

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "E", MUMBAI**

**BEFORE SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER
AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.4079/M/2024
Assessment Year: 2016-17**

M/s. Kamlesh Gupta and Sons HUF, 95-C, Mittal Towers, Nariman Point, Churchgate, Mumbai - 400021 PAN: AAEHK4734K	Vs.	The Income Tax Officer - 19(2)(2) Piramal Chamber, Lalbaug, Lower Parel, Mumbai Maharashtra - 400020
(Appellant)		(Respondent)

**ITA No.4187/M/2024
Assessment Year: 2016-17**

Income Tax Officer - 19(2)(2), 503, 5 th Floor, Income Tax Office, Piramal Chamber, Curry Road Maharashtra - 400012	Vs.	M/s. Kamlesh Gupta and Sons HUF 56,56 Mount Unique 62A Peddar Road, Mumbai Maharashtra - 400026 PAN: AAEHK4734K
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Sumit Mantri, A.R.
Revenue by : Shri G. Santosh Kumar, Sr. AR

Date of Hearing : 15.10.2024
Date of Pronouncement : 30.10.2024

O R D E R

Per : Narender Kumar Choudhry, Judicial Member:

These cross appeals by the Revenue Department and the Assessee have been preferred against the order dated 21.06.2024, impugned herein, passed by the National Faceless Appeal Center (NFAC)/ Ld. Commissioner of Income Tax (Appeals) (in short Ld. Commissioner) under section 250 of the Income Tax Act, 1961 (in short 'the Act') for the A.Y. 2016-17.

2. For Brevity, we are inclined to decide Revenue's appeal No.4187/M/2024 first, which pertains to the decision of the Ld. Commissioner in directing the Assessing Officer (AO) to verify the opening balance of unsecured loans from the returns and any other material on record and provide a relief to the Assessee in respect of opening balance

3. We observe that the AO vide assessment order dated 29.12.2018 u/s 144 of the Act has passed the impugned assessment specifically in the absence of any reply from the Assessee in spite of granting numerous opportunities by observing and holding mainly as under:

"That during the year under consideration from the return of income it appears that the Assessee had taken unsecured loans to the tune of Rs.6,26,53,277/- from various parties. No loan confirmation was filed during the scrutiny proceedings. Accordingly, the Assessee vide notice u/s 142(1) of the Act was asked to submit the details/confirmation of lenders from whom the alleged loan was claimed to have been taken. However, the Assessee did not respond to the notice and not complied with the notice as well as show cause notice wherein it was specifically mentioned that in the absence of details and confirmation from all parties, the entire unsecured loans be treated as unaccounted money and added to his total income. Law is well settled that the onus of proving the source of a sum of money found to have been received by an Assessee, is on it. The Assessee has to discharge the onus by identifying the lender, proving the financial capacity of the lender and establishing the genuineness of the transaction. In the instant case in spite of numerous opportunities granted the Assessee failed to prove (1) the identity of lender, (2) the capacity of the lender and (3) the genuineness of the transaction. As the Assessee failed to submit even the basic confirmation and therefore relying on various judgments as recorded in the assessment order such as Roshan Di Hatti vs. CIT (1977) 107 ITR 937 (SC)/Kale Khan Mohammad Hanif vs. CIT (1963) 50 ITR 1 (SC) the unsecured loan amounting to Rs.6,26,53,277/- is treated as non genuine and income from undisclosed sources brought into the books under the garb of unsecured loan and added the same as unexplained cash credit u/s 68 of the Act".

3.1 The AO also made other addition of Rs.79,14,292/- u/s 36(1)(iii) of the Act which we will deal later in the Assessee's appeal.

4. The Assessee before the Ld. Commissioner challenged the aforesaid additions who though issued various notices to the Assessee, however, the Assessee except files responses on some of the dates, made no compliance. The Ld. Commissioner noticed the following facts :

“That in the written submissions the Assessee has stated that opening balance on account of unsecured loans from 39 parties is Rs.4,26,00,000/-, ultimately held that the addition of the opening balance cannot be made in the current assessment year as it is well settled law that addition u/s 68 of the Act can be made only during the year in which such credit has been received and if the credit balance appearing in the account of the Assessee is not pertaining to the year under consideration then the addition u/s 68 of the Act cannot be made”.

4.1 The Ld. Commissioner by considering the aforesaid facts and circumstances ultimately directed the AO to verify the opening balance of unsecured loans from the returns and other material on record and provide relief to the Assessee qua opening balance.

4.2 The Ld. Commissioner further clarified that all fresh unsecured loans during the year including those representing secured up loans, shall be brought to tax u/s 68 of the Act as the Assessee has not discharged the onus of proving the identity, financial capacity and genuineness of the loan parties as narrated by the AO in the assessment order.

5. The Revenue Department, being aggrieved, is in appeal before us.

6. We have heard the parties and perused the material available on record and given thoughtful consideration given thoughtful considerations to the rival contention of the parties and peculiar facts and circumstances of the case. We are in agreement with the Ld. Commissioner in concluding that addition on the opening balance cannot be made in the current assessment year as it is a well settled law that addition u/s 68 of the Act can be made only during the year in which such credit has been received. We further observe that the Ld. Commissioner while directing the AO to

verify the opening balance of unsecured loans also consciously clarified that all fresh unsecured loans during the assessment year under consideration including those representing secured up loans shall be brought to tax u/s 68 of the Act as the Assessee has not discharged the onus of proving the identity, financial capacity and genuineness of the loan parties. We even otherwise do not find any reason/material to contradict the findings of the Ld. Commissioner in directing the AO as such. Hence, the appeal filed by the Revenue Department stands dismissed.

