

IN THE INCOME TAX APPELLATE TRIBUNAL
“D” Bench, Mumbai
Before Shri B.R. Baskaran (AM)& Ramlal Negi (JM)

I.T.A. No. 1250/Mum/2014
(Assessment Year 2009-10)

I.T.A. No. 3304/Mum/2014
(Assessment Year 2010-11)

Dilip Kumar Sarawgi 10, Oval Vadi Vithal Vadi Matka Gali Kalbadevi Road Mumbai-400 02.	Vs.	ITO Ward 14(1)(2) Earnest House Mumbai-400 021.
(Appellant)		(Respondent)

PAN No. AFXPS8926B

Assessee by	Dr. K. Shivaram
Department by	Shri Purushottam Kumar
Date of Hearing	21.12.2016
Date of Pronouncement	31.1.2017

ORDER

Per B.R. Baskaran (AM) :

Both the appeals filed by the assessee are directed against the orders passed by Ld CIT(A)-25, Mumbai and they relate to the assessment years 2009-10 and 2010-11. In both the years, the assessee is challenging the decision of Ld CIT(A) in confirming the addition made by the AO u/s 68 of the Act. Both the appeals were heard together and hence they are being disposed of by this common order, for the sake of convenience.

2. We shall set out the facts relevant to the AY 2009-10. The assessee is a trader in Grey fabrics. The AO noticed that the assessee has shown unsecured loan of Rs.8.64 crores in the Balance Sheet as on 31.3.2009. The AO further

noticed that the assessee has taken loans from the following companies in his Proprietary concern named M/s Aman Agencies.

M/s Ankul Tracom Pvt Ltd	2.75 crores
M/s Paragon Tracom Pvt Ltd	1.80 crores.

The assessee filed confirmation letters obtained from the above said parties. The AO, however, issued notices u/s 133(6) of the Act to the above said parties asking them to submit details of loans and advances given to the assessee, copy of financial statements, motive behind giving the loans to the assessee. The ward inspector, through whom the notices were sought to be served, reported that he could not locate the addresses. When this fact was mentioned to the assessee, the assessee obtained and furnished all the details that were called for by the AO in respect of the above said two parties. It is stated that the assessee also furnished new addresses of the above said parties. The AO noticed that both the companies have filed returns declaring NIL income. He further noticed that both the companies are having common directors and did not carry on any business activities during the relevant year.

3. The assessee explained that these companies had issued share capital with premium in 2006 and the said proceeds were invested in various companies. During the year under consideration, they sold the investments and the sale proceeds thereof were utilized to give loans to the assessee. The assessee submitted that these companies are registered with the Registrar of Companies, loans were received through banking channels and the sources of the loans have also been explained. Accordingly it was contended that the assessee has discharged the initial onus placed upon it u/s 68 of the Act.

4. However, the AO took the view that the lending companies did not carry on any business activities and hence their claim of raising of share capital with

high premium was not believable. The AO took the view that the 'doctrine of preponderance of probabilities' as explained by the Hon'ble Supreme Court in the case of Durga Prasad More (82 ITR 540) should be applied to the facts of the present case. Accordingly the AO took the view that the loans taken from the above said two companies are not genuine, but only stage managed transactions. Accordingly he considered the above said loans as unexplained cash credits in terms of sec. 68 of the Act and assessed the same as income of the assessee.

5. In the appellate proceedings before Ld CIT(A), the assessee furnished his explanations with regard to various observations made by the AO in the assessment order. He submitted that the assessee has received entire amount of loans through RTGS/NEFT/Account payee cheques, i.e., through banking channels and the lenders details including their financial statements were submitted through their respective letter heads. It was further submitted that the net worth of the lenders (funds availability position) would determine their credit worthiness and not their business activities. It was submitted that the lender companies had raised shares by issuing share capital with premium in the year 2006. Those funds were invested in certain companies and the said investments were sold in order to give loans to the assessee. The AO had observed that the assessee has failed to produce the creditors of the lender companies. In that regard, the assessee submitted that he was not in a position to compel them to appear before the AO and the AO could have easily summoned them by using his powers.

6. The assessee further submitted that he had promoted a company named M/s Aman Infratex Ltd and it had proposed to come out with a public issue of shares. He submitted that the above said lenders have given interest free soft loan to the assessee with the understanding that the shares of Aman Infratex

Ltd would be allotted to them at a price that may be discovered by the Merchant Bankers. He further submitted that the lender companies are not related to him.

