

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D" MUMBAI**

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

**ITA Nos. 4129 & 4132/MUM/2023
Assessment Years: 2014-15 & 2011-12**

Rubberwala Housing and
Infrastructure Ltd.,
Rubberwala House, Ground floor,
Dr. A. Nair Road, Agripada,
Mumbai-400011.
PAN NO. AACCR 7449 B
Appellant

Vs.

ACIT Circle-5(3)(2),
5th floor, Aayakar Bhavan,
Mumbai.
Respondent

**ITA No. 4128 & 4131, 4130/MUM/2023
Assessment Year: 2017-18 & 2011-12, 2012-13**

Rubberwala Housing and
Infrastructure Ltd.,
Rubberwala House, Ground floor,
Dr. A. Nair Road, Agripada,
Mumbai-400011.
PAN NO. AACCR 7449 B
Appellant

Vs.

ACIT Circle-5(3)(1),
Mumbai.
Respondent

**ITA No. 4019/MUM/2023
Assessment Year: 2012-13**

Rubberwala Realty
Rubberwala House, Ground floor,
Dr. A. Nair Road, Agripada,
Mumbai-400011.
PAN NO. AANFR 3670 E
Appellant

Vs.

ITO-19(3)(2),
2nd floor, Matru Mandir, Tardeo,
Mumbai.
Respondent

**ITA No. 3696/MUM/2023
Assessment Year: 2011-12**

Rubberwala Housing and Infrastructure Ltd.,
Rubberwala Realty, Hilton Infrastructure &
Heks Infrastructure and Developers
ITA Nos. 4129 & 4132, 4128 & 4131,
4130/MUM/2023, 4019/M/23, 3696/M/23
& 4018/M/2023



Hilton Infrastructure,
Rubberwala House, Ground floor,
Dr. A. Nair Road, Agripada,
Mumbai-400011.

PAN NO. AAFH 3675 R
Appellant

Vs.

ITO-21(1)(4),
Aayakar Bhavan,
Mumbai.

Respondent

ITA No. 4018/MUM/2023
Assessment Year: 2012-13

Heks Infrastructure and Developers,
Ground Floor, Rubberwala House,
Dr. A. Nair Road, Agripada,
Mumbai-400011.

PAN NO. AAEFH 8317 F
Appellant

Vs.

ITA-17(1)(5),
Mumbai.

Respondent

Assessee by : Mr. Prateek Jain
Revenue by : Mr. R.R. Makwana, Sr. DR

Date of Hearing : 17/10/2024
Date of pronouncement : 28/10/2024

ORDER

PER BENCH

The captioned appeals by the assessee are directed against separate orders passed by the Ld. Commissioner of Income-tax (Appeals) – 52, Mumbai [in short ‘the Ld. CIT(A)’] for relevant assessment years. As identical issues are involved in these appeals, therefore, same were heard together and disposed off by way of this consolidated order for convenience.



ITA No. 4129/Mum/2023 (Assessment Year 2014-15)

2. First, we take up the ITA No. 4129/Mum/2023 for assessment year 2014-15 in the case of Rubberwala Holding and Infrastructure Ltd. The grounds raised by the assessee are reproduced as under:

1. On the facts and circumstances of the Appellant's case and in law Id. CIT (A) erred in confirming the action of the Id. A.O. in ignoring the fact that the provisions of section 43CA were not applicable when allotment letters /agreement is made prior to 31.03.2013 and consideration is received either in full or in part, for the reasons mentioned in the impugned order or otherwise.

2. On the facts and circumstances of the Appellant's case and in law Id. CIT (A) erred in confirming the action of the Id. A.O. in making a disallowance of Rs. 2,03,05,828/- u/s 43CA of the Act, for the reasons mentioned in the impugned order or otherwise.

3. Briefly stated facts of the case are that the assessee filed return of income on 31.01.2015 declaring total income at Rs.2,94,10,450/-. The assessee was engaged in the real estate activity of construction and development and sale of flats. The return of income filed by the assessee was selected for scrutiny and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. The Assessing Officer observed that certain properties sold by the assessee were registered under the year under consideration and the sale consideration of those properties shown in registered document was below the value which was determined by the stamp duty value authorities. Accordingly, the Assessing Officer invoked section 43CA of the Act and made addition for the difference amount between the stamp value as on



the date of the allotment and the sale consideration agreed on the date of the allotment and this manner, he made total addition of Rs.2,03,05,828/- in the assessment order passed u/s 143(3) of the Act on 28.12.2016.

4. On further appeal, the Ld. CIT(A) upheld the addition in view of decision of the Jaipur Bench of the Tribunal in the case of Spytch Builcon v. ACIT reported in (2021) 190 ITD 325 (Jaipur-Trib).