7. Coming to the appeal filed by the Assessee, we observe that the AO has also made the addition of Rs.79,14,292/- being difference between the interest paid or borrowed capital and investment income and added the same to the income of the Assessee u/s 36(1)(iii) of the Act by observing and concluding as under :

“The Assessee has taken unsecured loan of Rs.6,26,53,277/- and has paid interest thereon of Rs.96,24,203/- and also made investment in Government Securities to the tune of Rs.4,61,35,363/- and has also shown loan and advances made at Rs.1,18,37,337/-. The total investment income shown by the Assessee for the current year is Rs.17,09,911/-. Therefore, it is apparent that the Assessee has paid interest on borrowed capital which is greater than the investment income in his hands. Hence, the Assessee was asked as to why the difference between the interest paid and the investment income i.e. Rs.79,14,292/- (Rs.96,24,203/- - Rs.17,09,911/-) should not be added to the total income of the Assessee. However, the Assessee did not offer any explanation. Therefore, it is construed that the Assessee does not have anything concrete to say against the proposed addition. Hence, the difference between the interest paid or borrowed capital and investment income i.e. Rs.79,14,292/- is added back to the income of the Assessee u/s 36(1)(iii) of the Act”.

8. The Assessee, being aggrieved, also challenged this addition before the Ld. Commissioner and during the appellate proceedings submitted

several documents along with application for submission of additional evidence under rule 46A of the Income Tax Rules, 1962 (in short 'the Rules) on 22.12.2023.

9. The Ld. Commissioner though examined the admissibility of the evidence u/r 46A of the Rules, however, upheld the addition of Rs.79,14,292/- by observing as holding mainly as under:

“That the condition prescribed in rule 46A of the Rules is not satisfied and therefore the application for admission of additional evidence dated 22.12.2023 is rejected. The Ld. Commissioner on merits by observing that during the appellate proceedings the Assessee has not furnished any satisfactory explanation of the transactions of unsecured loan. Further, the AO has also observed in the assessment order that the unsecured loans are not genuine. In view of this discussion, the addition of Rs.79,14,292/- is upheld” .

10. The Assessee, being aggrieved, is in appeal before us. The Ld. Counsel for the Assessee at the outset has claimed that due to various circumstances, the Assessee was prevented from submitting its response in the assessment proceedings as the Assessee has not received any notices allegedly issued by the AO, which resulted into non-compliance by the Assessee. However the Ld. Commissioner did not accept the claim of the Assessee and rejected the documents/ evidence without being admitting the same. Though the evidence is essential for proper and just decision of the case and therefore for substantial justice, may be by imposing reasonable cost, direction may be given to the Ld. Commissioner to consider the evidence.

11. On the contrary, the Ld. DR refuted the claim of the Assessee.

12. We have heard the parties and given thoughtful considerations to the rival claims of the parties and the peculiar facts and circumstances of the case. We observe that the Ld. Commissioner has duly taken into

consideration the aforesaid reason given by the Assessee and refused to entertain the evidence by observing and holding as under

“The Assessee is making an incorrect statement, as in the statement of facts the Assessee has admitted that all the notices were subsequently downloaded from the e-filing portal by the tax consultant. Thus there has been valid service of all electronic notices as envisaged in section 282 of the Act. The Assessee cannot be absolved his responsibility to respond to statutory notices on the plea of ignorance and negligence. The Assessee was aware of the fact that the e-mail address used in the return of income was that of her husband. Therefore he is not satisfied that the Assessee had sufficient cause which prevented him from furnishing the relevant details before the AO. It is also not a case that the AO refused to admit the evidence or sufficient opportunities were not given by the AO during the course of assessment proceedings”.

12.1 No doubt the reason stated by the Assessee before the Ld. Commissioner for producing the additional evidence u/r 46A of the Rules does not inspire confidence and/or not logical or acceptable, however, considering the peculiar facts and circumstances in totality we are of the considered view that the documents such as details of unsecured loan, loan confirmation, ITR acknowledgment and bank statements as sought to be filed by the Assessee, prima-facie appear to be essential for just decision of the case. The Ld. Commissioner while deciding the issue in hand has not gone into the detail, as he was not having proper reply/document, which the Assessee has failed to file, therefore decided the issue in limine but not in its right perspective, hence, we are inclined to remand this issue pertaining to the addition of Rs.79,14,292/- made u/s 36(1)(iii) of the Act by the AO, to the file of the Ld. Commissioner for decision afresh by the additional evidence filed by the Assessee u/r 46A of the Rules, however, subject to deposit of Rs.22,000/- within 30 days from the receipt of this order in the Revenue Department, without claiming any deduction/disallowance on this amount. **Thus** the case is remanded to the file of Ld. Commissioner and appeal of the Assessee is allowed for statistical purposes accordingly.

13. We clarify, in case of further default, the Assessee shall not be entitled for any leniency.

14. In the result, the appeal filed by the Revenue Department stands dismissed, whereas the appeal filed by the Assessee stands allowed for statistical purposes.

Order pronounced in the open court on 30.10.2024.

**Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER**

**Sd/-
(NARENDER KUMAR CHOUDHRY)
JUDICIAL MEMBER**

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.