

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ
**IN THE INCOME TAX APPELLATE TRIBUNAL,
" B " BENCH, AHMEDABAD**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER**

आयकर अपील सं./ITA No. 417/AHD/2022

निर्धारण वर्ष/Asstt. Year: 2018-2019

Income Tax Officer, Ward-1(1)(1), Ahmedabad.	Vs.	M/s Aashna Developers Pvt. Ltd., 301, Satkar Complex, Off C.G Road, Near Lal Bunglow, Ahmedabad-380006. PAN: AABCA9995Q
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(Applicant)		(Respondent)
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Revenue by :	Dr. Darsi Suman Ratnam, CIT.D.R
Assessee by :	Shri S.N Soparkar, Sr. Advocate

सुनवाई की तारीख/**Date of Hearing** : **12/12/2023**

घोषणा की तारीख /**Date of Pronouncement**: **10/01/2024**

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the revenue against the order of the National Faceless Appeal Centre (NFAC), arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2018-19.

2. The only issue raised by the revenue is that the learned CIT(A) erred in deleting the addition of unsecured loan taken from shell/paper companies managed by Shri Mukesh Banka for Rs. 6,74,81,741/- only.

3. The facts in brief are that the assessee, a private limited company, is engaged in the business of real estate development. The assessee company during the year has accepted unsecured loans from certain parties. It was alleged by the AO that the parties from whom unsecured loans were accepted by the assessee are paper/shell companies and managed by the entry provider Shri Mukesh Banka. The basis of such an allegation was the search proceedings carried out in the case of Shri Mukesh Banka group where certain evidence were found and statement of Shri Mukesh Banka was recorded under section 132(4) of the Act. Accordingly, it was unearthed that Shri Mukesh Banka is engaged in the activity of providing bogus accommodation entry in the form of unsecured loan, share capital or other forms through various paper/shell companies controlled and managed by him. As such, Shri Mukesh Banka has appointed dummy directors in those paper/shell companies. The paper/shell companies were not found on their given addresses after the search proceedings. On analysis of the bank statements of those companies, it was noticed that huge amounts of cash were withdrawn from their bank accounts. Further, based on analysis of bank statements, various beneficiaries of accommodation entries were identified, and the present assessee company was one of them.

3.1 Based on the above, the AO found that the assessee company has taken unsecured loan of Rs. 6,74,81,741/- from 6 companies which were controlled and managed by Shir Mukesh Banka. The details of date-wise transfer of the money from those companies are reproduced on pages 3 to 4 of the assessment order. Accordingly, the AO proposes to treat the impugned unsecured loans as unexplained cash credit under the provision of section 68 of the Act.

3.2 However, the assessee submitted that it has accepted genuine intercorporate deposits from those 6 parties during the year which have been duly repaid in the next year along with interest after deducting necessary tax at source. The tax deducted on payment of interest has been duly claimed by those parties in their respective ITRs.

3.3 The assessee in support of its claim has furnished ledger copies, confirmation letters, bank statements, ITRs and annual reports of the parties. It was also submitted that the correct amount of loan from those parties were of Rs. 6,24,81,741/- only. The assessee contended that once it is found that the loan credited through banking channel has been repaid through banking channel along with interest, then the nature and source of such credit cannot be doubted under section 68 of the Act.

3.4 The assessee further submitted that the entire basis of alleging the unsecured loan as bogus the material found during the search at the Mukesh Banka group and statement of Shir Mukesh Banka. However, no such material and opportunity of cross examination of Shri Mukesh Banka has been provided. Therefore, such material or statement cannot be relied against it. It was also submitted that one of the allegations that huge amount of cash was withdrawn from banks of the alleged paper companies whereas no such cash withdrawal in case of the parties from whom it has accepted intercorporate deposits.

3.5 However, the AO held that the contention of the assessee is not acceptable and case laws relied on were also not commensurate to the fact of the present case. The assessee has taken unsecured loans of Rs. 6,74,81,741/- from paper/shell companies of Banka group, therefore the same was treated as unexplained cash credit under section 68 of the Act and added to the total income.

4. The aggrieved assessee preferred an appeal before the learned CIT(A). The assessee before the learned CIT(A) besides reiterating the submission made during the assessment, filed copy of affidavit of Shri Mukesh Banka for retraction of his statement, copies of affidavit by the loans parties that they have no connection of whatsoever with Mukesh Banka.

5. The learned CIT(A) after considering the facts in totality deleted the addition made by the AO. The relevant finding of the Ld. CIT(A) is available on pages 22 to 36 of his order.

6. Being aggrieved by the order of the learned CIT(A) the revenue is in appeal before us.

7. The learned DR before us submitted that the loan companies were formed same day, at the same address and having same email ids. All the affidavits furnished by assessee were similarly worded and notarized from one person on the same date. Furthermore, only the Ledger copy was submitted by the assessee to justify the re-payment of the loan received by it. As such, there was no bank statement furnished by the assessee of the loan parties. As per the Id. DR, there was no need to furnish the opportunity of cross examination as there was sufficient collateral evidence against the assessee that the assessee had received bogus loans. The learned DR in support of his contentions has relied on the judgements discussed below:

1. Swati Bajaj	139 taxmann.com 352
2. GTC Industries Limited	65 ITD 380
3. NRA Iron & Steel Pvt. Ltd.	103 taxmann.com 48
4. Sadiq Sheikh	122 taxmann.com 39
5. Kottex Industries (P.) Ltd	129 taxmann.com 151

7.1 The DR before us reiterated the finding of the AO contained in the assessment order.

8. On the other hand, the learned AR before us filed a paper book running from pages 1 to 292 and supported the order of the Id. CIT-A.

9. We have heard the rival contentions of both the parties and perused the materials on record. In the case on hand, the AO treated the credit of unsecured loan in the books of the assessee as unexplained cash credit under section 68 of the Act. The entire thrust of the AO for treating the unsecured loan as unexplained cash credit was materials collected during the search proceeding from the premises of Shri Mukesh Banka and his statement recorded during the search. However, we note that the learned CIT(A) has given categorical finding that the search materials and statement relied upon by the AO for making addition against the assessee were neither supplied to the assessee for rebuttal nor the opportunity of cross examination of Shri Mukesh Banka has been provided. The relevant finding of learned CIT(A) reads as under:

In brief, considering the facts of the case in light of the provisions of the Act, as elaborated by various courts as discussed in previous para, I hereby note that the show cause notice 05/04/2021 issued by the AO was not accompanied with material/information/copies of statements of Shri Mukesh Banka/copies of bank statements of paper/shell companies and other relevant information forming the basis of show cause notice, despite written request of the appellant, neither the information/ material collected at the time of search on Shri Mukesh Banka nor the copies of his statements which were being relied upon to draw adverse inference against the appellant were furnished by the AO to the appellant. Further, the written request of the appellant for cross-examination of Shri Mukesh Banka was also brushed aside. There is clear violation of principles of natural justice on the facts of the present case.

9.1 It is settled position of law that not providing the material used against the assessee for rebuttable and opportunity of cross examination of the statement relied upon by the AO will vitiate the validity of the assessment. In holding so, we draw support and guidance from the judgment of Hon'ble Supreme Court in the

case of Andaman Timber Industries vs. CCE reported in 62 taxmann.com 3. On the other hand, we note that the assessee in support of genuineness of loan have furnished all the necessary documents such as ledger of parties, contra ledger from the parties and confirmation, ITRs, bank statements and annual reports. However, the AO without pointing out any infirmity and application of mind on those documentary evidence, treated the loan amount as unexplained cash credit by relying upon the statement recorded and material collected during the search at third party premises and that too without providing the opportunity of rebuttal and cross examination. In the identical facts and circumstances, the Hon'ble Supreme Court in the case of CIT vs. Odeon Builders Pvt Ltd has confirmed the concurrent finding of learned CIT(A), the ITAT and the High court in favour of the assessee by observing as under:

3. However, on going through the judgments of the CIT, ITAT and the High Court, we find that on merits a disallowance of Rs. 19,39,60,866/- was based solely on third party information, which was not subjected to any further scrutiny. Thus, the CIT (Appeals) allowed the appeal of the assessee stating:

"Thus, the entire disallowance in this case is based on third party information gathered by the Investigation Wing of the Department, which have not been independently subjected to further verification by the AO who has not provided the copy of such statements to the appellant, thus denying opportunity of cross examination to the appellant, who has prima facie discharged the initial burden of substantiating the purchases through various documentation including purchase bills, transportation bills, confirmed copy of accounts and the fact of payment through cheques, & VAT Registration of the sellers & their Income Tax Return. In view of the above discussion in totality, the purchases made by the appellant from M/s Padmesh Realtors Pvt. Ltd. is found to be acceptable and the consequent disallowance resulting in addition to income made for Rs. 19,39,60,866/-, is directed to be deleted."

4. The ITAT by its judgment dated 16th May, 2014 relied on the self-same reasoning and dismissed the appeal of the revenue. Likewise, the High Court by the impugned judgment dated 5th July, 2017, affirmed the judgments of the CIT and ITAT as concurrent factual findings, which have not been shown to be perverse and, therefore, dismissed the appeal stating that no substantial question of law arises from the impugned order of the ITAT.

9.2 Be that as it maybe, the issue on hand has bearing on the provision of section 68 of the Act. The provision of section 68 of the Act suggests that if there

is any sum credited in books of account maintained for the any previous year, then the assessee is required to offer proper and reasonable explanation regarding nature and sources of such credit to the satisfaction of the AO. Thus, the primary onus lies with the assessee to explain the source of credit in the books. Over the period, the Hon'ble Courts have laid down that the assessee to discharge its onus is required to furnish evidence with respect to identity of the creditor, genuineness of transaction and credit worthiness of the creditor. If the assessee fails to discharge the primary onus cast or the explanation and evidence submitted by the assessee was not found satisfactory by the AO, then the sum credited in the books shall be deemed as income of the assessee. The Hon'ble Supreme court in case of CIT vs. P. Mohanakala reported in 291 ITR 278 while dealing with scope of provision of the section 68 of the Act held that "*the opinion of the AO that the explanation furnished by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the sine qua non for forming the opinion.*" In other words, once the assessee submits primary evidence with regard to identity and credit worthiness of creditor and the genuineness of the transaction the onus shifts on the AO to consider the material provided and make independent inquiry in order to find out genuineness of the evidence or bring material contrary to fact explained by the assessee. The AO cannot reject the primary evidence furnished by the assessee without appreciating the facts available on record or without bringing contrary material to form the belief that primary document or explanation furnished by the assessee is not satisfactory.

9.3 Undeniably, the assessee during the assessment proceeding in support of genuineness of credit of unsecured loans has furnished ledger of parties, contra ledger from the parties and confirmation, ITRs, bank statements and annual report of parties along with their affidavit. The AO in assessment order has

nowhere referred to any independent inquiry of whatsoever made to disprove the primary evidence provided by the assessee and not pointed out any infirmity in those evidence. As such, the AO merely on the basis statement of Shri Mukesh Banka which has been retracted subsequently held the unsecured loans as unexplained cash credit. In our considered opinion the approach taken by the AO is not justified. As such the AO failed to appreciate the facts, evidence provided, and case laws relied upon by the assessee company. It is pertinent mentioned that the assessee company has taken loan through banking channel and repaid the same in the next year along with interest through banking channel and deducted TDS on the interest. It is also important to note that the interest has been allowed by the AO during the assessment which has direct nexus on the loan in dispute. As such the AO has taken a contrary stand. Thus, the loan amount of cannot be made subject to addition under the provisions of section 68 of the Act in view of the judgment of Hon'ble Jurisdictional High Court in the case of PCIT vs. Ojas Tarmake (P) Ltd. reported in 156 taxmann.com 375 where it was held as under:

What is evident is that the Tribunal found on facts that the amount of loan received by the assessee was returned to the loan party during the year itself and all transactions were carried out through banking channel. The Tribunal on the decision of Dy. CIT v. Rohini Builders [2003] 127 Taxman 523/[2002] 256 ITR 360 (Guj.), held in favour of the assessee. [Para 3]

9.4 In view of the above detailed discussion, we hereby confirm the finding of the learned CIT(A) and direct the AO to delete the addition made by him. At this juncture, it is important to note that the Id. DR at the time of hearing has referred several judgements of the Hon'ble Courts, the citation of them has already been reproduced somewhere in the preceding paragraph but in our humble understanding, principles laid down in such case laws are distinguishable from the facts of the present case and therefore we are reluctant to make any reference to such case laws in the case on hand as long as the interest on the loan taken by the assessee has not been disputed by the revenue. Thus, to our understanding, the Revenue has grossly erred by treating the element of interest on the alleged

bogus loan as genuine and treating the same loan as bogus in nature. Hence, the ground of appeal of the revenue is hereby dismissed.

10. In the result, appeal of the Revenue is hereby dismissed.

Order pronounced in the Court on 10/01/2024 at Ahmedabad.

Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated
Manish

(True Copy)
10/01/2024