5. Aggrieved, the assessee is in appeal before the Tribunal by way of raising grounds as reproduced above.

6. We have heard rival submission of the parties and perused the relevant material on record. Before us, the Ld. counsel for the assessee submitted that in the case of the assessee sales have taken place in the year prior to assessment year 2013-14 and therefore, section 43CA of the Act which has been introduced w.e.f. assessment year 2014-15 cannot be attracted. The Ld. counsel for the assessee relied on the decision of the Co-ordinate Bench of the Bombay Tribunal in the case of Spenta Enterprises dated 27.01.2022 in ITA No. 2133/Mum/2019. The Ld. counsel also relied on the decision of the Co-ordinate Bench of the Jaipur Tribunal dated 16.07.2018 in the case of **Indexone Tradecone (P.) Ltd. [2018] 97 taxmann.com 174 (Jaipur-Trib.)**. The Ld. counsel



also relied on the decision of Hon'ble Bombay High Court in the case of **PCIT v. Swananda Properties (P.) Ltd. [2019] 111 taxmann.com 94 (Bombay)**. In the instant case the crucial issue in dispute is whether section 43CA of the Act has to be invoked in the year in which property was registered or the year in which property was sold by the assessee. As far as assessee is concerned, the assessee has already entered into an agreement to sale and shown the corresponding sales in earlier years in its books of accounts. Therefore, the provisions of section 43CA of the Act has to be seen from the angle when the assessee has entered into its sales in its books of accounts and it cannot be construed to be treated effective in the year in which registration of the properties has taken place. The Co-ordinate Bench of the Tribunal in the case of Spenta Enterprises (supra) after considering held that in a situation where agreement to sale has entered into in year prior to assessment year 2014-15, the section 43CA of the Act cannot be invoked. The relevant finding of the Tribunal (supra) is reproduced as under:

"9. Upon assessee's appeal, Ld.CIT(A) has held that he was of the opinion that invariably the stamp value date on registration has to be adopted and hence, he was upholding the order of the AO. I find that this is quiet contrary to what the AO has held. AO has clearly accepted the assessee's contentions that he is in agreement that ready recoker value on the date of allotment is being considered. Hence, the reason for Ld.CIT(A) in upholding the addition is not as per the facts on record. In any case, I note that this is assessee's plea that section 43CA was introduced w.e.f. 01.04.2013 and the agreement under consideration were entered into prior to 31.03.2013. Further, this is assessee's plea that difference is only 5% between the ready recoker rate and sale consideration. Hence, this is assessee's plea that the same has to be



ignored on the touchstone of ITAT, Mumbai decision in the case of Krishna Enterprises vs. ACIT. I am of the considered opinion that the assessee succeeds on both the counts. Hence, I set aside the orders of the authorities below and decide the issue in favour of the assessee.”

6.1 Further, the Co-ordinate Bench of the Tribunal in the case of Indexone Tradecone (P.) Ltd. (supra) held as under:

“13. In the present case, where the date of agreement to sell in respect of the two flats is 9.4.2007, which is much prior to the financial year relevant to assessment year 2014-15 when the provisions of section 43CA have become effective, there is no way the assessee would have foreseen these provisions at the time of entering into the agreement to sell that it has to receive the consideration only by any mode other than cash. At the relevant point in time when it had entered into agreement to sell, there was no such requirement of receiving the whole of the consideration in mode other than cash. Therefore, in order to make the provisions of sub-section (4) workable, in our view, the provisions of sub-section (4) would be applicable in respect of agreement to sell for transfer of an asset which has been executed on or after 1st April, 2013 and thus, not applicable in the instant case. The matter is accordingly remanded back to the file of the Id CIT(A) to determine the valuation of the two properties in terms of sub-section (3) as on the date of agreement to sell which is 9.4.2007 and where it is so determined that such valuation is higher than what has been declared by the assessee, the same can be brought to tax in the year under consideration.”

6.2 We note that the Tribunal in the case of M/s Spyteck Buildcon (supra) relied upon by the Ld. CIT(A) has not considered the decision of the Tribunal in the case of Indexone Tradecone (P.) Ltd. (supra), which is an earlier decision. Further, the Hon'ble Bombay High Court in the case of Swananda Properties (P.) Ltd. (supra) held that provisions of section 43CA are applicable prospectively and not retrospectively. Since, the sale consideration in the case of the assessee have been recorded in books of accounts in the earlier years, in our opinion provision of section 43CA of the Act cannot be



upheld retrospectively. As far as contention of the Ld. Departmental Representative (DR) that section 43CA(4) is concerned, we are of the opinion that sub-section will be applicable in the case of agreement to sale undertaken after 01.04.2014 and not in case of the agreement to sale enter in prior years. The grounds of appeal of the assessee are accordingly allowed.