7. In view of the detailed submissions made by the assessee, the Ld CIT(A) called for a remand report from the AO. In the remand proceedings, the AO collected details from the bankers of the lender companies and noticed that they had very few transactions in their respective bank accounts. Further the deposits in the bank account of lender companies have been made from Kolkatta. Details furnished by the bank showed that the depositor parties had held the bank accounts for a year or two. In one of the instructions, the assessee himself has given instruction to the bank for transfer of funds. Further the companies in which the lender companies had made investments were also found to be Kolkatta based companies. The AO had noticed that the lender companies have issued shares at high premium, but their financial transactions did not justify the same. The AO also noticed that both the lender companies have operated from the same address and the share holders of both the companies were same. The AO sought the details of sources from the share holders of the lender companies, but they refused to furnish the same. The AO further noticed that the addresses of the some of the directors of the lender companies were found to be the address of the assessee. Hence the AO took the view that the directors are the employees of the assessee. Hence for the detailed reasons given in the remand report, the AO stood by the addition made by him.

8. The Ld CIT(A) confronted the remand report given by the AO with the assessee. The assessee furnished detailed letter offering explanations to various points raised by the AO in the remand report. He also submitted that he was one of the directors of the lender companies only for few days. In a nutshell,

the assessee submitted that he has proved the loans in terms of sec. 68 of the Act and the enquiries made by the AO with regard to the lender companies would not go against the creditworthiness of the lender companies. The assessee also categorically submitted that none of the directors of the lender companies are associated with him as his employees.

9. The Ld CIT(A), however, concurred with the view taken by the AO and accordingly upheld the addition of Rs.4.55 crores made by the AO.

10. The Ld A.R submitted that the assessee has discharged the initial onus placed upon him u/s 68 of the Act by proving the three main ingredients, viz., the identity of the creditors, the genuineness of the transactions and the credit worthiness of the creditors. He submitted that the assessing officer has made detailed enquiries from the lender companies with regard to their sources for lending money to the assessee. He submitted that the lender companies had utilized the funds raised by them through issue of shares in the year 2006 to make investments in certain companies. During the year under consideration, they have sold those investments and used the proceeds thereof to give loan to the assessee company. He submitted that the assessing officer has made enquiries with regard to the shareholders, directors of the lender companies and has drawn certain adverse inferences on surmises. Further, the AO has rejected the creditworthiness of the lenders only on the reasoning that they did not carry on any business activities. The AO had also suspected the sources of the funds of the lenders by observing that they could not have issued shares at a high premium. The Ld A.R submitted that the lender companies had raised funds by issuing shares in the year 2006 and not during the year under consideration. Similarly investments were made by the lender companies in 2006-2007 and those investments have been sold to give loan to the assessee company as soft loan with the understanding that the assessee would arrange allotment of shares

in M/s Aman Infratex Ltd. The Ld A.R submitted that the assessee cannot be questioned about the transactions carried on by the lender companies and the view taken on their activities cannot be used to take adverse inferences against the assessee. The theory of preponderance of probabilities cannot be applied in the facts of the present case. He submitted that the transactions of the lender companies have been accepted in their respective assessments.

11. The Ld A.R further submitted that the assessee had taken loans from the above said lender companies. He submitted that the lender companies have confirmed the loan transactions. The loans were given under a Memorandum of Understanding as soft loan, which is a normal commercial transaction. As per MOU these lender companies are to be allotted shares in the public issue of shares of M/s Aman infratex Limited, a company owned by the assessee. Accordingly he submitted that the motive of these lenders in giving loans to the assessee has been explained. He submitted that the identity of the lender companies have been sufficiently proved as the AO himself has conducted detailed enquiries about the share holders, directors and the nature of financial transactions carried on by them. The assessee has received entire amount of loan through banking channels and hence the genuineness of transactions have also been proved. The assessee has explained the sources of the lender companies and hence the credit worthiness of the lenders has also been proved. He submitted that M/s Aman infratex Ltd had actually appointed a Merchant banker and also paid a sum of Rs.10.00 lakhs as fee, which fact proves the claim of the assessee that the loans received were interest free soft loans. The Ld A.R submitted that the tax authorities have only rejected the various explanations of the assessee on surmises and conjectures.

12. On the contrary, the Ld D.R supported the order passed by Ld CIT(A) and also furnished a written submissions. We have gone through the written

submissions and noticed that the Ld D.R has placed reliance on various case laws, in which various propositions with regard to the onus of the assessee u/s 68 of the Act has been discussed. He submitted that the assessing officer has made detailed enquiries with regard to the lender companies, their financial statements, nature of transactions and also about the share holders and directors and has come to the conclusion that the claim of the assessee defies the logic of human probabilities.

