

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "G" : DELHI
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI B.R.R. KUMAR, ACCOUNTANT MEMBER
ITA.No.7130/Del./2019
Assessment Year 2015-2016

M/s. Thirubala Chemicals Pvt. Ltd., C-501, NDM-2, Netaji Subhash Palace, New Delhi – 110 034. PAN AACCT0454E	vs.	The Income Tax Officer, Ward – 25 (2), New Delhi.
(Appellant)		(Respondent)

For Assessee :	Shri Shantanu Jain, Advocate
For Revenue :	Shri Parikshist Singh, Sr. D.R.

Date of Hearing :	30.09.2020
Date of Pronouncement :	06.10.2020

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by assessee has been directed against the order Ld. CIT(A)-9, New Delhi, Dated 11.07.2019, for the A.Y. 2015-2016, challenging the addition of Rs.1.16 crores under section 68 of the Income Tax Act, 1961.

2. We have heard the Learned Representatives of both the parties through video conferencing and perused the material available on record.

3. Briefly the facts of the case are that in this case return of income was filed by the assessee-company on 30.09.2015 declaring loss of Rs.3,37,043/- for the assessment year under appeal. The case was selected on limited parameters under CASS to examine the following issues

- (i) Large interest expenses related to exempt income under section 14A.
- (ii) Mismatch in the amount paid to the related persons under section 40A(2)(b) reported in Audit Report and ITR.

3.1. During the course of assessment proceedings, it was noticed that the assessee has received unsecured loans from the following parties as per the details mentioned below :

Name of the lender	Address of the lender	PAN	Amount received [in Rs.]
Ambashree Infratech (P) Ltd.,	85, Metacalf Street, 2 nd Floor, Kolkata, West Bengal.	AAKCA4144N	59,00,000/-
Blockdeal Dealcom (P) Ltd.,	27A, Weston Street, Kolkata, West Bengal.	AAECB9457B	27,00,000/-
Unifour Commosale (P) Ltd.,	85, Metacalf Street, 2 nd Floor, Kolkata, West Bengal.	AABCU4645B	30,00,000/-
Total	--	--	Rs.1,16,00,000/-

3.2. In order to verify the genuineness of the transactions, letters under section 133(6) were issued to the parties. But the letters sent to M/s Unifour Commosale (P) Ltd. and M/s Ambashree Infratech (P) Ltd., were received back as reported by the postal authorities "Not Known." The letters were issued at all addresses as available on ROC. However, reply in respect of M/s. Blockdeal Dealcom (P)

Ltd., was received by the A.O. The A.O. noticed that the said entity has filed its return at a very low income with heavy worth of balance-sheet. Considering the same and other peculiar facts, Commission under section 131 were issued to the concerned A.Os. of these parties on 25.10.2017. While issuing the Commission under section 131, facts were communicated to the concerned A.Os. with a request to examine the genuineness of the above transactions, identity and creditworthiness of the parties as per parameter of section 68 of the Income Tax Act, 1961. It was also requested that local enquiries may be conducted and Directors of the said company may be examined personally under section 131 of the Income Tax Act, 1961. Reports of the concerned A.Os. have been received by the A.O. which is mentioned at pages 8 and 9 of the assessment order intimating therein that in the case of the creditors M/s Ambashri Infratech (P) Ltd., and Unifour Commosale (P) Ltd., as per the report of the Inspector it was stated that summons could not be served as the parties are not traceable on the given address. However in the case of M/s

Blockdeal Dealcom (P) Ltd., - Creditor, the summons were served and the Director of this Company sought time to respond. However, later on they have failed to appear personally for deposition and preferred only submission of the documents. It may be noted that all the three creditor companies fall under the jurisdiction of Assessing Officer, Ward-2(2), Ward-1(1) and Ward-6(4), Kolkata. The A.O. in view of report of the Inspector and the concerned A.Os. at Kolkata noted that the assessee failed to prove the identity of the creditors, their creditworthiness and the genuineness of the transaction in the matter and the same appears to be paper company only. The A.O. issued show cause notice to the assessee as to why the aforesaid sum of Rs.1.16 cross should not be treated as unexplained and added back to the income of the assessee.

3.3 The assessee in response to the notice of the A.O. filed reply dated 14.12.2017 and assessee raised various pleas and relied upon multiple Judgements and the explanation of assessee is summarised by the A.O. in the assessment order as under :

- (i) The said loan were repaid in the subsequent years and the assessee company is under no obligation to spend money and time to prove their genuineness.
- (ii) Report of Inspectors are suspect as there are evidences contrary to the same and in support, the assessee has provided copies of assessment orders of the alleged companies in question for different assessment years.
- (iii) The assessee *suo motu* vide letter dated 30.11.2017 has provided confirmation along with assessment particulars and bank statement from all the parties to whom commissions were issued and also letters from the said companies confirming that Inspectors from the different charges contacted for verification and in response to the same they have provided the desired documents.

- (iv) The assessee must be given right of cross examination of the Inspectors, who visited the premises of the lender companies.

3.4. The A.O. after examining the material on record noted that the burden is upon the assessee to prove ingredients of section 68 of the Income Tax Act, 1961. The A.O. as regards doubting the report of the Inspector and *suo motu* confirmation filed by the creditors observed that the said documents have been provided by the parties *suo motu* to the assessee which have been filed by assessee before him. The A.O. noted that Inspector of the Department have verified the facts and there were no justification for the assessee to ask for cross-examination of the report and statement of the Inspector because it is not an absolute right of the assessee to ask for the report of the Inspector and cross-examination thereon. The A.O. on examination of the bank statements of the creditor companies noted that there are deposits and withdrawals in their bank accounts and the Profit and Loss Account shows that these companies have declared only nominal income in the return

of income filed for the year under consideration and the details are as under :

Name of the Assessee Company	P & L A/c receipt/ turnover	Income declared	Worth of Balance Sheet.
M/s. Blockdeal Dealcom (P) Ltd.,	21,39,913/-	4,618/-	26,97,44,582/-
M/s. Ambashree Infratech Pvt. Ltd.,	59,20,793/-	1,32,343/-	39,62,04,753/-
M/s. Unifour Commosale Pvt. Ltd.,	47,87,325/-	1,30,050/-	32,68,23,677/-

3.5. The A.O. following certain Judgments held that assessee has failed to prove the ingredients of section 68 of the Income Tax Act and made addition of Rs.1.16 crores under section 68 of the Income Tax Act, 1961 on account of unexplained credit in the books of account of the assessee.

4. The assessee challenged the addition before the Ld. CIT(A). Detailed submissions of the assessee are noted in the impugned order. The assessee also explained that assessee paid interest on the loans and TDS was also deducted which have not been doubted by the A.O. All the

creditors are existing assesseees at Kolkata which fact is verified by the concerned A.O. No cash has been originated in their accounts. Merely because the creditors did not appear, is no ground to make addition against the assessee. The assessee also relied on the submissions made before the A.O. The Ld. CIT(A) considering the explanation of assessee did not find any merit in the appeal of assessee. It was also noted by the Ld. CIT(A) that it is not an absolute right of the assessee to ask for the enquiry report submitted by the Inspector and the concerned A.Os. of Kolkata. The appeal of assessee was accordingly dismissed and addition was confirmed.

5. Learned Counsel for the Assessee reiterated the submissions made before the authorities below. He has submitted that assessee filed all the documentary evidences in respect of the three creditors before A.O. which consist of copy of their ITR for the assessment year under appeal, their audited accounts, confirmations, bank statements, confirmation of the return of the loan in subsequent assessment year 2016-2017, Copy of MCA to show the

Company Board has shown them working actively as well as copy of the assessment orders for the A.Ys 2013-2014 and 2014-2015. He has also referred to the replies filed by the creditor in response to the summons issued by the A.O. Learned Counsel for the Assessee, therefore, submitted that since the impugned amount have been repaid to the creditors in the subsequent assessment year and A.O. did not disallow the interest paid to the creditor in assessment year under appeal and the TDS deducted and paid to the Revenue Department of such interest have not been doubted, therefore, there were no justification for the A.O. to make the addition. The initial burden upon the assessee to prove the ingredients of section 68 of the Income Tax Act have been discharged by the assessee. He has submitted that A.O. merely relied upon the report of the concerned A.Os. of Kolkata based on enquiry conducted by the Inspector at Kolkata. But, despite asking, the A.O. has not provided copy of the report of the Inspector and the copy of the report of the concerned A.Os. at Kolkata for rebuttal on behalf of the assessee and no cross-examination have been

allowed to such documents collected at the back of the assessee by the Inspector at Kolkata and no right of cross examination have been afforded to the assessee to cross examine the Inspector. Therefore, such material collected at the back of the assessee cannot be read in evidence against the assessee. In support of this contention, he has relied upon Judgements of the Hon'ble Supreme Court in the cases of Kishanchand Chellaram vs., CIT 125 ITR 713 (SC) and M/s. Andaman Timber Industries vs., CCE, Kolkata (2016) 15 SCC 785 (SC). He has, therefore, submitted that such material cannot be used in evidence against the assessee. He has submitted that it is an undisputed fact that all the creditors are assessed to tax and have sufficient means to make the investment in assessee company and the Company Law Board shows that they are active in their status and they have earned the revenue income and no cash was found deposited in their accounts for making any investment in assessee company. Therefore, addition could not be made against the assessee. In support of this submission, he has relied upon the following decisions :

1.	DCIT vs., Rohini Builders 256 ITR 360 (Guj.) (HC) in which SLP filed by the Department have been dismissed by the Hon'ble Supreme Court in SLP (C) No.515 of 2002 Dated 08.01.2002.
2.	CIT vs., Winstral Petrochemicals Pvt. Ltd., 330 ITR 603 (Del.) (HC)

5.1. Learned Counsel for the Assessee, therefore, submitted that the impugned addition is wholly unjustified and the same may be deleted.

6. On the other hand, the Ld. D.R. relied upon the orders of the authorities below and submitted that addresses of the creditor companies are same and it appears that the transactions have been managed by the assessee. It is submitted that letter sent to two parties returned un-served by the postal authorities with the remarks "Not Known." He has submitted that in response to Summons/Commission under section 131 of the Income Tax Act, 1961, concerned A.Os. at Kolkata reported against the assessee company that the transaction is not genuine, therefore, addition have been correctly made into the matter.

7. We have considered the rival submissions and perused the material available on record. In this case the A.O. noted that in assessment year under appeal, assessee has received unsecured loans from three creditors as reproduced above in a sum of Rs.1.16 crores. Initially the letters sent under section 133(6) of the I.T. Act to these three creditors were not served upon two parties. The A.O, in such circumstances, issued Commission under section 131 of the Income Tax Act, 1961 to the Kolkata A.Os. because all the three creditors were situated in Kolkata. The A.O. requested the concerned A.Os. of Kolkata to examine the genuineness of the transaction, identity of the creditors and their creditworthiness. It was also requested to make local enquiry by examining the Directors of the creditor companies. The concerned A.Os. of the Kolkata submitted the report before the A.O. based on the report of the Inspector, in which, it was intimated that the summons under section 131 of the I.T. Act, 1961, could not be served upon the two creditors and in case of one creditor though they have filed submissions and documents, but, the

Director of the Investor Company did not appear for examination. The assessee-company, in its reply before the A.O, sought for copy of the report of the Inspector and report of the concerned A.Os. of Kolkata for making further submissions and also asked for cross-examination of the Inspector who has reported against the assessee-company. The A.O, however, did not provide any material collected at the back of the assessee-company by the Inspector of the Kolkata to the assessee and did not allow any cross examination to the assessee-company. The A.O. in the assessment order held that assessee has no absolute right to ask for the cross-examination or to seek report of the Inspector and A.Os. of Kolkata. The Ld. CIT(A) confirmed this finding of A.O. by holding that the assessee has no absolute right to ask for the material collected at the back of the assessee and to ask for cross-examination of such material and Inspector on behalf of the assessee. Thus, it is established on record that whatever material was collected by the Inspector and concerned A.Os. at Kolkata on the basis of summons issued to them under section 131 of the

Income-Tax Act, were never supplied to the assessee and assessee was not allowed to cross-examine the Inspector or the material collected at his back at any stage. It is also established that no right of cross-examination have been given to the assessee to cross-examine the Inspector or to rebut the evidence collected at the back of assessee at Kolkata. Therefore, such material collected at the back of the assessee cannot be read in evidence against the assessee. We rely upon decision of the Hon'ble Supreme Court in the case of Kishanchand Chellaram vs., CIT 125 ITR 713 (SC) wherein the Hon'ble Supreme Court held that *“any material collected at the back of the assessee and not confronted and no opportunity given to cross-examine, such material cannot be relied upon against the assessee.”* The same view have been taken by the Hon'ble Supreme Court in its subsequent decision in the case of M/s Andaman Timber Industries 281 CTR 214 (SC). Thus, whatever material have been collected by the concerned A.Os. at Kolkata or the Inspector at Kolkata, which has made the basis to doubt the documentary evidences placed before

A.O, could not be read in evidence against the assessee. It is also violation of principles of natural justice and could not be treated as any adverse material against the assessee and such evidence shall have to be excluded from consideration. Thus, the material now available on record for consideration is whether burden upon the assessee under section 68 of the Income Tax Act, 1961 have been discharged for proving the identity of the creditors, their creditworthiness and genuineness of the transaction in the matter shall have to be considered. It is not in dispute that assessee filed documentary evidences before A.O. in respect of the genuine credits which consists of copy of the ITR of the creditors along with their assessment orders under section 143(3) of the I.T. Act, 1961, their audited balance-sheet, their confirmations to confirm the receipt of the loan, bank statement, bank statement and confirmation of subsequent year to show loans have been repaid. The assessee paid interest on these loans and deducted TDS. All these documentary evidences have not been doubted by the A.O. Thus, the documentary evidences on record clearly

established that all the creditors are assessed to tax and are existing assesseees. Thus their identity have been established. All the creditors have confirmed giving loan to the assessee which is repaid in subsequent year and were subjected to interest. The A.O. did not disallow the interest paid on these loans in assessment year under appeal as well as in subsequent assessment year. The bank statements of the creditors show that no cash have been found deposited in their bank account before giving loan to the assessee. There were sufficient balances available in the bank accounts of the Creditors to give loan to the assessee. The A.O. in the assessment order also noted that the worth of the creditors is in several crores. Thus, as against loan amount in lakhs, the creditors have their worth in crores. Therefore, there were no justification to doubt the creditworthiness of the creditors and genuineness of the transaction in the matter. Thus, the initial burden upon the assessee to prove the identity of the creditors, genuineness of the transactions and creditworthiness of the creditors has been discharged by the assessee. The A.O. did not make

any effort to make adequate enquiry on the documentary evidences submitted by the assessee. Thus, the A.O. failed to make any enquiry on the same. Thus, there was no justification to the authorities below to treat the loan amount of Rs.1.16 crores as an unexplained income of the assessee. We rely upon the following decisions.

7.1. Decision of the Hon'ble Delhi High Court in the case of CIT vs. Dwarkadhish Investment Pvt. Ltd., (2011) 330 ITR 298 (Del.) in which it was held that assessee need not to prove "*source of the source*".

7.2. Judgment of the Hon'ble Supreme Court in the case of CIT vs. Orissa Corporation (P.) Ltd., (1986) 159 ITR 78 (SC) in which it was held as under :

"In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the revenue that the said creditors were the income-tax assesseees. Their index number was in the file of the revenue. The revenue, apart from issuing notices under section

131 at the instance of the assessee, did not pursue the matter further. The revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do any further. In the premises, if the Tribunal came to the conclusion that the assessee had discharged the burden that lay on him, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion was based on some evidence on which a conclusion could be arrived at, no question of law as such could arise.

The High Court was, therefore, right in refusing to refer the questions sought for.”

7.3. Decision of Hon'ble Gauhati High Court in the case of CIT vs. Nemi Chand Kothari reported at (2003) 264 ITR 254 (Gauhati.) in which it has been held as under :

“Under section 68 of Income Tax Act creditor’s creditworthiness has to be judged vis-à-vis transactions, which have taken place between assessee and creditor, and it is not business of assessee to find out source of money of his creditor or genuineness of transactions, which took place between creditor and sub-creditor and/or creditworthiness of sub-creditors for these aspects may not be within special knowledge of assessee.”

7.4. Decision of Hon'ble Gujrat High Court in the case of DCIT vs. Rohini Builders (2002) 256 ITR 360 (Gujrat) in which it was held as under :

“Assessee had discharged initial onus by providing identity of the creditors by giving their complete address, GIR numbers/permanent account numbers and copies of assessment orders

wherever readily available. Assessee had also proved capacity of creditors by showing that amounts were received by account payee cheques drawn from bank accounts of creditors. Repayment of loans and interest thereon was also made by account payee cheques by assessee and tax also had been deducted at source on interest payments and remitted.”

7.4.1. In this case, SLP filed by the Department have been dismissed.

7.5. Decision of Hon'ble Delhi High Court in the case of CIT vs. Mod Creations Pvt. Ltd., (2013) 354 ITR 282 (Del.) in which it was held as under :

“The Tribunal has adopted an erroneous approach on the aspects of genuineness of the transactions in issue and the creditworthiness of the persons/creditors who lent money to the assessee. The first aspect, i.e., identity of the creditors was established before any of the authorities below. It

will have to be kept in mind that section 68 only sets up a presumption against the assessee whenever unexplained credits are found in the books of account of the assessee. It cannot but be again said that the presumption is rebuttable. In refuting the presumption raised, the initial burden is on the assessee. This burden, which is placed on the assessee, shifts as soon as the assessee establishes the authenticity of transactions as executed between the assessee and its creditors. It is no part of the assessee's burden to prove either the genuineness of the transactions executed between the creditors and the sub-creditors nor is it the burden of the assessee to prove the creditworthiness of the sub-creditor."

7.6. Decision of Hon'ble Delhi High Court in the case of CIT vs. Kamdhenu Steel and Alloys Ltd., & Ors. 361 ITR 220 (Del.) in which it was held as under :

“Once adequate evidence/material is given, which would prima facie discharge the burden of the assessee in proving the identity of shareholders, genuineness of the transaction and creditworthiness of the shareholders, thereafter in case such evidence is to be discarded or it is proved that it has “created” evidence, the Revenue is supposed to make thorough probe before it could nail the assessee and fasten the assessee with such a liability under s.68; AO failed to carry his suspicion to logical conclusion by further investigation and therefore addition under s.68 was not sustainable.”

7.7. Decision of Hon’ble jurisdictional High Court in the case of CIT vs. Vrindavan Farms Pvt. Ltd., etc. ITA.No.71 of 2015 dated 12th August, 2015 (Del.), in which it was held as under :

“The sole basis for the Revenue to doubt their creditworthiness was the low income as reflected in their return of income. It was observed by the ITAT that the AO had not undertaken any

investigation of the veracity of the documents submitted by the assessee, the departmental appeal was dismissed by the Hon'ble High Court.

7.8. Decision of Hon'ble jurisdictional High Court in the case of Divine Leasing & Finance Ltd., 299 ITR 268, in which it was held as under :

“No adverse inference should be drawn if shareholders failed to respond to the notice by A.O.”

7.9. Decision of Hon'ble Delhi High Court in the case of CIT vs. Winstral Petrochemicals P. Ltd., 330 ITR 603, in which it was held as under :

“Dismissing the appeal, that it had not been disputed that the share application money was received by the assessee-company by way of account payee cheques, through normal banking channels. Admittedly, copies of application for allotment of shares were also provided to the

Assessing Officer. Since the applicant companies were duly incorporated, were issued PAN cards and had bank accounts from which money was transferred to the assessee by way of account payee cheques, they could not be said to be non-existent, even if they, after submitting the share applications had changed their addresses or had stopped functioning. Therefore, the Commissioner (Appeals) and the Tribunal were justified in holding that the genuineness of the transactions had been duly established by the assessee.”

7.10. Decision of Hon'ble Jurisdictional Delhi High Court in the case of CIT vs. Value Capital Services Pvt. Ltd., (2008) 307 ITR 334 (Del.) (HC), in which it was held as under :

“Dismissing the appeal, that the additional burden was on the Department to show that even if the share applicants did not have the means to make the investment, the investment made by them

actually emanated from the coffers of the assessee so as to enable it to be treated as the undisclosed income of the assessee. No substantial question of law arose.”

7.11. Considering the facts of the case in the light of documentary evidences available on record and the fact that A.O. did not make any adequate enquiry on the documentary evidences filed by the assessee-company clearly established that assessee-company proved identity of the creditors, their creditworthiness and the genuineness of the transaction in the matter. Merely low income declared in the return of income by the creditors is no ground to reject the explanation of the assessee-company because their creditworthiness is in several crores as is already admitted by the A.O. in the assessment order. In view of the above discussion, we set aside the orders of the authorities below and delete the entire addition.

8. In the result appeal of the assessee allowed.

Order pronounced in the open Court.

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

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Delhi, Dated 06th October, 2020

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'G' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.