ITA No. 4128/Mum/2023 (Assessment year 2017-18)

7. Now we take up ITA No. 4128/Mum/2023 for assessment year 2017-18 in the case of Rubberwala Holding and Infrastructure Ltd. The relevant ground raised by the assessee is reproduced as under:

1. *On the facts and circumstances of the Appellant's case and in law Id. CIT (A) erred in confirming the action of the Id. A.O. in disallowing payment of employees contribution of Provident fund and ESIC amounting to Rs. 2,83,050/-, for the reasons mentioned in the impugned order or otherwise.*

7.1 In the case issue-in-dispute involved is regarding disallowance of delayed payment of employee's contribution to provident fund(PF) and employee's state insurance corporation amounting(ESIC) to Rs.2,83,050/-. The Ld. CIT(A) has upheld the disallowance in view of the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. (supra). The relevant finding of the Ld. CIT(A) is reproduced as under:

"11. The appellant's argument that the issue cannot be a subject matter of disallowance is not acceptable in view of the decision of the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. vs.



CIT [2022] 143 taxmann.com 178 (SC) dated 12.10.2022. This issue stands settled now, and is no longer res integra.

12. In the recent case of CC Engineers Pvt. Ltd. in ITA No. 698/Pun/2021 dt. 07.11.2022, the Hon'ble ITAT analysed the impact of the decision of the Hon'ble Supreme Court in Checkmate Services (P) Ltd. referred above and held that the amount was to be added back."

7.2 In view of the above, we do not find any infirmity in the order of the Ld. CIT(A). Accordingly, we uphold the disallowance. The grounds of appeal of the assessee are accordingly dismissed.

ITA No. 4019/Mum/2023 (Assessment year 2012-13)

8. Now we take ITA No. 4019/Mum/2023 in the case of Rubberwala Realty, Mumbai for assessment year 2012-13. The grounds raised by the assessee are reproduced as under:

1. On the facts and circumstances of the Appellant's case and in law CIT (A) erred in confirming the action of the Id. A.O. in reopening the assessment u/s 147 by issue of notice u/s 148 of the Act dated 29.03.2016 which is bad in law.

2. On the facts and circumstances of the Appellant's case and in law CIT (A) erred in confirming the action of the Id. A.O. in treating the unsecured loans from M/s. Shree Bhairav Gems as accommodation entries of Rs.5,00,000/- by invoking provisions of section 68 of the Act, for the reasons mentioned in the impugned order or otherwise.

3. On the facts and circumstances of the Appellant's case and in law CIT (A) erred in confirming the action of the Id. A.O. in disallowing the interest amounting to Rs. 12,205/- paid with respect to the said loan, for the reasons mentioned in the impugned order or otherwise.

8.1 Briefly stated facts of the case are that the assessee filed return of income on 09.02.2013 declaring total income at Rs. Nil. Subsequently, scrutiny assessment u/s 143(3) of the Act was



completed on 09.03.2015, wherein total income was assessed at Rs. Nil. Subsequently, information was received from the Investigation Wing, Mumbai that survey action u/s 133A was carried out at the premises of M/s Rubberwala Housing and Infrastructure Ltd., wherein director of the Rubberwala Housing and Infrastructure Ltd. namely Shri Tabrez Shaikh (who is a partner of the assessee) in his statement recorded on oath u/s 131 of the Act admitted to have taken accommodation entries of the unsecured loans from certain parties by his group concerns including the assessee. In view of the information, in the reassessment proceedings, the Assessing Officer made addition amounting to Rs.72,00,000/- in terms of section 68 of the Act in relation to four parties having details as under:

Sr. No.	Name of Surat based concern providing accommodation entries	Amt. of accommodation entry (Rs.)
1.	M/s Shree Bhairav Diamond Pvt. Ltd.	10,00,000
2.	M/s Samta Exports Pvt. Ltd,	37,00,000
3.	M/s Dhankuber Exports Pvt. Ltd.	20,00,000
4.	Shree Bhairav Gems	5,00,000
	Total	72,00,000

8.2 On further appeal, the Ld. CIT(A) deleted the addition except amount of Rs.5,00,000/- in respect of Shree Bhairav Diamond. The Ld. CIT(A) also upheld the disallowance of the interest of



Rs.12,205/- paid to Shree Bhairav Gems. The relevant finding of the Ld. CIT(a) is reproduced as under:

“9.3. The above findings substantiate that the appellant has been able to discharge its onus before the AO. As regards M/s Shree Bhairav Gems, the financials have not been furnished before the AO. In the case of M/s. Pratham Telecom India P Ltd vs DCIT dated 17.09.2018 in ITA no.316 of 2016, the Hon'ble jurisdictional HC has held that "The assessee cannot simply provide some details such as Permanent Account Number, business address, the account which was maintained and a Bank Statement, or a Company's Master Data maintained by the Registrar of Companies. The assessee is obliged to explain the surrounding circumstances and the backdrop in which the transactions took place." It can be seen that the onus has not been discharged by the appellant before the AO as far as M/s Shree Bhairav Gems is concerned. Thus it cannot be stated that the creditworthiness of the transactions in respect of this lender has been proved before the AO. Hence, the addition of Rs. 5,00,000/- in respect of loans stated to be received from Shree Bhairav Gems is upheld. Rest of the addition is deleted.

