued by Joint Commissioner of Income-tax, Central Range-1, Nagpur”.

5. Shri Hirani, counsel for the assessee opened his argument by taking recourse to a legal ground and submitted that since the impugned assessment order is passed u/s 143 r.w.s 153 of the Act, prior approval of JCIT is required u/s 153(d) of the Act. Therefore, once prior approval has already been taken by the Assessing Officer and accepted the return submitted by the Assessee, then the same authority cannot exercise the power u/s 263 to reverse the order of Assessment Officer. He drew our attention to the case of **Principal Commissioner of Income Tax vs. Prakhar Developers (P) Ltd**, decided by the Hon’ble High Court of M.P. dated 01/04/2024. He particularly drew our attention to paras 7 & 8 of the order, which are reproduced below;

*“7. Learned counsel for the appellant failed to answer the query made by this Court whether order passed by the Pune Bench in the case of **Ramamoorthy Vasudevan (supra)** was challenged before the High Court or Supreme Court on the issue of jurisdiction under s. 263 of the Act. Learned counsel submits that should could not lay her hands any order/judgment passed by the High Court as well as by the Supreme Court on this issue. In the case of **Ramamoorthy Vasudevan (supra)**, in a similar facts and circumstances, reliance has been placed on judgments delivered by the Pune Bench of Tribunal in the case of **Dhariwal Industries Ltd. Vs.***

CIT (ITA Nos. 1108 to 1113/Pun/2014), Lucknow Bench in case of Mehtab Alam vs. Asstt. CIT (ITA Nos. 288 to 294/Lkw/2014), Hyderabad Bench of the Tribunal in the case of CH. Krishna Murthy vs. Asstt CIT (ITA No. 766/Hyd/2012) and one of the judgment passed by the High Court of Judicature at Allahabad in the case of CIT vs. Ashok Kumar (IT Appeal No. 192 of 2000) and Hyderabad Bench of Tribunal in the case of Trinity Infra Ventures vs. Dy. CIT (ITA No. 584/Hyd/2015) and consistently held that once the order under s. 143(3) r/w s. 153A of the Act has been passed after taking prior approval of the Asstt CIT under S.153D of the Act, then the jurisdiction under s.263 of the Act cannot be invoked. Therefore, the view taken by the Co-ordinate Bench of the Tribunal had attained finality. Hence, the Tribunal, Indore has not committed any error of law by following the same view.

8. *Even otherwise, as per s. 263 of the Act, the Principal Chief CIT or Principal CIT or CIT may call for and examine the record of any proceeding under this Act and if he considers that any order passed therein by the AO, is erroneous insofar as it is prejudicial to the interests of the Revenue, he may make enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify. For passing any order under ss. 143(3) and 153A of the Act, prior approval of Jt.CIT is required under s. 153A of the Act, or Principal CIT or CIT as the case may be. Therefore, once prior approval had already been taken by the AO and accepted the return submitted by the assessee, then the same authority cannot exercise the power under s.263 of the Act to reverse the order of AO.”*

He additionally relied on certain other judgments as narrated below;

[1] **Ramamoorthy Vasudevan vs. Principal Commissioner of Income Tax**, ITA Nos. 967 & 968/ Pun/ 2016 – ITAT Pune.

[2] **Dhariwal Industries Ltd. Vs. CIT**, ITA Nos. 1108 to 1113 / Pun / 2014 – ITAT Pune.

[3] **Mehtab Alam vs. Asstt. CIT**, ITA Nos. 288 to 294 / Lkw ./ 2014 – ITAT Lucknow.

[4] **CH. Krishna Murthy vs. Assistant Commissioner of Income Tax**, ITA No. 755 / Hyd /2012 – ITAT Hyderabad.

[5] **CIT vs. Dr. Ashok Kumar**, ITA No. 192 of 2000, Allahabad HC

[6] Trinity Infra Ventures Ltd. Vs. Deputy Commissioner of Income Tax, ITA No. 584 / Hyd / 2015 – ITAT Hyderabad.

6. We find that the issue raised by Shri Hirani is appropriately covered by the judgment of the Hon'ble Madhya Pradesh High Court. The learned CIT (DR) has failed to controvert the legal issue and fairly submitted that there is no order of the jurisdictional High Court for this issue. We find, the various coordinate benches of the Tribunal have held that once the order u/s 143(3) r/w 153A of the Act has been passed after taking prior approval of Additional CIT u/s 153D of the Act, then the jurisdiction u/s 263 cannot be invoked. In the instant case, it is clearly evident from the assessment order that the order was passed with prior approval u/s 153D of the Act, dated 20/12/2016, issued by JCIT, Central Range-1, Nagpur. Respectfully following the judgment of the Hon'ble High Court, we held that CIT Central, Nagpur, fell into an error in revising the order passed by the Assessing Officer. The assessee succeeds on the sole solitary issue of the usurpation. We accordingly held that the revision order u/s 263 of the IT Act is not sustainable.

