

IN THE INCOME TAX APPELLATE TRIBUNAL

"A" BENCH, MUMBAI

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.1878/MUM/2024

(Assessment Year : 2013-14)

A Kheni Developer Private Limited,

54, Brijkutir 67, A Nepeansea Road,

Opp. Regency Hotel

Mumbai 400006

PAN – AAICA1345H

..... Appellant

v/s

ITO, 12(1)(1),

Aaykar Bhavan, M.K. Road,

Mumbai – 400020.

..... Respondent

Assessee by : Shri V.P. Kothari

Revenue by : Shri Ram Krishna Kedia, Sr.DR

Date of Hearing –19/09/2024

Date of Order – 02/12/2024

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The assessee has filed the present appeal challenging the impugned order dated 29/03/2024, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [*"learned CIT(A)"*], for the assessment year 2013-14.

2. In this appeal, the assessee has raised the following grounds: –

"1. The learned CIT(A) NFAC has erred in law and on facts in confirming the addition of Rs.61.85.823/- u/s 68 of the Income Tax Act, 1961 treating the unsecured loan taken from M/s. Euro Diam [Bhanwarlal Jain Group concern] without considering the evidence and documents submitted to prove the creditworthiness, identity and genuineness of the transactions.

2. The learned CIT(A) NFAC has erred in law and on facts in confirming the addition of Rs.95.359.-been interest payment to M/s. Euro Diam considering the loan taken as non-genuine which is already included in the addition us 68 as per Ground No. 1.

3. The learned CIT(A) NFAC has erred in law and on facts in confirming the disallowance loss of R.s.2,00,808/- declared in Return of Income without properly considering the facts of the case."

3. The issue arising in grounds no. 1 and 2, raised in assessee's appeal, pertains to addition on account of an unsecured loan received by the assessee during the year under consideration under section 68 of the Act and disallowance of interest paid on such loans by considering the same as non-genuine.

4. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee is engaged in the business of real estate developers and filed its return of income on 29/09/2013 for the year under consideration, declaring a total loss of INR 2,00,808. The return filed by the assessee was selected for scrutiny through CASS and statutory notices under section 143(2) and section 142(1) of the Act were issued and served on the assessee. During the assessment proceedings, it was observed that the assessee has received an unsecured loan amounting to ₹ 61 lakh from Euro Diam, which is an entity controlled by Mr. Bhanwarlal Jain, who in his statement recorded under section 132(4)/131 of the Act admitted before the Investigation Wing that they were merely dummy entities engaged in providing accommodation entries in terms of bogus unsecured loan, bogus

purchases, etc. Accordingly, the assessee was asked to show cause as to why the unsecured loan to the tune of ₹ 61 lakh received from Euro Diam be not added to the total income of the assessee as unexplained cash credit under section 68 of the Act and the interest thereon claim by the assessee be also not disallowed. In response, the assessee submitted that it has already submitted the loan confirmation letter along with a bank statement and copy of acknowledgement for filing of return to prove the identity and creditworthiness of Euro Diam. The assessee further submitted that to prove the genuineness of the loan transaction, the assessee has filed a copy of the affidavit sworn by Mr. Gagan K. Chandalia, proprietor of Euro Diam dated 30/12/2015. Thus, the assessee submitted that it has proved the identity and creditworthiness of the loan party and the affidavit confirms the genuineness of the transaction. Therefore, the initial burden as required under section 68 of the Act has been discharged by the assessee. The assessee further submitted that the money has been transferred through the bank account of the loan lender to the assessee's bank account and the payment has also been made by the assessee in the bank account of the loan party.

5. The Assessing Officer ("AO") vide order dated 18/03/2016 passed under section 143(3) of the Act disagreed with the submissions of the assessee and held that Euro Diam is controlled and managed by Mr. Bhanwarlal Jain, who is engaged in the business of providing accommodation entries of various types through numerous self-controlled business entities. By referring to the search conducted on Mr. Bhanwarlal Jain, the AO held that Mr. Bhanwarlal Jain had admitted that they had only provided accommodation entries in the

guise of unsecured loans. The AO also referred to the statement of Mr. Bhanwarlal Jain recorded under section 132 (4)/131 of the Act. The AO further noted that notices issued under section 133(6) of the Act to various concerns controlled and managed by Mr. Bhanwarlal Jain were returned unserved. Further, the Inspector deputed to serve the notice reported that no such party was available at the given address. Further upon enquiry, it was informed that after November 2013, nobody came to these premises and no genuine business activity was carried out before and after November 2013 from these premises. Thus, the AO concluded that the assessee has availed loans and advances from the bogus party and has not been able to establish the genuineness of the loan or creditworthiness of the transaction. Accordingly, the AO made an addition of ₹ 61 lakh being the unsecured loan received by the assessee from Euro Diam under section 68 of the Act. The AO also disallowed the interest amounting to ₹ 95,359 on the said loan claimed under section 37(1) of the Act by the assessee.