9.4. I have perused the decision of the Hon'ble Tribunal relied in the case of one of the group company of the appellant, i.e. M/s. Rubberwala Hospitality Pvt. Ltd bearing ITA No. 299 & 314/Mum/2020 dated 23.11.2021. It is well known that addition u/s.68 is based on facts and the ability to discharge onus. This is also evident from para 7 of the said order, "...and direct the AO to delete the addition as the assessee has proved all the three ingredients of section 68 of the Act". In the instant case too, the facts have been appreciated based on the submission of the appellant, and decisions taken in the preceding paragraphs. No further discussion is required on this.”

8.3 Aggrieved with the disallowance of loan and interest in respect of Shree Bhairav Gems, the assessee is in appeal before the Tribunal by way of raising grounds as reproduced above.

8.4 As far as ground No. 2 and 3 of the appeal are concerned, the Ld. counsel submitted that the Ld. CIT(A) has merely sustained the disallowance for the reason that financial of Shree Bhairav Gems



were not submitted before the AO but same were duly filed before the Ld. CIT(A) which he did not consider. He further submitted that identical additions in respect of loan already paid in the case of group concern namely M/s Rubberwala Hospitality Pvt. Ltd. bearing ITA No. 299 & 314/Mum/2020 dated 23.11.2021 has been deleted by the Tribunal.

8.5 On the contrary, the Ld. DR relied on the order of the lower authorities.

8.6 We have heard rival submission of the parties and perused the relevant material on record. In our opinion, the Ld. CIT(A) has accepted the stand of the assessee in respect of three loan parties where also identical information was received. The only basis on which the Ld. CIT(A) has sustained the disallowance is that financial of said party were not filed before the Assessing Officer. Before us the ld Counsel for the assessee submitted that one more opportunity might be provided to the assessee for filing said documents. In view of above prayer of the assessee and in the interest of substantial justice, we set aside the finding of the Ld. CIT(A) in respect of loan of Rs.5,00,000/- held as unexplained cash credit and interest disallowance at Rs.12,205/- and restore the matter back to the file of the Assessing Officer to be decided afresh. The grounds No. 2 and 3 of the appeal of the assessee are



accordingly allowed for statistical purpose. Since, we have already restored the grievance of the assessee on merit to the AO, the issue of adjudication of the validity of the assessment made u/s 147 of the Act raised by way of ground No. 1 is rendered academic and therefore, same is not required to be adjudicated at this stage and left open.

ITA No. 3696/Mum/2023 (Assessment Year 2011-12)

9. Now, we take up appeal of the assessee in ITA No. 3696/Mum/2023 in the case of Hilton Infrastructure, Mumbai for assessment 2011-12. The grounds raised by the assessee are reproduced as under:

1. On the facts and circumstances of the Appellant's case and in law CIT (A) erred in confirming the action of the Id. A.O. erred in holding that the loan taken by the appellant from M/s. Pearl Enterprises and its repayment thereon is non-genuine, for the reasons mentioned in the impugned order or otherwise.

2. On the facts and circumstances of the Appellant's case and in law CIT, (A) erred in confirming the action of the Id. A.O. erred in disallowed the interest amounting to Rs. 15,39,443/- paid on unsecured loan, for the reasons mentioned in the impugned order or otherwise.

9.1 Briefly stated, facts of the case are that in the case the Assessing Officer vide his order dated 24.12.2018 made addition for loan of Rs.1,37,84,370/- received from M/s Pearl Enterprises held to be unexplained cash credit in terms of section 68 of the Act. But the Ld. CIT(A) deleted the said additions as money was received in earlier year. The finding of the Ld. CIT(A) is reproduced as under:



“7.11. Thus, the essential ingredient for application of S.68 is that the moneys should have been received, i.e. credited. In the instant case, the part money have been repaid during the year. In my view, the provisions of S.68 cannot be applied on such repayment of loan. Hence, notwithstanding my observations in the earlier paragraphs, the addition of Rs. 1,37,84,370/- made u/s.68 stands deleted. This ground stands Allowed.”

9.2 However, the Ld. CIT(A) sustained the disallowance on the payment of interest expenditure amounting to Rs.15,39,433/- to said party. Aggrieved, the assessee is in appeal before the Tribunal by way of raising grounds as reproduced above.