13. We have heard rival contentions and perused the record. We notice that the assessing officer has conducted detailed enquiries during the course of remand proceedings. When the remand report was confronted with the assessee, he has summarized the findings of the AO and also given his explanations to various observations made in the remand report. For the sake of convenience, we extract below the relevant portions from the order of the Ld CIT(A):-

“On being confronted with the aforesaid remand report, the A.R. of the appellant made his detailed submissions vide letter dated 10.09.2013, the relevant extract of which is reproduced below:

“With reference to the above and wider instructions from our above named client we hereby submit that:

a. Although in the matter before your good of neither there was a submission of additional documents in support of the argument by the assessee which were not submitted during the course of assessment proceedings nor it was pleaded by the assessee that sufficient opportunity was not provided to him by the Learned Assessing Officer during the course of assessment proceedings to put forward his case, the then Hon We CIT(A)-25 decided suomoto to remand the written submission of the assessee during the appellant proceedings u/s 250(4) of the IT Act, 1961 for his comments on such submission of the assessee w.r.t. genuineness and creditworthiness of the loan creditors. However, from the remand proceedings and the remand reports submitted it can be appreciated that learned Assessing Officer has instead of giving his comments and submissions, has made a rigorous inquiry again not only w.r.t. the creditworthiness of the loan creditors but also of its directors, as stated by hi,, in para 3 of his remand report.

b. However, during the course of the remand proceedings, the assessee has co-operated and submitted all the details within his means and within the purview of law in the matter to the learned Assessing Officer as called by him from time to time.

i) Remand proceedings and report on addition of Rs. 4,55,00,0001- u/s. 68 for loans taken.

During the course of remand proceedings and from the remand report, it appears that the learned Assessing Officer has reiterated only his original arguments in the assessment orders in support of the addition on the basis of his own assumptions, presumptions exceeding his legal jurisdiction in the matter as laid down by the provisions of the act and by various courts, and has failed to concentrate and contradict the arguments of the assessee put forward in the appellant proceedings. He has without any material on record has made up his mind that loan creditor companies have no credit worthiness and their net worth is bogus. He concentrated and focused his remand proceedings in that direction only and carried out various out of the point of judgeing the creditworthiness of the loan creditors made additional inquiries and investigations and has given his findings in the remand report. These inquiries and investigations into the net worth of the Companies which was formed in the year 2005-06 and outcome thereof has no bearing and not at all relevant in the assessment proceedings of the assessee. The assessee has taken soft loans from the loan creditor companies and they have confirmed the loan transactions in reply to notices u/s. 133(6) of the Income Tax Act, 1961 and submitted various documents as per the requirements of section 68 of the Act.

Notices u/s. 133(6) of the Income Tax Act, 1961 and submitted various documents as per the requirements of section 68 of the Act.

The learned Assessing Officer has made the following observations in the remand report:

1. The loan creditor companies were incorporated in the year 2005 and 2006 and it is inconceivable to note that in the very first year even when the companies have not started their business activities have accumulated huge share premiums.

2. No cogent documentary evidences have been furnished to substantiate the sources of investments made by the loan creditors companies which were sold by the loan creditors companies in F Y 2008-09 and are the source of loans taken by the assessee.

3. Amount received by the loan Creditors Companies from sale of investments do not match with the amount mentioned in submission made by the loan creditors.

4. *The loan creditor company is carrying out business activity in Mumbai however transfer of funds is being made from the bank account in Kolkata.*
5. *No cogent documentary evidence was furnished by the loan creditor companies to substantiate the sale of investment and investment is sold without any gain or loss.*
6. *During the F Y 2008-09 relevant to A Y 2009-10, on perusal of the bank statements it is observed that big amounts are deposited and on the very same day or on the next day the same amounts are transferred through RTGS.*
7. *Investment Companies and to whom investments sold are all unlisted private limited companies situated in Kolkata.*
8. *The loan creditors companies did not had any substantial business activities in the instant year. This shows that these companies do not have the capacity to earn profits/income which itself signify that the assessee does not have the creditworthiness to advance such huge loans.*
9. *The high ratio of share premium depicted in the balance sheets of loan creditors companies raises the doubt about genuineness of the accumulation of share premium by these companies.*
10. *Despite giving categorical opportunities, the assessee did not produce any of tire Directors of loan creditor companies for personal identification and confirmation of the loans.*
11. *Accumulation of huge share premium, purported investments in shares of unlisted private limited companies out of share premiums, sale of these investments at par for advancing the funds as loans being interest free proves that these transactions are nothing but circular transactions/accommodation entries. No plausible explanation and cogent documentary evidences have been furnished to substantiate the genuineness of share premium, sources of investments, sale of investments etc.*
12. *Addresses of the loan creditors is common i.e. they are operating from the same premises and has only provided the address for sake of convenience of correspondence and show the existence of these companies on record.*
13. *Directors of the loan creditor companies are employees of the assessee and the assessee is also one of the directors of the loan creditor companies.*
14. *Mr. Narotiwn Bagadia, Chartered Accountant, is also looking after the affairs of these loan creditor companies. The auditor of the assessee and loan creditor companies is same. This finding is also crucial to know how the alleged transactions are managed by them in connivance with the assessee*

