

THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Before Shri B.R. Baskaran (AM)

I.T.A. No. 7459/Mum/2016 (Assessment Year 2008-09)

ITO 3(3)(4) Room No. 672 6 th Floor Aayakar Bhavan M.K. Road Mumbai-400 020. (Appellant)	Vs.	Shri Harsh Dalmia 91, Sunflower Cuffe Parade Mumbai-400005 PAN : ABQPD8832L (Respondent)
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Assessee by	None
Department by	Ms. N. Hemlatha
Date of Hearing	17.10.2017
Date of Pronouncement	17.10.2017

O R D E R

The appeal filed by the Revenue is directed against the order dated 29.9.2016 passed by the learned CIT(A)-8, Mumbai and it relates to A.Y. 2008-09.

2. None appeared on behalf of the assessee even though adjournment was granted on earlier occasion at the specific request of the assessee. Hence, I proceed to dispose of the appeal ex-parte, without presence of the assessee.

3. I heard learned Departmental Representative and perused the record. The Revenue is aggrieved by the decision of the learned CIT(A) in deleting the addition of ₹ 41 lakhs relating to unexplained cash credit.

4. The Assessing Officer received information that the assessee-herein was a beneficiary of accommodation loan entries provided by M/s. Basant Marketing Pvt. Limited (BMPL). Accordingly he reopened the impugned assessment and added a sum of ₹ 41 lakhs, being loan taken from BMPL, as unexplained cash credit. The learned CIT(A) noticed that the assessee has discharged the initial

burden placed upon him by producing all the materials. Further, transaction carried out by BMPL is not found to be fake or bogus by the learned CIT(A) in the order passed by him in A.Y. 2011-12 in the hands of BMPL. The learned CIT(A) further noticed that the Revenue has accepted the order passed by the learned CIT(A) in the hands of BMPL. He further noticed that identical addition made by the Assessing Officer in the hands of M/s. Watermarks Systems (India) Pvt. Limited for A.Y. 2008-09 was deleted by him. Accordingly, the learned CIT(A) deleted the impugned addition of ₹ 41 lakhs. Aggrieved, the Revenue has filed this appeal before the Tribunal.

5. I noticed that the learned CIT(A) has deleted the addition with the following observations :-

5.2.1 This relates to addition of Rs. 41,00,000/- u/s. 68, representing loan received from BMPL. The assessing officer dealt with this issue at para 4 of his order. He has observed that during the relevant previous year, the appellant has shown unsecured loans from BMPL at Rs. 56,65,500/-. He has reproduced reply of the appellant dated 07/03/2015 under para 4.4 of his order. In para 4.8 the assessing officer has observed that from the ledger account of the appellant in the books of BMPL, debit entries of the impugned amounts are recorded.

5.2.2 In at para 4.10 and 4.11, the assessing officer has observed, "As can be seen from the background of the entities involved in the transaction, the findings of the other investigating agency regarding involvement of the group in providing accommodation entries, the findings of the assessment in assessee's own case, for AY 2007-08, it follows that the transaction of the assessee during the year under discussion, is also a case of providing accommodation entry to the assessee, by the said M/s. Basant Marketing Pvt. Ltd. i.e. providing of credit entry to the assessee which is nothing else but at moderation entry." He further referred to intimation from DCIT Central Circle XXVIII, Kolkata and report of CBI. Citing these information, the assessing officer made addition of Rs. 58.20 lakhs u/s 68.

5.2.3 It is pertinent to note that the appellant had furnished PAN details, confirmation, balance sheet, copies of Income Tax returns and bank statements of BMPL to the assessing officer during the course of reassessment. Further, subsequently CIT(A)-20, Kolkata has decided appeal of BMPL for AY 2010-11 were he has categorically stated that there is no material on record to conclude that the company was involved

in providing accommodation entry. Although, this finding was for assessment year 2010-11, it is also relevant for the instant appeal. Nowhere in his order has the assessing officer brought any finding of fact to establish that the impugned amounts were unexplained. There is no dispute as to the identity of BMPL, the amounts have been transferred and recorded in audited books of account, BMPL is assessed to Income Tax and it is acceptable business practice for promoters of companies to give to or take loans from group companies. The assessing officer has not brought anything on record to challenge the genuineness of the transactions.

5.2.4 In Appeal No.CIT(A)-8/1T-407/14-15, filed by M/s Watermarks Systems (India) Pvt Ltd for AY 2008-09, another group concern that had taken loans from BMPL. I had made the following observations:-

"7.3.4 A bare reading of section 68 suggests that if any sum is found credited in the books of account of the assessee maintained for any previous year, and the assessee offers no explanation about the nature and source of such credit found in the books or the explanation offered by the assessee, in the opinion of the Assessing Officer, is not satisfactory, it is only then the sum so credited may be charged to income-tax as the income of the assessee of that previous year. The expression 'the Assessee offers no explanation' means where the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. Accordingly, in order to discharge this burden, assessee is required to prove the (a) Identity of Shareholder (b) Genuineness of transaction and (c) Credit worthiness of creditors.