9.3 We have heard rival submissions of the parties and perused the relevant material on record. We find that the Ld. CIT(A) has not brought on record whether the corresponding addition in the relevant assessment year for the money received from M/s Pearl Enterprises was made in the hands of the assessee or not. Unless the credit from the said party is held to be unexplained cash credit no addition could have been made in respect of the interest from said party. Accordingly, we set aside the finding of the Ld. CIT(A). the ground No. 1 and 2 of the appeal of the assessee are accordingly allowed.

ITA No. 4018/Mum/2023 (Assessment Year 2012-13)

10. Now, we take up the ITA No. 4018/Mum/2023 in the case of Heks Infrastructure and Developers, Mumbai for assessment year



2012-13. The grounds raised by the assessee are reproduced as under:

1. On the facts and circumstances of Appellant's case and in law CIT (A) erred in confirming the action of the Id. A.O. in reopening the assessment u/s 147 by issue of notice u/s 148 of the Act dated 30.11.2016 which is bad in law.

2. On the facts and circumstances of Appellant's case and in law CIT (A) erred in confirming the action of the Id. A.O. in treating the unsecured loans taken by the appellant from M/s. Shree Bhairav Gems as non-genuine, for the reasons mentioned in the impugned order or otherwise.

3. On the facts and circumstances of Appellant's case and in law CIT (A) erred in confirming the action of the Id. A.O. in making an addition of Rs. 5,00,000/- on, account of unsecured loan taken by the appellant treating the same as unexplained cash credit u/s 68 of the Act, for the reasons mentioned in the impugned order or otherwise.

10.1 Briefly stated facts of the case are that the assessee filed return of income declaring Nil income on 31.08.2012. Subsequently on receipt of the information from the Director General of Income-tax (Inv.), Mumbai that assessee had taken bogus loan entries from group companies of Shri Praveen Kumar Jain, the assessment was reopened by way of issue of notice u/s 148 of the Act after recording reasons to believe that income escaped assessment. The reassessment was completed on 30.11.2016, wherein addition amounting to Rs.15,00,000/- from loan received from M/s Karishma Diamonds Pvt. Ltd. was made, whereas in the reason recorded , it was shown to had been received from the following three parties:



(a) Shree Bhairav Diamond Pvt. Ltd. Rs. 6,00,000/-

(b) Shree Bhairav Gems, Rs. 5,00,000/- &

(c) M/s Dhankuber Exports Pvt Ltd. Rs. 4,00,000/-.

10.2 The Ld. CIT(A) however deleted the addition in respect of two parties but sustained addition of Rs.5,00,000/- in respect of Shri Bhairav Gems. The relevant finding of the Ld. CIT(A) is reproduced as under:

“8.2. As regards loan of Rs. 4,00,000/- received from M/s Dhankuber Exports Pvt Ltd., it is seen that the appellant has furnished copy of ITR acknowledgment, ledger confirmation, bank statement and balance sheet. Thus, it can be concluded that the appellant has been able to adequately discharge the onus laid on it. Apart from the statement of Shri Gautam B Jain there is no other independent evidence to take a contrary view. Hence, this addition stands deleted.

8.3. As regards loan of Rs. 6,00,000/- received from Shree Bhairav Diamond Pvt. Ltd. It is seen that the appellant has furnished copy of ITR acknowledgment, ledger confirmation, bank statement and balance sheet. Thus, it can be held that the appellant has been able to adequately discharge the onus laid on it. Apart from the statement of Shri Gautam B Jain there is no other independent evidence to take a contrary view. Hence, this addition stands deleted.

8.4. The appellant has stated that Rs. 5,00,000/- has been received from Shree Bhairav Gems. The appellant has stated that it has furnished the copy of ITR acknowledgment and ledger confirmation. The financials are not submitted meaning thereby that the creditworthiness does not stand established by the appellant. I find from the ledger confirmation and ITR that these supporting evidences are in respect of Shree Bhairav Gems. However, the balance sheet of the appellant shows outstanding loans from Shree Bhairav Gems Pvt Ltd and not Shree Bhairav Gems. No evidence regarding the financial standing or creditworthiness of the said party has been furnished. In the case of M/s. Pratham Telecom India P Ltd vs DCIT dated 17.09.2018 in ITA no.316 of 2016, the Hon'ble jurisdictional HC has held that "The assessee cannot simply provide some details such as Permanent Account Number, business address, the account which was maintained and a Bank Statement, or a Company's Master Data maintained by the Registrar of Companies. The assessee is obliged to explain the



surrounding circumstances and the backdrop in which the transactions took place." It can be seen that the same has not been done by the appellant before the AO. Hence, on a consideration of entire facts, it is obvious that the appellant has not discharged the onus laid on it. The addition of Rs. 5,00,000/-stands confirmed.