and their accomplices.

15. Loan transactions appearing in the books of the assessee and the alleged loan creditors are not genuine. The financial statements i.e. P & L A/cs. and Balance Sheets produced by the loan creditors does not prove its creditworthiness. The assessee has grossly failed to establish the genuineness of alleged loan transactions and creditworthiness of the loan creditors transactions are counterfeit and is a colorable device. The alleged loan introduced in the books of the assessee is nothing but his unaccounted money routed through such bogus companies.

Pointwise reply on the above observations made by the learned Assessing Officer in the remand is being given as under:

1. With reference to the observations of the learned Assessing Officer in (1) and (2) above, we hereby submit that the share capital and share premium is duly reflected in the Audited Balance Sheet of the loan creditors Companies and the same is accepted by their respective Assessing Officers. If at all the learned Assessing Officer had any doubt about the genuineness of the same he could have written to the respective Assessing Officer of the loan creditor companies to reopen their assessments. While dealing with the issue of unexplained cash credit for the loans taken by the assessee during the F. Y. 2008-09 relevant to the A. Y. 2009-10, it is beyond the purview of the learned Assessing Officer of the assessee to examine about the genuineness or otherwise of the share capital and share premium of the loan creditor companies which is received by them in the year 2005-06.

Attention of your goodself is brought to the fact that u/s. 68 of the Act, assessee's burden is confined to prove the genuineness w.r.t. the transactions between the assessee and his creditors only. The assessee has taken soft loans from two companies namely Anukul Tracom Private Limited and Paragon Tracom Private Limited. The assessing officer has issued notices u/s. 133(6) and in their reply the said companies has confirmed the loan transactions with the assessee. The Companies has submitted their audited balance sheet, copy of income tax return acknowledgement, their bank statements, source of money given on loan. Thus the -requirements of section 68 of the Act as to the identity, existence and creditworthiness of the loan creditors is proved beyond any doubt and onus cast on the assessee u/s. 68 of the Act is duly fulfilled.

2. The assessee is not liable to submit the details of transactions which took place between its creditor and sub-creditor and to submit the evidences of source of source. It is not always possible for the assessee to compel its loan creditors to submit the details and evidences of the transactions which has no relevance with the transactions entered into by it with the assessee.

It has been held by the Hon'ble Gauhati High Court in the case of Nemi Chand Kothari V. CIT (2004) 136 Taxman 213 (Garr.) that - It is not the burden of the assessee to prove the genuineness of the transactions between his creditor and sub-creditors nor is it the burden of the assessee to prove that the sub-creditor had the creditworthiness to advance the cash Credit to the creditor from whom the cash credit has been, eventfully, received by the assessee. It is not the business of The assessee to find out the source of money of his creditor or of the genuineness of the transaction, which took place between the creditor and sub-creditors and/or creditworthiness of the sub-creditors, since; these aspects may not be within the special knowledge of the assessee.

3. As regards observation of the learned Assessing Officer in 3 above, we hereby submit that learned Assessing Officer has not taken the total of figures as mentioned in the bank statement properly and has not considered bank statement for account maintained with State Bank of India by Anukul Tracom Private Limited.

4. As regards transfer or payment of funds from bank account maintained in Kolkata by-the loan creditor we hereby submit that maintenance of a bank account in Kolkata and to transact from the said bank account does not make the transactions as ingenuine whether or not the transacting party is situated in Kolkata or anywhere else.

5. As regards non submission of documentary evidence of sale of investments, we hereby submit that during the course of remand proceedings the loan creditors in reply to notices u/s. 133(6) has submitted the sales invoices/debit notes of sale of investments mentioning therein name and address of the buyer party, nature of investments and amount, bank statement for realization of sale proceeds of investments and Balance Sheet showing reduced amount of investments. These documents constitute sufficient documentary evidence for sale of investments. The learned Assessing Officer has not specified any other evidence which the assessee failed to submit.