7. In the result, assessee's appeal is allowed.

[2] ITA No. 46/Nag/2021

1. This appeal is placed by the Department against the consequential order passed u/s 143(3) r.w.s 263 of the I.T. Act, 1961, dated 31/12/2019, wherein a sum of Rs. 2,00,00,000/- was added u/s 68 of the I.T. Act. However, CIT(A) had directed deletion of the amount.

2. We have already held in ITA No.97/Nag/2019 that the revision order is unsustainable for the detailed reasons as enunciated above. Since the very basis of invocation of Section 263 has been quashed, the assessment order has no legal nexus to stand upon. In the absence of a valid foundation, the superstructure is bound to crumble.

3. In view of above, the departmental appeal is dismissed. Since we have already quashed the order on the ground of jurisdiction, the grounds raised by the department are for academical matters and we do not feel it appropriate to deal with the same.

4. Be it as may, we further find that CIT(A) has elaborately dealt as follows in granting relief.

“4.7 I have gone through the assessment order as well as the arguments of the appellant and am inclined to agree with the appellant. I find that the appellant has duly satisfied the onus cast upon it under the rigors of the provisions of section 68 of the Act. The appellant has duly proved the identity, genuineness and creditworthiness of the investor AVPL. The fact that the investor AVPL is a private limited company is enough to prove its which proves the genuineness of the transaction which has also been confirmed by AVPL. The financials of the company AVPL, already discussed above, suggest that it has sufficient funds to invest in the appellant Company. Therefore, the AO has erred in simply ignoring the details filed by the appellant during the course of assessment proceedings which is not acceptable.

4.8 The appellant has rightly placed reliance on Anil Chhaganlal Jain Vs. ACIT (ITAT Mumbai)[supra] wherein it has been held that if the assessee has explained the source of the loans received by it, the fact that the lender may have raised bogus share capital to advance the funds to the assessee does not mean that the loan received by the assessee can be treated as unexplained income.

The appellant has argued and placed reliance on CIT Vs. Lovely Exports Pvt. Ltd. (2008) 6 DTR 308 (SC) that in case the Department was not satisfied about the source of the funds of the Lenders, it was free to proceed against the Lenders rather than making additions in the hands of the Appellant.

The appellant has rightly placed reliance on CIT Vs. Dwarkadhish Investment Pvt. Ltd. (2011) 37 (I) ITCL 456 (Del HC) wherein it has been as under:

"8. In any matter, the onus of proof is not a static one. Though in section 68 proceedings, the initial burden of proof lies on the assessee yet once he proves the identity of the creditors/share applicants by either furnishing their PAN or income-tax assessment number and shows the genuineness of transaction by showing money in his books either by account payee cheque or by draft or by any other mode, then the onus of proof would shift to the revenue. Just because the creditors/share applicants could not be found at the address given, it would not give the revenue the right to invoke section 68. One must not lose sight of the fact that it is the revenue which has all the power and wherewithal to trace any person. Moreover, it is settled law that the assessee need not to prove the source of source.

In the case of CIT Vs. Vrindavan Farms Pvt. Ltd (Delhi HC) where the assessee had received share application money which was added by the AO under section 68 of the Act, the Hon'ble High Court held as under:

5. The Court is of the view that the Assessee by produced sufficient documentation discharged its initial onus of showing the genuineness and creditworthiness of the share applicants. It was incumbent to the assessing officer to have undertaken some inquiry and investigation before coming to a conclusion on the issue of creditworthiness. In para 39 of the decision in Nova Promoters (supra), the Court has taken note of a situation where the complete particulars of the share applicants are furnished to the assessing officer and the assessing officer fails to conduct an inquiry. The Court has observed that in that event no addition can be made in the hands of the Assessee under section 68 of the Act and it will be open to the Revenue to move against the share applicants in accordance with law.

The appellant has further rightly placed reliance on Vishnulal Karwa Vs. ITO (1987) 32 Taxman 276 (Jp - Trib) wherein it has been held that even highly suspicious circumstances by itself would not lead to the conclusion that the amount belonged to the assessee. In the absence of any other evidence to the contrary, disbelieving the evidence as such would not be proper.

In the case of CIT Vs. Metachem Industries (2000) 245 ITR 160 (MP) the Hon'ble HC has held as under:

"Once it is established that the amount has been invested by a particular person, be he a partner or an individual, then the responsibility of the assessee-firm is over. The assessee-firm cannot ask that person who makes investment whether the money invested is properly taxed or not. The assessee is only to explain that this investment has been made by the particular individual and it is responsibility

of that individual to account for the investment made by him. If that person owns that entry, then, the burden of the assessee-firm is discharged. It is open for the assessing officer to undertake further investigation with regard to that individual who has deposited this amount.