7.3.5 Various courts have discussed the aspects of burden of proof that lies on assessee. Inference can be drawn about the nature of evidence offered, the circumstances explaining the credit and the actions of an assessee that would constitute reasonable discharge of that burden of proof. Some of those cases are mentioned hereunder.

- i. Supreme Court in case of CIT v. P. Mohanakala [2007] 291 ITR 278 / 161 Taxman 169 held that the expression "assessee offers no explanation" means where the assessee offers no proper, reasonable and acceptable explanation as regards the sum found credited in the books maintained by the assessee. It further held that the opinion of the AO for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material & other attending circumstances available on record. The opinion of the AD 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.

- ii. *CIT vs Daulat Ram Rawat Mull (87 ITR 349) (SC): It was held that assessee was not required to prove the source of the source.*
- iii. *190 ITR 396 (Born): It was held that the assessee having discharged the initial burden, by giving complete name and address of the bankers and confirmation letters, it was for the Income-tax Officer to show that the explanation rendered by the assessee was not true.*
- iv. *CIT v. Lovely Exports (P.) Ltd. [App/n No. 11993 of 2007, dated 11-1-2008]:*

If the share application money is received by the assessee-company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as undisclosed income of the assessee-company.

- v. *CIT v. First Point Finance Ltd. [2006] 2861TR 477 (Raj.), CIT v. Bhawani Oil Mills (P.) Ltd. 49 DTR 212:*

Where it is found that the investors are genuinely existing persons, they have filed confirmations in respect of investments made by them and their statements are also recorded, amount of share application money cannot be treated as unexplained cash credit and no addition can be made under section 68.

- vi. *Shree Barkha Synthetics Ltd. v. Asstt. CIT [2006] 283 1TR 377/155 Taxman 289 (Raj.), Uma Polymers (P.) Ltd. v. Dy. CIT [2006] 101 TTJ 124 (Jodh.)(TM):*

Where the share application money is received by the assessee company through banking channel, the assessee has only to prove the existence of person in whose name share application money is received. Once the existence of investor is proved, it is no further burden of assessee to prove whether the person itself has invested the said money or some other person has made investment in name of that person. The burden then shifts on the Revenue to establish that such an investment has come from assessee-company itself.

- vii. *CIT v. Gangour Investment Ltd. [2009] 179 Taxman 1 (Delhi), C/T v. Victor Electrodes Ltd. [2010] 329 1TR 271 (Delhi), Dy. C/T v. Dolphine*

*Marbles (P.) Ltd. [2011] 129 1TD 163/10 taxmann.com 75 (Jab.)(TM),
Bharti Syntex Ltd. v. Dy. C/T 52 OTR 73 (Jp.):*

Assessee-company filed letters of the share applicant companies wrote to the ACIT confirming that they had applied for shares in the assessee-company, giving details of draft, copies of resolutions passed by BOD of applicant-companies besides their bank statement/copies of acknowledgement of returns, certificates of incorporations and balance sheets of the applicant-companies wherein investment made in the assessee-company was shown, PAN, ROC certificate, it had discharged the onus which lay upon it under section 68 by establishing the identity and creditworthiness of each shareholder and, therefore, no addition could be made under section 68.

viii. *CIT v. Orissa Corpn. (P.) Ltd. [1986] 159 ITR 78 125 Taxman 80F (SC):*

In this case assessee gave the names and addresses of the creditors. It was in the knowledge of the Revenue that the creditors were income-tax assessees. The revenue apart from issuing notices under section 131 did not pursue the matter further. It did not examine the source of income of the alleged creditors to find out whether they were creditworthy. Therefore, it was held that in these circumstances, assessee could not do any further and it had discharged the burden laid on it.

ix. *Dy. CIT v. Rohini Builders [2002] 256 ITR 360 1[2003] 127 Taxman 523 (Gui.):*

If the identity of the creditors is proved and the amounts are received by account-payee cheques, the initial burden of proving credit is discharged and the source of credits need not be proved.

ix. *CIT v. Samtel Color Ltd. 64 DTR 46: In this decision given by the Delhi High Court, it was held that by bringing on record every possible information regarding the depositors included in the application form which included particulars of applicant/depositor, telephone No., particulars of demand draft/cheque through which the deposit was made, tax status of applicant and other deposit with the assessee, if any, assessee had discharged the initial onus laid on it under section 68 and addition could not be made merely for the reason that no confirmation letters were filed in respect of some of the depositors.*

x. *CIT v. Orissa Corpri. (P.) Ltd. [1986] 159 ITR 78 125 Taxman 80F (SC) :in this case assessee gave the names and addresses of the creditors. It was in the knowledge of the Revenue that the creditors were income-tax assessees. The revenue apart from issuing notices under section 131 did not pursue the matter further. It did not examine the*

source of income of the alleged creditors to find out whether they were creditworthy. Therefore, it was held that in these circumstances, assessee could not do any further and it had discharged the burden laid on it.

xi. In *Orient Trading Co. Ltd. v. Commissioner of Income-tax (1963) 49 ITR 723 (Born.)*, one of the questions referred to the Bombay High Court was whether there was any material before the Tribunal to hold that a sum standing in the books of the assessee to the credit of a third party belonged to the assessee. The Bombay High Court discussed the nature and significance of cash credits in such cases and observed as follows:

"When cash credits appear in the accounts of an assessee, whether in his own name or in the name of third parties, the Income-tax Officer is entitled to satisfy himself as to the true nature and source of the amounts entered therein, and if after investigation or inquiry he is satisfied that there is no satisfactory explanation as to the said entries, he would be entitled to regard them as representing the undisclosed income of the assessee. When these credit entries stand in the name of the assessee himself, the burden is undoubtedly on him to prove satisfactorily the nature and source of these entries and to show that they do not constitute a part of his business income liable to tax. When, however, entries stand, not in the assessee's own name, but in the name of third parties, there has been some divergence of opinion expressed as to the question of the burden of proof. The Income-tax Officer's rejection not of the explanation of the assessee, but of the explanation regarding the source of income of the depositors, cannot by itself lead to any inference regarding the non-genuine or fictitious character of the entries in the assessee's books of account."

xii. The assessee having discharged the initial burden, by giving complete name and address of the bankers and confirmation letters, it was for the Income-tax Officer to show that the explanation rendered by the assessee was not true 190 ITR 396 (Born).

7.3.6 The facts of the instant case have to be viewed in accordance with the ratio of the judgements cited above. As already mentioned, the Assessing Officer has not disputed the identity of the creditors, BMPL. He has also stated in the remand report that BMPL had received huge inflow of funds, which is supported by its bank statements. The Assessing Officer has also stated that these funds were received by BMPL through cheques, RTGS etc. and the appellant company was given loan out of these funds. Most importantly, the Assessing Officer himself observed that the transactions though supported by proper evidence, "appears to be part of said bogus billing activity."

7.3.7 It is noted that Commissioner of Income Tax(A)-20, Kolkata, in his order for assessment year 2010-11 in the case of MIs Basant Marketing Private Limited has held BMPL as not fake or bogus. This fact is also not disputed by the Assessing Officer in his remand report.

7.3.8 Thus, it is seen that the identity of BMPL is established beyond doubt. It is also not disputed that BMPL had sufficient funds in its own books of accounts and reflected in bank statements, which establishes its creditworthiness. The appellant is not required to establish source of source as held in *Jaikishan Dadlani vs ITO 4 SOT 138 (MUM)*. The appellant had offered explanation to the Assessing Officer but had not been able to submit all documentary evidences because the same were in custody of CBI. As already quoted above, in the appeal in the case of BMPL for AY 2010-11, the Id. CIT(A) 20, Kolkata had categorically observed that there is no material on record to back the finding that BMPL was involved in providing accommodation entry. The finding of fact of CIT(A) in that case has been accepted by the Department by not going in appeal against it. Thus, the genuineness of the transaction itself has been accepted by the Department.

7.3.9 In view of the ratio of decisions cited above, facts and circumstances of the case as discussed and after giving due consideration to the observations of the Assessing Officer in his remand report, I do not find merit in the action of the Assessing Officer in making addition of ₹ 4,35,69,600/- u/s. 68 of the Act and the same is, therefore, deleted. These grounds of appeal are allowed."

5.2.5 In the instant case, loan from the same group company BMPL is under question, therefore, my decision in respect of BMPL cited above is also valid in the instant appeal. The appellant had discharged onus and the assessing officer has not brought anything on record to negate identity, creditworthiness or genuineness of transaction with BMPL but has instead made the addition on certain conjectures and surmises. Therefore, the addition of Rs. 41,00,000/- is deleted. This ground of appeal is allowed."

7. I noticed that the learned CIT(A) has passed a reasoned order by duly considering the facts surrounding the issue and also by applying the principles laid down in various decisions relied upon by him. I notice that the Ld CIT(A) has taken note of the fact that the transactions carried on by M/s BMPL were found to be genuine in its hand. In the instant case, the AO has made the impugned addition only on the reasoning that M/s BMPL was giving only accommodation loan entries. Since the transactions carried on by M/s BMPL

were found to be genuine, the reasoning given by the AO fails. Accordingly I am of the view that the Ld CIT(A) has deleted the addition on proper reasoning and hence I do not find any reason to interfere with the order passed by him on this issue.

8. In the result, appeal filed by the Revenue is dismissed.

Order has been pronounced in the Court on 17.10.2017.

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

Mumbai; Dated : 17/10/2017

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