6. As regards deposit of big amounts we hereby submit that amounts deposited (being cheques or RTGS and not cash) were receipts of loan creditors towards sale of investments and said amounts were transferred through RTGS/cheques on the same day or next day to assessee as loan. No prudent businessman will keep the amounts deposited in current account for some time before giving the same as loan. Further transfer of funds immediately on deposit does not make the transactions as in genuine.

7. The loan creditor companies had invested in the shares of private limited companies in Kolkata. During the year these investments are sold to some other private limited companies in Kolkata. The learned Assessing Officer has rightly observed the said fact but the same in itself cannot make

the transaction as bogus or fake. The learned Assessing Officer has on his own assumption and presumption treated the transaction as ingenuine.

8. If there is no substantial business activity during a particular year, it cannot be concluded that the Company does not have the capacity to earn profit/income. . Likewise Creditworthiness of the loan creditor is being judged by the net worth of the company (loan creditor). It is not the business a loan creditor has done in a particular year but the net worth of that loan creditor is the sole parameter of its creditworthiness. The loan creditors have sufficient net worth to advance the loan to the assessee and their creditworthiness is not questionable.

9. As mentioned in (1) above high ratio of share premium as depicted in the balance sheets of loan creditors which was received by them in F Y 2005-06 has no bearing On the loan transactions of the assessee which he has entered into with them in F Y 2008-09. Still, if the learned Assessing Officer had any doubt about the genuineness of same he could have recommended the reopening of the assessment u/s. 148 to the Assessing Officer of the loan creditors but in no circumstances the same could be questioned during the course of assessment proceedings of the assessee for the assessment year 2009-10.

10. The learned Assessing Officer has stated that the Assessee did not produce the director of the loan creditor Companies for personal identification and confirmation of loan transactions, In this regard it is respectfully submitted that genuineness of the loan transactions and creditworthiness of the loan creditors i. proved beyond any doubt by submitting the loan confirmation by the loan creditors in reply to notice u/s. 133'6), mentioning PAN nos., bank statements and their audited Balance Sheet. How by nonattendance of the directors of the loan creditors it can be concluded that the cash credit is non-genuine or unexplained u/s 68

Without prejudice to the above we hereby submit that the assessee cannot compel any person to appear before the learned Assessing Officer. It is the learned Assessing Officer, who has been given powers of a civil court u/s. 131 of the Act to call upon a person to prove the genuineness of the transaction. If the appearance of the directors of the loan creditor was so vital for him in forming his opinion, he could have summoned the director u/s. 131 and recorded his statement.

11. As regards accumulation of huge share premium, purported investments in shares of unlisted private limited companies out of share premiums and documentary evidence with respect to sale of investments, we have already explained the same in points 1.5 and 9 above. As regards interest free loans to the assessee, Anukul Tracom Pvt. Ltd. and Paragon Tracomn Pvt. Ltd. (lender Companies) have provided an interest free soft

loan of Rs. 1.80 crores and Rs. 2.75 crores respectively to the assessee on the understanding that the assessee will transfer the shares of AmnanInfratex Limited, a Company promoted by him, which is coming out with a public issue of shares shortly. As per understanding he will transfer (lie shares of Amnaninfratex Lid. in favour of lender companies before the public issue of shares of the said Company at a price as will be discovered by the Merchant Bankers during the course of public issue. Therefore file soft loan given to Mr. Dilip Sarawgi, was in fact an advance for purchase of shares of AnanInfratex Ltd. It may be noted that the assessee has invested the entire money received as soft loan in tile shares of AntanInfratex Ltd. Thus the soft loan received by the assessee is not hearing any interest and therefore no interest was provided and paid on the said fowls. We are enclosing herewith copy of MOU entered into by the assessee with the loan creditors companies for your perusal.

Without prejudice to the above we hereby respectfully submit that it is beyond the purview of the provisions of section 68 whether any interest is charged or not on the loan advanced by the loan creditors. The provisions of section require that the assessee has to establish the identity of the loan creditors, their creditworthiness and source of the loan given. All these conditions have been fulfilled by the assessee by submitting their confirmations, their PAN nos. bank statements and their audited Balance sheet. Thus, the onus cast on the assessee u/s. 68 of the I.T. Act, 1961 was duly discharged.

12. During the course of the assessment proceedings, the assessee has never stated that address of the loan creditors is different or not common. However, while dealing with the question of unexplained cash credit u/s 68 of the Act, it is beyond the purview of the provision of the said section and any stretch of logical imagination, how, by finding by the learned Assessing Officer that address of both of the companies (loan creditors) are common. It can be concluded that the cash credit is non-genuine or unexplained u/s 68.