8.5. I have perused the decision of the Hon'ble Tribunal relied in the case of one of the group company of the appellant, i.e. M/s. Rubberwala Hospitality Pvt. Ltd bearing ITA No. 299 & 314/Mum/2020 dated 23.11.2021. It is well known that addition u/s.68 is based on facts and the ability to discharge onus. This is also evident from para 7 of the said order, "...and direct the AO to delete the addition as the assessee has proved all the three ingredients of section 68 of the Act". In the instant case too, the facts have been appreciated based on the submission of the appellant, and decisions taken in the preceding paragraphs. No further discussion is required on this."

10.3 We have heard rival submissions of the parties and perused the relevant material on record. Before us, the Ld. counsel of the assessee has challenged the reopening of assessment u/s 147 of the Act on the ground that the Assessing Officer has not applied his mind while recording the reasons to believe that income escaped assessment. The Ld. counsel submitted that the Assessing Officer has recorded that loan of Rs.15,00,000/- was received from M/s Karishma Diamonds Pvt. Ltd., whereas on verification the Ld. CIT(A) found that no such loan was received from M/s Karishma Diamonds Pvt. Ltd. during the year under consideration. The Ld. DR before us has also not controverted this fact that no such amount was received from M/s Karishma Diamonds Pvt. Ltd. In our opinion, no such loan was received from M/s Karishma Diamonds Pvt. Ltd. during the year under consideration. The reasons to believe recorded that income escaped assessment are based purely



on non-application of the mind where he has not verified that any such loan was received by the assessee. The Ld. CIT(A) has upheld the addition in respect of another party which was not mentioned in the reasons recorded by the Assessing Officer. In view of the reassessment proceedings cannot be sustained and same are quashed. Since reassessment proceeding has already been quashed by us no addition on merit could be sustained in the case of the assessee. Accordingly, the grounds No. 1 to 3 of the appeal of the assessee are allowed.

ITA No. 4131/Mum/2023 (Assessment Year 2011-12)

11. Now, we take up appeal of the assessee in the case of Rubberwala Housing and Infrastructure Ltd. in ITA No. 4131/Mum/2023 for assessment year 2011-12. In the case, the Assessing Officer made addition in his order dated 29.12.2018 passed u/s 147 of the Act amounting to Rs.30,00,000/-.

11.1 On further appeal, the Ld. CIT(A) upheld the addition/disallowance observing as under:

“6.1. I have considered the facts of the case and submission of the appellant. According to the appellant, it has discharged its onus by furnishing copy of ITR acknowledgment, ledger confirmation and financial statement of M/s Nissim Traders Pvt. Ltd. Besides, the appellant has filed copies of its bank accounts to substantiate its claim that funds have been received in its bank account. However, the fact is that the AO had issued S.133(6) notice to M/s Nissim Traders Pvt. Ltd. which was not complied with.



6.2. It may be noted that the appellant had availed loan from the same party during AY 2016-17 which was decided by this office vide its order dt. 31.07.2023.

"23.2. According to the AO, an analysis of the financials of the lender i.e. M/s Nissim Traders Pvt. Ltd. does not establish creditworthiness of the entity and genuineness of the transactions. The AO issued 133(6) to the alleged lender which remained uncomplied with. Having considered the entire facts and reasoning given by the AO, I am of the view that the appellant has not been able to discharge its onus as regards S. 68 effectively. The addition stands CONFIRMED."

6.3. Under these circumstances, and considering that the party is one and the same, the addition stands CONFIRMED."

11.2 Before us, the Ld. counsel for the assessee submitted that addition has been sustained merely for the reason that notice u/s 133(6) of the Act were not complied with and Ld. counsel submitted that assessee is willing to provide current address of the said party to the Assessing Officer and necessary verification may be carried out by way of issue of notice u/s 133(6) of the Act on the new address. In view of the above facts and circumstances, we feel it appropriate to restore this issue back to the file of the Assessing Officer for deciding afresh after carrying out inquiries as deem fit in the facts and circumstances of the case. The grounds of appeal of the assessee are accordingly allowed for statistical purposes.

ITA No. 4132/Mum/2023 (Assessment Year 2011-12)

12. Now, we take up ITA No. 4132/Mum/2023 in the case of Rubberwala Housing and Infrastructure Ltd., Mumbai for



assessment year 2011-12. The grounds raised by the assessee are reproduced as under:

1. On the facts and circumstances of the Appellant's case and in law Id. CIT (A) erred in confirming the action of the Id. A.O. in reopening the assessment u/s 147 by issue of notice u/s 148 of the Act dated 29.03.2016 which is bad in law.

2. On the facts and circumstances of the Appellant's case and in law Id. CIT (A) erred in confirming the action of the Id. A.O. in making an addition of Rs. 34,50,000/- on account of unsecured loan treating the same as unexplained cash credit by invoking the provisions of section 68 of the Act, for reasons mentioned in the impugned order or otherwise.

12.1 In the case also the unsecured loan received amounting to Rs.86,50,000/- by the assessee was held by the Assessing Officer as unexplained cash credit in terms of section 68 of the Act but the Ld. CIT(A) deleted the addition amounting to Rs.52,00,000/- but sustained addition amounting to Rs.5,00,000/- from Shree Bhairav Diamond Pvt. Ltd. and Rs.29,50,000/- from M/s Shree Bhairav Gems. The relevant finding of the Ld. CIT(A) is reproduced as under:

“6.1. I have considered the facts of the case. The AO had made addition of Rs.86,50,000/- in respect of loans received from the following parties:-

	<i>Name of concern</i>	<i>Amount</i>
1	<i>Kush Gems Pvt. Ltd.</i>	<i>52,00,000</i>
2	<i>Shree Bhairav Diamond Pvt. Ltd.</i>	<i>5,00,000</i>
3	<i>Shree Bhairav Gems</i>	<i>29,50,000</i>
	<i>Total</i>	<i>86,50,000</i>



6.2. *Apparently these are concerns managed by Bhanwarlal Jain and are not genuine in nature. A survey was conducted at the premises of assessee on*

29.09.2014. During the survey, statement of Shri Tabrez Shaikh was recorded. He could not furnish the details of the loans at the time of survey so as to establish identity, genuineness and creditworthiness. Accordingly, he offered the peak balance for taxation.

6.3 *Shri Tabrez Shaikh subsequently filed an affidavit stating that he had erroneously disclosed the genuine transactions of loan amount as accommodation entries before the tax authorities, I concur with the AO that unless coercion is shown to have been exerted, the statement cannot be discarded. It is also noted that the retraction affidavit is dt. 29.09.2015 and was submitted much later to the department while the survey was conducted on 29.09.2014. Hence, this aspect of the argument of the appellant is rejected.*

6.4. *At the same time in respect of addition of u/s 68, what one needs to see is whether the appellant is able discharge the onus placed as regards identity, creditworthiness and genuineness. In the case of Manoj Agarwal, 113 ITD 377, DoJ: 25.07.2008, the Hon'ble ITAT Delhi (Special Bench) has interpreted the decision of Noorjehan and held as: "178... It is well-settled that under section 68 the burden keeps shifting from one side to the other depending upon the evidence adduced." In CIT vs N. R. Portfolio P Ltd. (2013) 214 Taxman 408 (Delhi HC), it was held by Hon'ble Court that : "8.....the concept of "shifting onus" does not mean that once certain facts are provided, the assessee's duties are over. If on verification, or during proceedings, the AO cannot contact the share applicants, or that the information becomes unverifiable, or there are further doubts in the pursuit of such details, the onus shifts back to the assessee. At that stage, if it falters, the consequence may well be an addition under Section 68". Hence notwithstanding the fact that the statement was given or retraction was made, the issue is examined independently on the basis of evidences and*



whether the appellant has been able to adequately discharge its onus.

6.4. As regards the loan from M/s Kush Gems Pvt. Ltd., I find that the appellant has furnished the following before the AO (a) Audited financial statements for the year ended 31.03.2011 (b) Confirmation of balance. It is further seen from the confirmation that interest of Rs. 56,244/- has been charged for the year. It is further seen that the appellant has also furnished copies of bank statement of M/s Kush Gems Pvt. Ltd. reflecting the loan transactions. The copy of ITR, Tax Audit Report and financials of the said party relevant to AY 2011-12 have also been furnished. This is also evident from para 5 (i) at page 4 of the assessment order, where the AO has confirmed that these documents were furnished. Considering the totality of facts before me, I am of the view that the appellant has been able to discharge the onus laid before it as regards section 68. There is no other information which would warrant a different view. In the given circumstances, the addition of Rs. 52,00,000/- made in the case of M/s Kush Gems Pvt. Ltd. stands

6.5 As regards Rs. 5,00,000/- from M/s Shree Bhairav Diamond Pvt. Ltd. and Rs. 29,50,000/- from M/s Shree Bhairav Gems, the appellant has furnished the following: copy of ledger confirmation. Besides, the appellant has furnished copy of its bank account to substantiate its claim that funds having received from the said entities. However, the return of income/financials have not been furnished. In the case of M/s. Pratham Telecom India P Ltd vs DCIT dated 17.09.2018 in ITA no.316 of 2016, the Hon'ble jurisdictional HC has held that "The assessee cannot simply provide some details such as Permanent Account Number, business address, the account which was maintained and a Bank Statement, or a Company's Master Data maintained by the Registrar of Companies. The assessee is obliged to explain the surrounding circumstances and the backdrop in which the transactions took place." It can be seen that the onus has not been completely discharged by the appellant before the AO as far as M/s Shree Bhairav Diamond



Pvt. Ltd. and M/s Shree Bhairav Gems are concerned. Thus it cannot be stated that the creditworthiness or genuineness of the transactions in respect of these lenders has been proved before the AO. Hence, the addition of Rs. 34,50,000/- in respect of loans stated to be received from M/s Shree Bhairav Diamond Pvt.Ltd. and M/s Shree Bhairav Gems is upheld.

6.6. I have perused the decision of the Hon'ble Tribunal relied in the case of one of the group company of the appellant, i.e. M/s. Rubberwala Hospitality Pvt. Ltd bearing TA No. 299 & 314/Mum/2020 dated 23.11.2021. It is well known that addition u/s.68 is based on facts and the ability to discharge onus. This is also evident from para 7 of the said order, "...and direct the AO to delete the addition as the assessee has

proved all the three ingredients of section 68 of the Act". In the instant case too, the facts have been appreciated based on the submission of the appellant, and decisions taken in the preceding paragraphs. No further discussion is required on this.

6.7. In effect addition of Rs. 52,00,000/- is deleted, while addition of Rs. 34,50,000/-is upheld."

12.2 We note that identical addition in respect of loan from Shree Bhairav Gems has been restored by us to the file of the assessing officer while adjudicating appeal in ITA No. 4019/Mum/2023 in the case of Rubberwala Realty and therefore, following our finding the present additions are also decided *mutasis mutandis*.

ITA No. 4130/Mum/2023 (Assessment Year 2012-13)

13. Now, we take up ITA No. 4130/Mum/2023 in the case of Rubberwala Housing and Infrastructure Ltd., Mumbai for



assessment year 2012-13. The grounds raised by the assessee are reproduced as under:

1. On the facts and circumstances of the Appellant's case and in law, the Id. CIT(A) erred in confirming the action of the Id. A.O. in alleging that the appellant had taken unsecured loans in the form of accommodation entries, treating the same as unexplained cash credit, for the reasons mentioned in the impugned order or otherwise.

2. On the facts and circumstances of the Appellant's case and in law, the Id. CIT(A) erred in disallowing the interest paid to M/s. A2 Jewels amounting to Rs. 1,80,000/-, for the reasons mentioned in the impugned order or otherwise.

13.1 From the impugned order by the Ld. CIT(A), we find that said ground has not been adjudicated by the Ld. CIT(A) for the reason that no such ground was taken in the appeal. The relevant finding of the Ld. CIT(A) is reproduced as under:

"9. The appellant has made a written submission regarding disallowance of Rs. 1,80,000/- being interest expenditure. It is seen that this issue also forms part of the statement of facts. However, no such ground has been taken in the "grounds of appeal". Hence, no adjudication is required on this."

13.2 We have heard rival submission of the parties and perused the relevant material on record. Since the Ld. CIT(A) has not adjudicated the ground, we set aside the finding of the Ld. CIT(A) and restore the matter back to him with the direction to the assessee to raise said ground specifically before the Id CIT(A). The ground of appeal of the assessee is accordingly allowed for statistical purposes.



14. In the result, the appeals of the assessee are allowed or dismissed indicated below:

Sr. No.	ITA No.	Name of Assessee	Result
1.	4129/Mum/2023 (A.Y. 2014-15)	Rubberwala Holding and Infrastructure Ltd.	Allowed
2.	4128/Mum/2023 (A.Y. 2017-18)	Rubberwala Holding and Infrastructure Ltd.	Dismissed
3.	4019/Mum/2023 (A.Y. 2012-13)	Rubberwala Realty	Allowed
4.	3696/Mum/2023 (A.Y. 2011-12)	Hilton Infrastructure	Allowed
5.	4018/Mum/2023 (A.Y. 2012-13)	Heks Infrastructure and Developers	Allowed
6.	4131/Mum/2023 (A.Y. 2011-12)	Rubberwala Housing and Infrastructure Ltd.	Allowed for statistical purposes
7.	4132/Mum/2023 (A.Y. 2011-12)	Rubberwala Housing and Infrastructure Ltd.	Dismissed
8.	4130/Mum/2023 (A.Y. 2012-13)	Rubberwala Housing and Infrastructure Ltd.	Allowed for statistical purposes

Order pronounced in the open Court on 28/10/2024.

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

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

Mumbai;
Dated: 28/10/2024
Rahul Sharma, Sr. P.S.

Rubberwala Housing and Infrastructure Ltd., 25
Rubberwala Realty, Hilton Infrastructure &
Heks Infrastructure and Developers
ITA Nos. 4129 & 4132, 4128 & 4131,
4130/MUM/2023, 4019/M/23, 3696/M/23
& 4018/M/2023



Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai