

**IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH 'A', LUCKNOW**

**BEFORE SHRI T. S. KAPOOR, ACCOUNTANT MEMBER AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER**

ITA No.424/Lkw/2016
Assessment Year:2010-11

M/s Narain Institute of Management Studies Pvt. Ltd., HIG-1, C-Block, Shyam Nagar, Kanpur. PAN:AACCN 2356 B (Appellant)	Vs.	Income Tax Officer-6(2), Kanpur. (Respondent)
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Appellant by	Shri B. P. Yadav, Cost Accountant
Respondent by	Shri Ajay Kumar, D.R.
Date of hearing	17/09/2018
Date of pronouncement	19/09/2018

ORDER

PER T. S. KAPOOR, A.M.

This is an appeal filed by the assessee against the order of CIT(A)-II, Kanpur dated 30/03/2016. The grounds of appeal taken by the assessee are reproduced below:

"1. The Learned Commissioner of Income Tax (Appeals)-II, Kanpur [hereinafter referred to as the Ld. CIT(A)] erred on facts and in law in confirming addition of Rs.16,11,266/- made by the Ld. A.O. without appreciating the fact that this amount was included in the creditors shown in the Balance Sheet and stood already added in the hands of the assessee along with addition of Rs.24,56,630/-.

2. The Ld. CIT(A) erred on facts and in law in not appreciating the law that the amount of Rs.16,11,266/- is business receipts and even if it is treated as undisclosed

receipts, only the profit element involved in Rs.16,11,266/- could be taxed in the hands of the assessee.

3. The Ld. CIT(A) erred on facts and in law in confirming addition of Rs.24,56,630/- made by the Ld. A.O. in the hands of the appellant by not appreciating that most of these creditors are old balances.

4. The Ld. CIT(A) erred on facts and in law in not appreciating the law that the amount of Rs.24,56,630/- is inclusive of Rs.16,11,266/- and to the extent of Rs.16,11,266/- it is double addition.

5. On the facts stated in the statement of facts, the Ld. CIT(A) was not at all justified in confirming the addition of Rs.24,56,630/- and hence addition of Rs.24,66,630/- may kindly be deleted.

6. The Ld. CIT(A) erred on facts and in law in confirming the addition of Rs.30,000/- without appreciating the law that once payee makes payment of tax, no addition could be made in the hands of the payer by invoking the provision of section 40a(ia) of the Act.

7. The Ld. CIT(A) erred on facts and in law in not providing the appellant reasonable and sufficient opportunity to have its say and to make compliances of the reasons being relied upon by him in making addition in the hands of the appellant.”

2. At the outset, Learned A. R. submitted that assessee is engaged in the service sector as a service providing company and it provides training to various candidates for becoming a service agent sponsored by various insurance companies and in return the assessee gets fee from these insurance companies. It was submitted that during the year under consideration during assessment proceedings the Assessing Officer observed that as per Form-26AS the receipt from various parties was to the extent of Rs.1,99,40,645/- whereas the assessee had declared in its profit & loss account an amount of Rs.1,27,76,402/- only and therefore, the assessee

was show caused to explain the same. It was submitted that the bills raised by the assessee at the end of the earlier year i.e. financial year 2008-09 were acknowledged by some of the insurance companies during the year under consideration and they had credited the commission and had deducted TDS in the year under consideration and for which detailed statement of bills related to earlier years were submitted and our attention was invited to pages 6 to 9 of the paper book. It was submitted that the Assessing Officer has noted this fact in his assessment order however, instead of reproducing all the bills from all companies, he noted only five companies and ignored the submissions regarding other companies. It was submitted that the Assessing Officer after noting down the bills raised by the assessee in earlier year in respect of five companies, accepted the difference to the extent of Rs.55,52,977/- however, upheld the difference to the tune of Rs.16,11,266/-. It was submitted that had the Assessing Officer taken into account the bills of other insurance companies also, there would have been no difference. It was submitted that the bills raised by the assessee to ING Vysya Life Insurance Company Limited, HDFC Standard Life Insurance Company Ltd., Metlife India Insurance Company Ltd. has not been taken into account. Further our attention was invited to the copy of balance sheet placed at page 1 of the paper book and our attention was invited to the amount of sundry debtors relating to the year ending 31/03/2009 to the extent of Rs.70,31,336/- and it was submitted that the break-up of these sundry debtors was placed at page 56 of the paper book and the break-up includes ING Vysya Life Insurance Company Limited, HDFC Standard Life Insurance Company Ltd., Metlife India Insurance Company Ltd. from whom also the payments were received in the year under consideration and that is why these were reflected in Form-26AS. Learned A. R. submitted that the Assessing Officer has conveniently ignored

the part information furnished by the assessee and has wrongly made the addition.