13. The observation of the learned Assessing Officer that Directors of the loan creditor companies are employees of the assessee is factually wrong. Directors of the Creditor Companies are not the employees of the assessee. As regards assessee being one of the directors of the loan creditors Company, we hereby submit that the assessee was one of the directors of the Companies only for few days during the F. Y. 2008-09.

However while dealing with the question of unexplained cash credit u/s. 68 of the Act, we hereby submit that it is not at all relevant whether the loan recipient is the director of lender company or not. What is relevant is whether the transaction of loan is genuine or not and whether the lender has confirmed the transaction of loan and its creditworthiness is proved and source of the loans given is explained. The loan creditors have fulfilled all the conditions of section 68 of the Act.

14. The learned Assessing Officer has, in his remand report, without having

any evidence or material on record leveled many allegations against the assessee, loan o editors and has also gone a step further and leveled allegation against Mr. Narottam Bagaria, chartered accountant and authorised representative of the assessee in these appeal proceedings. The said allegations are mentioned in para 4(F) on page 19 of the remand report. The same allegations are reproduced by the learned Assessing Officer in the Assessment Order for the A. Y. 2010-11.

The authorized representative has vide its letter dated 8" April, 2013 and 25" April, 2013 has requested the learned Assessing Officer to either share the documentar^y evidence on the basis of which he has leveled the allegations against him or withdraw the allegations leveled.

The learned Assessing Officer vide his order dated 09-05-2013 passed u/s. 154 of the Act has withdrawn the allegations leveled against Mr. Narottam Bagaria. We are enclosing herewith copy of order passed by him u/s. 154 for the A. Y. 2010-11.

The above incidence shows that many of the conclusions drawn by the learned Assessing Officer in the remand report are drawn with biased minds and are merely his assumptions and imaginations and not backed by any evidence or material on record.

15. The assessee has submitted loan confirmations, the loan creditor has replied to the notices issued by the learned Assessing Officer and confirmed the transactions with the assessee, they have submitted their audited balance sheets, Copy of IT acknowledgement of Income Tax Return filed, their bank statements reflecting the entries of amount received by cheques/RTGS on sale of investments and the said amounts given as loan to the assessee by cheques/RTGS. Thus the assessee has proved the identity and creditworthiness of his lenders and source of loan taken by him and onus cast u/s. 68 of the Act on the assessee is duly complied with.

But the learned Assessing Officer has on his own assumptions, presumptions and suspicions and without any material on record and with his biased mind has made various conclusions in the remand report as mentioned in point 15 above.

It has been held by Hon'ble Punjab & Haryana High Court in the case of Commissioner of Income-tax V. Rain Narain Goel, 224 I.T.R. - 180 (P & H), while dealing with the addition it/s. 68, suspicion however strong, cannot take the place of evidence or proof The said decision is based on the principle decided by Honourable Supreme Court of India in plethora of cases.

In the case of Vijay Kumar Arora Vs. State Govt. of NCT of Delhi in Criminal Appeal No. 125 of 2009 dt. 13.01.2010 the Hon'ble Supreme Court has held that "The law relating to circumstantial evidence is well settled In dealing with circumstantial evidence, there is always a

danger that conjecture or suspicion lingering on mind may take place of proof Suspicion, howsoever, strong cannot be allowed take place of proof and therefore, the court has to be watchful and ensure that conjecture and suspicion do not take place of Legal proof.

In a recent Supreme Court judgement decided on 24.8.2012 in the case of Subramanian Swamy Vs. A. Raja (2G spectrum case) Honourable Supreme Court - "Held, Sri P. C. and A.R. Similar View : "Suspicion, however strong, could not take place of legal proof"

In another case the Hon'ble Supreme Court has held the similar view "Suspicion howsoever high cannot be a substitute for legal proof [(2009) 2 SCC 570 (Para 23) Roop Singh Negi Vs. Punjab National Bank.

Thus the addition made by the learned Assessing Officer on the basis of inferences and conclusions drawn as mentioned above is totally unjustified and uncalled for and is therefore liable to be deleted."

14. We notice that the assessing officer has assessed the above said loan amounts of Rs.4.55 crores u/s 68 of the Act. It is a well established proposition that the initial burden of proof to prove the cash credits is placed upon the assessee, i.e., the assessee has to prove three main ingredients in respect of cash credits, viz., the identity of the creditor, the genuineness of the transactions and credit worthiness of the creditor. In the instant case, the identity of the creditors are not in doubt, since the assessing officer himself has made thorough examination of the financial statements and also collected details of the lenders, its share holders and directors. The genuineness of the transactions has been held to be proved, if the loan transactions have been carried out through banking channels. In the instant case, there is no doubt that the assessee has received the loan amounts through the banking channels and hence the genuineness of the transactions has also been proved.