5. So far as the responsibility of the assessee is concerned, it is satisfactorily discharged. Whether that person is income-tax payer or not or from where he has brought this money is not the responsibility of the firm. The moment the firm gives satisfactory explanation and produces the person who has deposited the amount, then the burden of the firm is discharged and in that case that credit entry cannot be treated to be income of the firm for the purposes of income-tax. It is open for the assessing officer to take appropriate action under section 69 of the Act against the person who appropriate able to explain the investment. In the present case, there is the concurrent finding of both the Commissioner (Appeals) as well as of the Tribunal that the firm has satisfactorily explained the aforesaid entries.

6. We are, therefore, of the opinion that the view taken by the Tribunal is correct and the aforesaid question is answered against the revenue and in favour of the assessee."

4.9 In the case of M/s Sunshine Metals and Alloys Pvt. Ltd. Vs. ITO ITA No. 3212/Mum/2014 the Hon'ble ITAT, with respect to share application money has held that if (a) the assessee has furnished the Name, Address, PAN no and Share Application Form to prove that the shares were allotted to the applicants and (b) the bank statement show that money was received through banking channels and there were no immediate withdrawals to suggest that the share application amounts have been returned back to these parties in cash, it means the assessee has discharged the primary onus cast upon it to prove the identity, capacity and genuineness of transactions. The AO in the present case has nowhere proven or even alleged that the amount so received from the investor has been returned back to the investor in cash which makes the addition bad in law and liable to be deleted.

4.10 In Umbrella Projects Pvt. Ltd. Vs. ITO ITA No. 5955/Del/2014 wherein the Hon'ble ITAT has held that if the assessee has discharged the initial onus regarding the identity, creditworthiness and genuineness, the onus shifts to the AO to bring material or evidence to discredit the same. The fact that the shareholders did not respond to notice u/s 133(6) is not insufficient to draw an adverse inference. However, in the present case the Investor Company AVPL has filed its reply to the AO and confirmed that it has invested Rs 2 Crores in the shares of the appellant Company.

It is further rightly argued by the AR that the addition made u/s 68 is not sustainable as the AO has nowhere controverted the evidences filed by the appellant nor has produced any concrete justification for making the addition. In this regard, reliance is placed on CIT Vs. Orissa Corporation Pvt. Ltd. (1986) 159 ITR 78 (SC) wherein the Hon'ble SC has held as under:

"In this case, the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assesseees. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices under section 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 alleged loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do anything further. In the premises, if the Tribunal came to the conclusion that the assessee had discharged the burden that lay on him, then it could not be said that such a conclusion was unreasonable nor 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."

4.11 The appellant further brought attention to the appeal order passed in the appeal of Shri Sanjay Gaurishankar Agrawal for AY 2014-15 vide Order No. CIT(A)-3/280/2016-17 dt. 30.3.2019, and to the appeal order passed in the case of M/s Radha Madhav Developers for AY 2014-15 vide order no. CIT(A)-3/195 & 196/2017-18 where the appellants had challenged the addition made u/s 68 in relation to loans taken by the assesseees from AVPL. In those cases, the AO held the same view that AVPL is a paper company and disputed the creditworthiness and genuineness of the loan taken by the assesseees from AVPL and held the same as unexplained cash credit u/s 68 of the Act. In appeal, Ld CIT(A) carefully considered all the facts & circumstances and deleted the addition thus deciding the appeal in assessee's favor.

Based on the above facts, discussions and respectfully following the various judicial pronouncements cited supra, I am of the view that the addition made U/s 68 of Rs. 2,00,00,000/- for AY 2014-15 deserves to be deleted."

Ld. CIT-DR could not raise any point as to how the findings of the CIT(A) is unsustainable in law and facts. Accordingly, even on merit the departmental appeal is liable to be dismissed because CIT(A)'s observation is watertight, cogent, incisive and need no interference.

5. In the result, the departmental appeal is dismissed.

[3] **CO No. 6/NAG/2023**

1. Shri Hirani fairly submits that he does not going to pursue the cross objection. Accordingly we dismiss the same in limine.

In the result, ITA No. 97/NAG/2023 is allowed in favour of the assessee, whereas, ITA No. 46/NAG/2021 is dismissed and the Cross Objection No. 6/NAG/2023 is also dismissed.

**Sd/-
V. DURGA RAO
JUDICIAL MEMBER**

**Sd/-
K.M. ROY
ACCOUNTANT MEMBER**

NAGPUR, DATED: 29/07/2024

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The PCIT / CIT (Judicial);*
- (4) *The DR, ITAT, Nagpur; and*
- (5) *Guard file.*

True Copy

By Order

*Pradeep J. Chowdhury
Sr. Private Secretary*

*Sr. Private Secretary
ITAT, Nagpur*