2.1 As regards the second addition of Rs.24,56,630/- Learned A. R. submitted that the Assessing Officer during the course of assessment proceedings observed that there was credit balance in respect of some insurance companies, the sum total of which was Rs.1,04,52,273/-. The Assessing Officer issued letters u/s 133(6) of the Act to five parties and it received confirmations from three parties and in respect of ING Vysya Life Insurance Company Limited and SBI Life the Assessing Officer did not receive the reply and therefore, the assessee was show caused. It was submitted that the assessee requested the Assessing Officer to again call for the information and instead of again asking the information the Assessing Officer made the addition on account of balance outstanding to their credit u/s 68 of the Act. Learned A. R. submitted that the said addition u/s 68 cannot be made as all the parties are well established insurance companies and all the payments were received through cheques for services to be rendered and therefore, the addition was not warranted. Reliance in this respect was placed on an order of Hon'ble Orissa High Court in the case of Aurobindo Sanitary Stores vs. CIT 2005-(IT3)-GJX-0127-ORI. Further reliance was placed on an order of Delhi Tribunal in the case of DCIT vs. Divine International [2012] 134 ITD 148-TDEL. Without prejudice Learned A. R. submitted that merely because of non furnishing of reply by insurance companies, the addition cannot be made and reliance was placed on the judgment of Hon'ble Supreme Court in the case of Orissa Corporation wherein the Hon'ble Court has held that if the notice issued u/s 133(6) returns back unserved, the assessee cannot be held liable and addition cannot be made for credits standing in their names. Learned A. R. submitted that Lucknow Bench of the Tribunal in the case of Astha Infra

Heights Pvt. Ltd. relying on the judgment of Hon'ble Supreme Court has also taken the same view.

3. Learned D. R., on the other hand, heavily placed his reliance on the orders of the authorities below.

4. We have heard the rival parties and have gone through the material placed on record. As regards the first issue of addition of Rs.16,11,266/-, we find that during the course of assessment proceedings the assessee had furnished break-up of company-wise bills which were raised by the assessee during the previous year ending on 31/03/2009 and for which the payments were received by the assessee during the current year. It was submitted by the assessee during the assessment proceedings that these bills were raised at the fag end of earlier financial year and for which the insurance companies had acknowledged and credited the fee amount after deduction of tax in the current year. The details of such bills company-wise and bill-wise are placed in paper book pages 6 to 9. We find that total of these amounts comes out to be Rs.71,25,310/-, the break-up of which is as under:

1. Tata AIG Life Insurance Co.	2,97,000
2. Reliance Life Insurance Co.	30,00,000
3. Birla Sunlife Insurance Co.	21,49,885
4. Aviva Life Insurance Co.	25,110
5. Bharti AXA Life Ins. Co. Ltd.	9,34,300
6. ING Vysya Life Insurance Co.	2,43,750
7. HDFC Standard Life Insurance Co. Ltd.	1,94,775
8. Metlife India Insurance Co. Ltd.	2,80,490

The total difference pointed out by Assessing Officer was to the tune of Rs.71,64,243/- and the sum total of these bills comes out to Rs.71,25,310/-. The Assessing Officer noted down the bills relating to only first five companies as mentioned in his assessment order and did not take into

account the bills raised to other insurance companies though the complete information was with him. We further find that the balance outstanding in the form of sundry debtors as on 31/03/2009 as per the audited balance sheet was Rs.70,31,336/-, the break-up of which is placed at page 56 of the paper book. For the sake of completeness, the break-up of debtors as on 31/03/2009 is reproduced below:

1. Aviva Life Insurance Co.	25,110
2. Bharti Axa Insurance Co.	9,34,300
3. Birla Sun Life Insurance Co.	20,55,911
4. HDFC Standard Life Insurance Co.	1,94,775
5. ING Vysys Life Insurance Co.	2,43,750
6. Met Life Insurance Co.	2,80,490
7. Reliance Life Insurance Co.	30,00,000
8. TATA AIG Life Insurance Co.	2,97,000

These sundry debtors include all those companies for which the assessee had claimed that the bills were raised by the assessee to these companies at the end of earlier year. The amount of sundry debtors as on 31/03/2009 tallies with the amount of bills raised at the close of earlier year except for a small difference in the amount of Birla Sunlife Insurance Co. This information also supports the contentions of assessee. The Assessing Officer has partly utilized this information to allow part relief and has conveniently ignored the part reply which is not correct as per law. In view of these facts and circumstances it can safely be said that there is no major difference between the figure in the profit & loss account and in Form 26AS as the figures had been duly reconciled. At the most the addition could have been made to the tune of Rs.38,933/- which is the difference between Rs.71,64,243/- and Rs.72,25,310/-. In view of the above, the addition of Rs.16,11,266/- is restricted to Rs.38,933/- as the balance difference was duly reconciled and the reconciliation was already with Assessing Officer.

5. As regards the other issue of addition of Rs.24,56,630/-, we find that the Assessing Officer issued letters for confirmation u/s 133(6) to five parties, the details of which is as under:

1. Elora Printing
2. ICICI Life Insurance
3. MAX Newyork Life Insurance
4. ING Vysys Life Insurance Co.
5. SBI Life Insurance Co.

Out of these parties, the first party confirmed the balance and therefore, the Assessing Officer accepted the same and did not make any addition. As regards the confirmation from ICICI Life Insurance and MAX Life, the Assessing Officer observed that there were differences between the confirmations to the tune of Rs.3,03,065/- and Rs.4,24,482/- respectively. As regards the confirmations from ING Vysys and State Bank of India Life, no confirmations were received and therefore, the assessee was show caused to explain. The assessee vide reply dated 25/03/2013 stated that he was not aware as to why the letters written to these parties had returned back and it was requested that reminder may be issued to them. As regards the differences in ledger account of ICICI and MAX Life, it was submitted that there might be some entries relating to other parties which might have been entered by these parties in the assessee's account. The Assessing Officer without requiring the insurance companies to file confirmation and without confronting the assessee with the differences in confirmations from ICICI and MAX Life, held the credits to be unexplained u/s 68 of the Act and made addition accordingly. We find that all these companies are big companies whose identity, creditworthiness and genuineness cannot be doubted as all the payments were received through cheques which is verifiable from pages 56 to 81 of the paper book where the copy of account of these companies, as appearing in the books of the assessee, are placed.

For making addition u/s 68 of the Act, the Assessing Officer has to satisfy himself that the sum credited in the books of the assessee are unexplained. or the explanation offered by him is not satisfactory. In the present case we observe that assessee has received huge amounts as fee for providing services to these parties and therefore, payments received from these companies cannot be termed as ingenuine. The Assessing Officer in his order has not doubted the creditworthiness, identity or genuineness of transactions. He has made the addition only due to difference in amounts relating to two companies and for remaining two companies he had made addition as the notices issued to them u/s 133(6) had returned back. This action of Assessing Officer is not justified as the differences in balances confirmed in two companies cannot be termed as unexplained credits without doubting the identity, creditworthiness and genuineness of transactions. Moreover, only the difference has been added back u/s 68 whereas transactions has not been doubted. This difference could have been due to debit or credit notes. Moreover, the Assessing Officer did not confront these confirmations to assessee. Therefore, no addition could have been made by Assessing Officer due to differences u/s 68 of the Act.

Further, we find that the Assessing Officer has made the addition as the confirmations were not sent by two parties. Hon'ble Lucknow Bench of the Tribunal in the case of Astha Infra Heights Pvt. Ltd. vs. Income Tax Officer, relying on the order of Hon'ble Supreme Court in the case of Orissa Corporation, under similar facts and circumstances has held as under:

"9. We have perused the case record and heard the rival contentions and we find that in this case addition made by the Revenue authorities are basically for two reasons, firstly Assessing Officer has issued notices under section 133(6) to the sundry creditors and that none of them appeared before him nor any written submission or confirmations were filed. At the first appellate stage, Id. CIT(A) rejected additional evidences

being filed before him and therefore there was no question to call for remand report in the case of the assessee to verify the genuineness and veracity of these additional evidences. So far as Assessing Officer is concerned, we find that, assessee is a builder and contractor and Assessing Officer has accepted purchase as in the purchase account and has not disputed purchase figure at all. It is the case of the assessee that creditors have increased since in the relevant assessment year there was increase in the business activities. It is common trade practice for the assessee to purchase raw materials for building construction and transportation and it is with regard to these items there was also increase in sundry creditors. In order to ascertain the genuineness of these creditors, notices under section 133(6) were issued in the given addresses by the assessee and it is not disputed by the Revenue that these notices were properly served on the given addresses of the creditors. Grievance of the Assessing Officer was that none of the creditors had appeared before him and no written submission/confirmation was filed before him. Assessee has provided complete list of names, addresses and total amount so far as sundry creditors are concerned to the Assessing Officer and after that it is the responsibility of the Assessing Officer to use Revenue Machinery available to him to enquire, find out, investigate and accordingly take the matter to its logical conclusion. This has also been discussed by various judicial pronouncements. The Co-ordinate ITAT Lucknow Bench in ITA No.659/LKW/2016 on the similar issue referred to the judgment of the Hon'ble Apex Court in the case of CIT vs. Orissa Corporation Pvt. Ltd., 159 ITR 78 and observed and held as follows:-

"we also find that the Apex Court has held in the case of CIT vs. Orissa Corporation Pvt. Ltd. (supra) that if the Assessing Officer issues notice under section 133(6), it is his duty to bring the process to logical conclusion and non-response of such person cannot be held against the assessee. We find that from the entire findings of the Assessing Officer no exercise has been done so to virtually see what is the outcome of notice issued under section 133(6) nor any enquiry or possible efforts were made by the Assessing Officer regarding the same. Disallowance was made only for the reason that there was no compliance of the said notice under section 133(6) by Larsen & Toubro Limited."

10. Similarly, in another case regarding genuineness of purchases in the case of *JCIT vs. Mathura Das Ashok Kumar, 101 TTJ 810, Allahabad Bench of the Tribunal* held that as the genuineness of the purchases has not been disputed, rather, the same has been accepted, the credits stand fully explained and no adverse inference is called for, either on facts or in law.

11. Co-ordinate *ITAT Kolkata Bench in the case of ACIT vs. Debdas Dutta, West Bengal in ITA No.1595/Kol/2014* on the similar issue has observed and held as follows:-

“In the instant case, the addition was made by AO on the ground that the trade creditors could not respond to the notice issued u/s 133(6) of the Act. However, *Ld. CIT(A)* reversed the order of AO. It is undisputed fact that all the trade creditors appearing in the balance-sheet are arising out of the expense of material purchased by the assessee. Thus all the purchases have been duly accepted by the AO and same was not disputed. However, the trade creditors which are emanating from the purchases have been disallowed merely on the ground of non-response of notice issued to them u/s 133(6) of the Act. In our considered view, the trade creditors cannot be disturbed without disallowing the corresponding purchase.”

12. We find that in the present case of the assessee, neither the Assessing Officer nor the *Id. D.R.* at the time of hearing disputed the purchases made by the assessee and once purchases are not doubted, in such a scenario question of creditors being non-genuine does not arise. As held by the Hon'ble Apex Court in *CIT vs. Orissa Corporation Pvt. Ltd. (supra)*, it was the duty of the Assessing Officer to ensure production of those creditors before him and for the deeds of his inaction, assessee cannot be held liable.

13. Secondly, we find that assessee has always complied with the requirements of law before the Revenue authorities, meaning thereby they have filed additional evidences before the *Id. CIT(A)* on an application under rule 46A which provides that *Id. CIT(A)* may admit those additional evidences after confronting the same before the Assessing Officer to ascertain the veracity of those evidences. Instead of doing this exercise, *Id. CIT(A)* has summarily rejected the additional evidences placed before him under rule 46A on baseless and frivolous reasons which goes against the principles of natural justice.

14. Taking totality of facts and records into consideration, we find that complete names, addresses, amounts were provided by the assessee including entire confirmation from these creditors as appearing from pages 7 to 99 of the paper book filed before us. Ld. CIT(A) has also not given a clear cut finding on the issue and has simply accepted the version of the Assessing Officer and the Assessing Officer, without taking procedure initiated by him under section 133(6) to a logical conclusion, has held the assessee liable for non-production of creditors, which is not warranted within the purview of tax legislation.

15. In view of the matter and on the basis of analysis and examination of the facts and records hereinabove, we set aside the order of the Id. CIT(A) and allow the appeal of the assessee."

6. Keeping in view these facts and circumstances of the case and judicial precedents, the addition confirmed by learned CIT(A) u/s 68 of the Act is not sustainable and the same is directed to be deleted.

7. In the result, the appeal of the assessee stands partly allowed.

(Order pronounced in the open court on 19/09/2018)

Sd/.
(PARTHA SARATHI CHAUDHURY)
Judicial Member

Sd/.
(T. S. KAPOOR)
Accountant Member

Dated:19/09/2018

*Singh

Copy of the order forwarded to :

1. The Appellant
2. The Respondent.
3. Concerned CIT
4. The CIT(A)
5. D.R., I.T.A.T., Lucknow