15. When coming to the question of creditworthiness of the creditors, we notice that the tax authorities have taken a different view and did not accept the claim of the assessee. The assessing officer has noticed that the lender companies have raised share capital by issuing shares at a high premium by the

year 2006. The AO also noticed that the lender companies have not carried out any business of worthy nature. Under these set of facts, the AO has come to the conclusion that the lender companies could not have raised share capital at a high premium. It is pertinent to note that we are concerned with the financial year 2008-09, i.e., the assessee has received loans from the lender companies during the financial year 2008-09, while the lender companies have raised share capital in the year 2006. Further, it is not the case that the funds so raised by the lender companies by issuing shares have been directly given as loan to the assessee. On the contrary, the lender companies have invested the funds in various other companies and they have held those investments for more than one year. In order to give the soft loan to the assessee, they have sold the investments and the proceeds thereof have been used. The tax authorities have taken the view that all these transactions have been stage managed, but the time gap between various financial transactions, in our view, defies the said logic.

16. The AO has also analysed the financial statements of the lender companies and noticed that they have not carried on any business transactions. He has further observed that the lender companies have declared NIL income before the tax authorities. However, the assessee has contended that these lender companies have proved not only the sources but also source of the sources for giving loan to the assessee. It was further submitted that the net worth (funds availability position) is relevant to prove the sources. We find merit in the said contentions of the assessee. We also agree with the submissions of the assessee that the annual income earned by the lender is not the determining factor. In the earlier paragraphs, we have discussed about the financial transactions carried on by the lender companies, i.e., they had raised funds by issuing shares; they have invested the funds in various companies;

those investments have been sold during the year under consideration and the proceeds thereof have been used to give loans to the assessee. These chronological events show that the lender companies have sufficient sources for giving loans to the assessee and hence we are of the view that there is no reason to suspect the credit worthiness of the lenders.

17. We notice that the assessing officer has come to the conclusion that the shareholders of both the lender companies are identical and the directors of the companies are not persons of sufficient means. Accordingly he has inferred that the directors may be low level employees of the assessee. Further the shareholders of the lender companies and also the companies in which they made investments are Kolkotta based companies. In our view, all these factors may not be relevant for examining a loan transaction u/s 68 of the Act. In any case, these are inferences drawn by the tax authorities on surmises and conjectures, particularly in view of the fact that none of the persons have denied the transactions and their creditworthiness has been proved.

18. Another important submission made by the Ld A.R is that though the assessing officer has drawn adverse inferences about the lender companies, yet the fact remains that the transactions of the lender companies have been accepted in their respective assessments. This being the fact, we are of the view that the adverse inferences drawn by the tax authorities and also their view that the conduct of the lender companies defies human probabilities cannot be sustained.

19. Before us, the Id A.R placed reliance on various case laws to contend that the addition u/s 68 cannot be made if the assessee has discharged the initial burden of proof placed upon him. He placed reliance on the decision rendered by Hon'ble Gujarat High Court in the case of DCIT Vs. Rohini Builders

(2002)(256 ITR 360) and also some other case laws to contend that the assessee is not required to prove source of sources of the lenders. He submitted that the assessee has also proved the source of sources of the lenders and hence his case stands on a stronger footing. He also relied upon the decision rendered by Hon'ble Punjab and Haryana High Court in the case of CIT Vs. K.C. Pipes Pvt Ltd (386 ITR 532) to submit that the action is required to be taken in the hands of the share holders, if their sources were doubtful. He submitted that even though the assessing officer of the assessee has expressed doubt about the sources in the hands of lender companies, yet the fact remains that the same has been accepted in the hands of the respective lender companies.

20. As noticed earlier, the various case laws relied upon by the tax authorities and by the Ld D.R discusses about the legal propositions relating to sec. 68 of the Act. The cash credit received by an assessee needs to be examined on the basis of facts available on record by applying various propositions laid down by the Honourble Courts on sec. 68 of the Act.