6. The learned CIT(A), vide impugned order, dismissed the appeal filed by the assessee and upheld the addition made under section 68 of the Act by observing as follows: –

"4. I have examined the rival contentions, perused the materials on record and the case laws relied on by the appellant and the Assessing Officer. The Hon'ble Apex Court in the case of CIT vs Durga Prasad More 82 ITR 540 and in the case of Sumati Dayal vs CIT 214 ITR 801 has expounded that revenue authorities are also supposed to consider the surrounding circumstances and apply the test of human probability. In these cases the transactions though apparent were held to be not real ones.

4.1. Section 68 of the Act stipulates that when there is credit of amounts in the books maintained by an assessee during the previous year and the assessee offers no explanation about the nature and source of such credit or the explanation offered by the assessee, in the opinion of the Assessing

Officer, is not satisfactory, then the said credit shall be deemed to be the income of the assessee. As per the various judicial decisions the appellant is required to prove (1) the genuineness of the loan creditors are (2) identity of the creditors and (3) creditworthiness of the creditors.

4.2 In Para 5 of the Assessment Order the learned Assessing Officer has observed that appellant has taken Loan of Rs.61,00,000/- from Euro Diam a Proprietary concern of Shri Gagan K. Chandalia a Bhanwarlal Jain Group concern who was involved in providing bogus entries which was admitted by them that they are carrying on this activity under various names one of which concern is Euro Diam.

4.3 In Para 5.3 of the order the Ld. AO has narrated the modus operandi of Bhanwarlal Jain Group for providing bogus entries through various entities to number of beneficiaries. The learned Assessing Officer has narrated the story of Bhanwarlal Jain Group in Para 4.3.1 to 4.3.7. In para 4.4 he has stated that notice u/s 133(6) dated 16.11.2016 was sent to the creditor but the same was not served as the said premises was closed. The AO has also gathered the information that since November, 14 nobody comes to the premises of the lender.

4.4 The appellant has submitted that regarding the loan of Rs.61,00,000/- from M/s. Euro Diam the appellant has proved the identity, creditworthiness and genuineness of the transactions by providing loan confirmation, bank statement of creditors, copy of Income Return, ITR acknowledgment with PAN and affidavit duly sworn by creditors confirming the loan transactions and it is genuineness. However, the learned Assessing Officer merely based on information received from DGIT regarding modus operandi of Bhanwarlal Jain Group not looked into the evidence and documents already on record.

4.5 The Assessment Order contains 21 pages wherein the AO has narrated the story of Bhanwarlal Jain Group and tried to prove that the whole business of Bhanwarlal Jain Group is non genuine, bogus and acted as entry provider to various beneficiaries.

4.6 It has been held in many judicial decisions that even after rejecting the explanation given by the assessee, the assessing authority should consider the crucial aspect as to whether on the facts and circumstances of the case it could be inferred that the sums credited in the books of the assessee constituted income of the previous year.

5. For the sake of ready reference, the following paras of the assessment order has been reproduced to highlight that this is not case where assessment has been done Sitting at the office rather Income Tax Department has conducted a search operation u/s 132 of the Act and has gathered information.

"4.10 Creditworthiness is not proved by showing issue and receipt of o cheque or by furnishing a copy of statement of bank account, when circumstances requires that there should be some more evidence of positive nature to show that the lenders had made genuine loan after due diligence or for personal reasons. The final conclusion must be pragmatic and practical, which takes into account holistic view of the entire evidence including the difficulties, which the assesses may face to unimpeachably establish creditworthiness of the shareholders.

4.11 On the question of creditworthiness and genuineness, there is no doubt that the money was received through banking channels, but did not reflect actual genuine business activity. The share subscribers did not have their own profit making apparatus and were not involved in business activity. They merely rotated money, which was coming through the bank accounts, which means deposits by way of cash and issue of cheques. The bank accounts, therefore, did not reflect their creditworthiness or even genuineness of the transaction.

4.12 Correct position of law is that the Revenue Authorities or the judiciary should be convinced about the identity, creditworthiness and genuineness of the transaction. The onus to prove the three factum is on the assessee as the facts are within the assessee's knowledge. Mere production of incorporation details, PAN Nos. or the fact that third persons or company had filed income tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up."

6. In view of the above discussion, the addition made by the AO u/s 68 of the Act is sustained as nothing has been produced before me by the appellant to contradict the observation made by the AO in the assessment order. Hence these grounds of appeal are dismissed."

7. Further, the learned CIT(A) also upheld the disallowance of interest paid on unsecured loans under section 37(1) of the Act. The learned CIT(A) also dismissed the ground raised by the assessee pertaining to the allowance of carry forward of losses. Being aggrieved, the assessee is in appeal before us.

8. We have considered the submissions of both sides, perused the material available on record and case laws relied on by both parties. In the present case, it is undisputed that during the year under consideration, the assessee received an unsecured loan of ₹ 61 lakh from Euro Diam. It is the plea of the assessee that the said loan was received through the proper banking channel and was also refunded by the assessee in the financial year 2013-14 along with interest. In order to substantiate the identity and creditworthiness of the lender and the genuineness of the transaction, the assessee has placed on record the copy of the loan confirmation and bank statement of Euro Diam reflecting the payment and receipt of the loan. Further, the assessee has also

filed the affidavit sworn by Mr. Gagan K. Chandalia, proprietor of Euro Diam on 30/12/2015. As per the assessee, it has also paid interest at the rate of 6% to Euro Diam. The assessee has also placed on record the financial statement of Euro Diam reflecting the loan and the balance sheet. On the contrary, as per the Revenue, Euro Diam is an entity which is owned and controlled by Mr. Bhanwarlal Jain, who in his statement recorded during the search action admitted that all the entities/controlled by him are bogus and are involved in providing accommodation entries to the beneficiaries. Thus, as per the Revenue, the loan of ₹ 61 lakh received by the assessee from one of the entities controlled by Mr. Bhanwarlal Jain is also one such transaction of accommodation entry. During the hearing, the learned Departmental Representative ("*learned DR*") submitted that during the search at the premises of Mr. Bhanwarlal Jain at a single place books of account and duplicate books of accounts were found. Further, by referring to the financials of Euro Diam submitted that Euro Diam has reported a total turnover of ₹ 153 crore during the year, however, the gross total income was declared only at ₹ 2,85,053. The learned DR further submitted that Euro Diam has huge sundry creditors and sundry creditors, i.e. ₹ 71.55 crore and ₹ 56.30 crore respectively. The learned DR submitted that the affidavit of Mr. Gagan K. Chandalia, proprietor of Euro Diam, filed by the assessee is just an afterthought, which does not prove the genuineness of the transaction.

9. From the perusal of the list of 70 business entities admitted to be owned/controlled by Mr. Bhanwarlal Jain, during his statement made during the course of search action, we find that Euro Diam is one such entity. Further,

we find that Mr. Bhanwarlal Jain has duly submitted the details of Euro Diam along with name of its proprietor, i.e. Mr. Gagan K. Chandalia. Further, it was also admitted that the business of all these concerns was supervised and managed by Mr. Bhanwarlal Jain. In order to determine the genuineness of the transaction and identity of the loan lender, the AO during the assessment proceedings also issued notices under section 133 (6) of the Act to the loan lender, however, these notices were returned unserved and even the Inspector, who was deputed to serve these notices, reported that no such entity is available at the given address. During the hearing, the learned Authorised Representative ("*learned AR*") submitted that the assessee was not granted the opportunity if notices issued under section 133(6) of the Act were returned unserved. Further, the learned AR emphasised on the fact that a loan of ₹ 61 lakh received by the assessee from Euro Diam has been returned by the assessee with interest in subsequent years. It is pertinent to note that in the instant case, the unsecured loan of ₹ 61 lakh received by the assessee from Euro Diam has been treated as unexplained credit by the assessee under section 68 of the Act. The provisions of section 68 of the Act read as follows: –

"68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year"

10. Thus, for the purpose of section 68 of the Act, if any sum is found credited in the books of an assessee and the assessee offers no explanation about the nature and source thereof or such explanation is not found to be

satisfactory, then the sum so credited may be charged to income tax as the income of the assessee of that year. Therefore, from a careful perusal of section 68 of the Act, it is evident that the relevant aspect is the credit of the sum in the assessee's books and the refund in subsequent years is completely irrelevant for the purpose of section 68 of the Act. Thus, section 68 of the Act requires the assessee to explain the nature and source of the sum so found to be created in its books of accounts maintained for that previous year. On the one hand, though the assessee has furnished the loan confirmation and affidavit of Mr. Gagan K. Chandalia, proprietor of Euro Diam dated 30/12/2015, on the other hand, it is also relevant to note that Mr. Bhanwarlal Jain had admitted that Euro Diam is one of the entities which is controlled and managed by him and in his statement, he further admitted that all these entities are engaged in providing accommodation entries. Thus, the evidence submitted by the assessee is shrouded with various other contradictory material. Even though ensuring the attendance of the person to whom the notice under section 133(6) of the Act has been issued is not the responsibility of the assessee, however, in view of the peculiar facts of the instant case, as noted in the following paragraphs, compliance to notice issued under section 133(6) of the Act becomes relevant. Since the assessee was not granted the opportunity to ensure the compliance of notice issued under section 133(6) of the Act to Euro Diam, during the hearing, the learned AR agreed that given an opportunity the assessee will produce the concerned person of Euro Diam for examination. Accordingly, we deem it appropriate to restore this issue to the file of the jurisdictional AO for *de novo* adjudication with a direction to the assessee to produce the concerned person of Euro Diam for examination

before the AO. We find that the decisions relied upon by the learned AR have been rendered in their own facts which are different from the facts under consideration before us. Therefore, these decisions are not applicable to the present case being factually distinguishable. Accordingly, the impugned order on this issue is set aside and grounds no. 1 and 2 raised in assessee's appeal are allowed for statistical purposes.

11. In view of our aforesaid directions, ground No. 3 needs no separate adjudication.

12. In the result, the appeal by the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 02/12/2024

Sd/-
AMAJIT SINGH
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 02/12/2024

Copy of the order forwarded to:

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

By Order

Assistant Registrar
ITAT, Mumbai