21. In view of the foregoing discussions, we are of the view that the assessee has discharged the initial burden of proof placed upon his shoulders by proving the identity of the creditors, the genuineness of the transactions and credit worthiness of the creditors. We have also noticed that the tax authorities have drawn adverse inferences on surmises and conjectures to doubt the credit worthiness of the lender companies. Though the tax authorities have expressed the view that the transactions carried on by the lender companies defies the logic of human probabilities, yet their explanation that the soft loans were given to the assessee with the intent of purchasing shares in M/s Aman infratex Ltd has not been established to be wrong. The MOU produced by the assessee has

been simply rejected by stating that the same is an afterthought without examining the directors of the lender companies to substantiate their view.

22. Accordingly we are unable to agree with the view taken by the Ld CIT(A). Accordingly we set aside the order passed by him and direct the AO to delete the addition of Rs.4.55 crores made u/s 68 of the Act in AY 2009-10.

23. We shall now take up the appeal filed by the assessee for AY 2010-11, wherein addition of Rs.6.77 crores was made by the AO u/s 68 of the Act in respect of loan taken from the following companies:-

M/s Anukul Tracom Pvt Ltd	3,12,20,000
M/s Paragon Tracom Pvt Ltd	2,55,44,199
M/s Dhanesh Properties P Ltd	1,10,00,000

During the financial year 2009-10 relevant to the AY 2010-11, these companies have engaged in purchase and sale of grey fabrics. The AO noticed that the gross margin declared by these companies was very low. Further these companies have not paid to the suppliers and have shown huge balance in Sundry creditors account. The AO further noticed that these companies have deposited funds into the bank account before transferring them to the assessee.

24. It is pertinent to note that the notices issued to the above said three companies u/s 133(6) of the Act have been responded duly by these companies by furnishing the details that were called for. Further all the three parties have also explained that these loans have been given as soft loans to the assessee and the same shall be used to buy shares in the public issue of M/s Aman Infratex Limited, a company owned by the assessee. Accordingly they submitted that these soft loans do not carry any interest.

25. The AO noticed that loans taken from the first two companies stated above have been added u/s 68 of the Act in AY 2009-10. Further, the AO had noticed in AY 2009-10 that these companies had issued shares in the earlier years at a high premium, which does not support the financials of these companies. The AO also noticed that the assessee has not paid any interest on these loans. Hence the assessing officer sought explanations about the financials of these companies. The assessee explained that the profitability would depend upon the nature and character of the business activity. He further explained that these companies are having accumulated reserves and unsecured loans and they have been used to give soft loans to him. He further submitted that the notices issued by the AO u/s 133(6) of the Act have been duly complied with by these companies. Accordingly the assessee submitted that he had discharged the initial burden placed upon him u/s 68 of the Act.

26. The assessing officer, however, went on to discuss the observations made in AY 2009-10 in the assessment order as well as in the remand report and came to the conclusion that these companies have only provided accommodation entries to the assessee. Accordingly he assessed the above cited loans as income of the assessee u/s 68 of the Act. The Ld CIT(A) also confirmed the addition made in AY 2010-11 by following his order rendered for AY 2009-10. Thus, we notice that both the tax authorities have followed their respective orders for assessing the loans received by the assessee as cash credits u/s 68 of the Act.

27. We have heard the parties and perused the record. Both the parties reiterated their respective contentions made in AY 2009-10. In respect of the three parties, there is no dispute that their respective identities have been proved. Since the loans have been received through the banking channels, the

genuineness of the transactions also stand proved. All the three loan creditors are assessed to income tax and their respective Balance sheet shows that they had sufficient amount of reserves and creditors balance to give advance to the assessee. All the lenders have filed return of income and their financial transactions have been accepted by their respective assessing officers. Hence the credit worthiness of the lenders also stand proved. The motive for giving advance has also been explained by the assessee. As in AY 2009-10, both the tax authorities have rejected the submissions and explanations of the assessee by applying the theory of human probabilities. In AY 2009-10, we noticed that the explanations given by the assessee cannot be rejected altogether, since giving of such type of soft loans on the understanding of allotment of shares in the ensuing public issue is quiet common in commercial circles. Hence we have held that the theory of human probabilities cannot be applied in the facts of the present case and accordingly held that the tax authorities have doubted the genuineness of transactions on surmises only. In our opinion, the view taken by us in AY 2009-10 should be extended to AY 2010-11 also.

28. In view of the foregoing discussions, we are unable to agree with the view taken by Ld CIT(A). Accordingly we set aside the order passed by Ld CIT(A) in AY 2010-11 and direct the AO to delete the assessment of impugned amounts u/s 68 of the Act.

29. In the result, both the appeals of the assessee are allowed.

Order has been pronounced in the Court on 31.1.2017.

Sd/-
(RAMLAL NEGI)
JUDICIAL MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 31/1/2017

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

PS

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai