

आयकर अपीलीय अधीकरण, न्यायपीठ –“A” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
[Before Shri J. Sudhakar Reddy, AM and Shri A. T. Varkey, JM]

I.T.A. No. 254/Kol/2020
Assessment Year: 2015-16

Assistant Commissioner of Income-tax, Circle-33, Kolkata.	Vs.	M/s. Sreeleathers (PAN: AAKFS2993L)
Appellant		Respondent

Date of Hearing (Virtual)	19.01.2021
Date of Pronouncement	05.02.2021
For the Appellant	Shri Dhruvajyoti Roy, JCIT
For the Respondent	Shri M. D. Shah, AR

ORDER

Per Shri A. T. Varkey, JM:

This appeal preferred by the Revenue is against the order of Ld. CIT(A)-09, Kolkata dated 14.11.2019 for Assessment year 2015-16.

2. The main grievance of the revenue is against the action of the Ld. CIT(A) deleting the disallowance related to the unexplained cash credit of Rs.4,50,00,000/- and the unexplained interest expenditure on it to the tune of Rs.74,30,571/-.

3. Brief facts of the case as noted by the AO are that the assessee had filed return of income disclosing a total income of Rs.75,35,310/-. Thereafter, the case was selected for scrutiny through CASS under limited category. The AO notes that the assessee is a firm involved in the business of trading/retailing of foot-ware and other leather and non-leather accessories. The AO notes on perusal of the accounts and details submitted during the course of hearing that the assessee has received unsecured loans from various companies out of which according to AO, are paper companies (13 in numbers) the details of which he has given in a chart at page 2 and 3 of the assessment order ;and according to AO from these 13 companies assessee had received Rs.4.50 cr. and has shown to have made the payment of Rs.74,30,571/- as interest. In the chart after giving the Sl. No., name and

address of the parties and the loan received and the interest paid, the AO notes that the physical verification done by the Income-tax Inspector could not find the said entity at the given address. According to AO, he brought this matter to the notice of the assessee by issuing notice and thereafter he reproduced the reply given by the assessee dated 22.12.2017 which is found at page 4 and 5 of the assessment order. Thereafter, the AO explained the modus operandi followed by paper companies for routing the black money in the guise of unsecured loans. According to him, these transactions are nothing but accommodation entries and these are not real transactions. According to him, merely by filing PAN details, Balance Sheet and receiving money through the banking channel cannot establish the identity, creditworthiness and genuinity of the transactions. Thereafter, he explained some modus operandi and also list out the characteristic of the paper companies at para 5.4 and 5.5 of the assessment order. Thereafter, the AO notes that in this year the assessee has received unsecured loan from one M/s. Fast Glow Distributors Pvt. Ltd. (M/s. FGDPL) from loan entry operator Shri Ashish Kr. Agarwal. And according to him, Shri Ashish Kr. Agarwal's statement had been recorded by the Investigation Wing of the Department which is reproduced from page 8 to 12 of the assessment order which, according to him, proves beyond doubt that the assessee has received accommodation entries in the form of unsecured loans. Thereafter, the AO after referring to the reply of Shri Ashish Kr. Agarwal to question no. 9 and the statement recorded on 27.01.2015 by Shri Ashish Kr. Agarwal, the AO noted that Shri Ashish Kr. Agarwal has confessed that M/s. FGDPL is used to provide accommodation entries. Thereafter, he says that for the sake of Natural Justice he deputed an Inspector to verify the identity, creditworthiness and genuineness of the loan creditors. However, according to him, the Inspector failed to trace the loan creditors. Thus, according to him, the assessee has taken accommodation entries in the form of unsecured loans by routing these unaccounted monies, which fact has been proved beyond doubt. Thereafter, he referred to the decision of the Hon'ble Delhi High court in CIT Vs. Nippon Builders & Developers 350 ITR 407. Thereafter, he referred to the decision of the Hon'ble jurisdictional High Court in CIT Vs. Maithan International (2015) 56 taxman 283 (Kol), and he was of the opinion that the unsecured loan received from bogus companies as mentioned in the chart of Rs.4.50 cr. need to be added, since assessee could not discharge its burden of proof to

substantiate the genuineness of introduction of unsecured loans. The AO held that the purported unsecured loans of Rs.4.50 cr. are nothing but the assessee's own money introduced under the garb of fresh unsecured loans into the assessee's business. Therefore, he treated Rs.4.50 cr. as unexplained cash credit and added back to the total income of the assessee. Thereafter, he noted that the assessee has incurred expenses on account of interest payment of Rs.74,30,571/- on the loans. Therefore, the corresponding interest expenses of Rs.74,30,571/- according to him, cannot be allowed as genuine expenditure. So, he disallowed the same and added to the total income of the assessee.

4. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A), who noted that the loans were squared off in the same year (i.e. AY 2015-16) and that all the loan creditors pursuant to the notice issued u/s. 133(6) of the Act by the AO have confirmed to have provided loan to the assessee. The Ld. CIT(A) after perusal of the loan confirmations and the loan schedule, gave a finding that the assessee during the year had ended up having zero balance credit, since the money which was received, had been repaid in the same year. Thus, according to him, it is difficult to assume that the loans in question are in the form of accommodation entry, since they effectively accommodate zero value at the end of the year and relied on the decision of the Hon'ble Gujarat High court in the case of CIT Vs. Chandra Shekhar . Thereafter, the Ld. CIT(A) notes that interest has been paid @ 12% per annum in most cases with proper TDS deduction. According to Ld. CIT(A), the business sense of extending such loan to a brand like Sreeleathers/assessee cannot be ignored. The Ld. CIT(A) notes that he has taken note of the replies given by the lender companies pursuant to the notice u/s 133(6) of the Act which were duly served upon them and from the replies it is established that these lender companies had enough net-worth which are in crores. The Ld. CIT(A) notes that some of the companies declared income to the tune of Rs. 45 Lakhs, 75 Lakhs etc. Thus, according to Ld. CIT(A), the assessee has satisfied the requirement of law insisted u/s 68 of the Act as laid down by the Hon'ble Jurisdictional High Court in the case of Precision Finance Pvt. Ltd. in respect of creditworthiness, identity and genuineness of the transaction. The Ld. CIT(A) has taken note of the fact that the statement relied on by the AO to take adverse view against the assessee i.e. Shri Ashish Kumar Agarwal's in respect of lender M/s Fast Glow Distributors

cannot be considered as per the ratio laid down in case of CIT vs. S. Khader Khan Son in 352 ITR 480 (SC). According to Ld. CIT(A), the statement since have been taken on oath under survey does not have any evidentiary value and moreover the statement has been recorded in third party case (not that of assessee) and without giving the full copy of the statement to the assessee and without the AO himself examining Shri Ashish Kumar and without giving an opportunity to the assessee to cross-examine the statement of Shri Ashish Kumar Agarwal cannot be used adversely against the assessee. For the said proposition, he referred to several decisions of the Hon'ble High Courts and Supreme Court. The Ld. CIT(A) also noted that the AO erred in giving the show cause notice referring to only one (1) lender i.e. M/s Fast Glow Distributors and not calling upon from any other lenders details thus limiting reply of the assessee and secondly the AO has not provided the inspector's report on the basis of which the AO has inferred the non-existence of the lender companies at the address given ; and the Ld. CIT(A) took note of the fact that all the lender companies were served with notice issued by AO u/s 133(6) by the postal authorities and pursuant to which the Ld. CIT(A) notes that all of them have complied directly to the AO by furnishing their respective replies called for by the AO. Therefore, the Ld. CIT(A) was of the opinion that the assessment order is bad *inter-alia*, for violation of natural justice also and therefore according to him additions cannot be sustained. Therefore, he deleted the addition made against the loan of Rs. 4,50 crores and interest thereon of Rs. 74,30,571/-.

5. Aggrieved the revenue is before us.

6. We have heard both the parties and perused the records. The Ld. D.R Shri Dhruvajyoti Roy assailing the action of the Ld. CIT(A) contended that the AO has made detailed enquiries through Inspector whose physical verification could not trace out the lender companies in the addresses furnished. According to him, AO has given show cause notice to the assessee pointing out the adverse observations made by the Inspector and pursuant to which the reply was given which has been reproduced by the AO in the assessment order which shows that the assessee had replied only in respect of one (1) lender company M/s Fast Glow Distributors, when the fact remains that the assessee had

taken loan from thirteen (13) lenders. According to Ld. D.R, the assessee has taken loan from the lender company called M/s Fast Glow Distributors which is a paper company operated by entry provider Shri Ashish Kumar Agarwal whose statement which the AO has reproduced from pages 8 to 12 would reveal that the assessee had taken accommodation entry from paper companies and therefore, the AO rightly taking note of these facts has given the modus-operandi of such entry provider and has rightly added the addition which has been erroneously deleted by the Ld. CIT(A) which he wants us to reverse. Per Contra, the Ld. A.R Shri Miraj D Shah supporting the order of the Ld. CIT(A) pointed out that all the eleven (11) lender companies from whom the assessee had taken loan of Rs. 4.50 crores in this assessment year has been given back (except Rs. 15 Lakhs). According to Ld. A.R, it is not 13 lender companies as noted by AO, but it is only 11 companies from which the assessee has taken loan of Rs. 4.50 crores in this relevant assessment year. According to Ld. A.R, the so-called Inspectors Report which adversely states about non-existence of lenders at their respective address is faulty on two accounts. Firstly copy of the Inspectors report was not given to assessee, so that assessee could have responded / explained the correct facts. Secondly, the so-called inspectors report cannot be believed because the AO had issued directly notices u/s 133(6) of the Act to all the lender companies to their respective addresses and pursuant to the same, all of them have confirmed the loan transaction with the assessee. In order to prove this fact, the Ld. A.R drew our attention to the notices u/s 133(6) of the Act issued by AO to each lender companies and the replies thereto by the respective lenders, wherein the lenders have given the following documents in support of loan transaction with the assessee (i) copy of the ledger FY 2014-15 (AY 2015-16) (ii) Detail of amount advanced to assessee by RTGS / cheque etc, amount, bank details (iii) Copy of bank statement (relevant extract) (iv) Lender companies PAN details (v) ITR details (vi) Audited balance sheet. These details are found at page 51,73,95,123,146,169,196,220,240,263,289,311,384 of the PB.

7. Thereafter the Ld. A.R drew our attention to voluminous paper book which contains 340 pages and drew our attention to the show cause notice (SCN) issued by the AO dated 20.12.2017 which is placed at page 2 of the PB which is reproduced as under:

Dated: 20.12.2017

Sreeleathers,
3 & 4, Lindsay Street,
Kolkata

Sir,

*Sub: Show cause in the case of M/s Sreeleathers [PAN: AAKFS 2993 L]
for the Assessment year 2015-16 – matter regarding*

2. *During the course of assessment proceedings, you have submitted a list of unsecured loans in respect of your claim of liability. Notices u/s 133(6) of the Income Tax Act, 1961 were issued to various parties calling for information for verification of the transactions claimed by you. Replies / confirmations were obtained from them and the same have placed in the assessment records.*

3. *On perusal of the accounts and details submitted during the course of hearing, it is noticed that during the year under consideration, that you have received unsecured loans from various companies out of which one (1) company have been found to be paper company having no worth as mentioned in table below:*

<i>Sl. No.</i>	<i>Name and address of the Party</i>	<i>Loan Received</i>	<i>Interest</i>
<i>1</i>	<i>Fast Glow Distributors</i>	<i>50,00,000</i>	<i>12,79,268</i>

4. *You are requested to prove identity of lenders, genuineness of transaction, and creditworthiness of lenders, failing which adverse inference would be drawn.*

5. *Your case is re-fixed for hearing at 12.30 PM on 22nd December, 2017 at the office of the undersigned. If you do not wish to avail yourself of this opportunity of being heard in person or through an Authorized Representative, you may show cause in writing on or before the said date which will be considered before any such order is made under Section 143(3) of the Income Tax Act, 1961.*

6. *It may be noted that request for adjournment of the case will not be entertained under any circumstances as the matter is time barring. In case of non-compliance, it will be assumed that you have no explanation to offer and the assessment will be completed as per provisions of the Income Tax Act, 1961 without giving any further opportunity to you.*

8. Drawing our attention to the SCN, the Ld. A.R submitted that the SCN is dated 20.12.2017 and the AO framed the assessment order within six days i.e. on 26.12.2017. Thereafter, he drew our attention to the fact that on perusal of the SCN it would reveal that the AO has clearly expressed doubt about only one (1) lender company and not about the other ten (10) lenders, which fact is evident from a plain reading of the content of SCN which reads;- *“it is noticed that during the year under consideration, that you have received unsecured loans from various companies out of which one (1) company have been found to be paper company having no worth as mentioned in table below”*:

<i>Sl. No.</i>	<i>Name and address of the Party</i>	<i>Loan Received</i>	<i>Interest</i>
<i>1</i>	<i>Fast Glow Distributors</i>	<i>50,00,000</i>	<i>12,79,268</i>

9. Thereafter, it was brought to our notice that the case was re-fixed for hearing at 12.30 PM on 22.12.2017. According to Ld. A.R the assessee had filed the reply to the SCN which the AO has reproduced from pages 4 and 5 of the assessment order. From a perusal of the same it can be understood that the assessee since was confronted adversely only in respect of one lender company i.e. M/s Fast Glow Distributors, had obviously restricted the reply along with supporting documents in respect of this company only and furnished the following documents to prove the identity, creditworthiness and genuineness of the lender M/s Fast Glow Distributors:

- a) Copy of PAN card of M/s Fast Glow Distributors
- b) Income Acknowledgment for AY 2015-16
- c) Copy of Bank Statement
- d) Copy of incorporation of lender company
- e) Company Master data from ROC of M/s Fast Glow Distributors
- f) Annual account of M/s Fast Glow Distributors for FY 2014-15
- g) Loan-confirmation from M/s Fast Glow Distributors

10. According to Ld. A.R when the assessee received assessment order dated 26.12.2017, the assessee was shocked to note that even though the AO expressed his doubts of M/s Fast Glow Distributors from which the assessee borrowed Rs. 50 Lakhs, the AO has made the addition of the entire loan transaction of this assessment year to the tune of Rs. 4.50 crores, which according to Ld. A.R is arbitrary and whimsical. Moreover, according to Ld. A.R he was surprised that the adverse view of AO has taken against the lending companies based on a statement recorded by the Investigation Wing i.e. DDIT(Inv) dated 27.01.2015 which is two years prior to framing of assessment. According to Ld. A.R, the statement cannot be relied upon for two reasons. According to him, the statement of Shri Ashish Kumar Agarwal has been recorded during survey u/s 133A of the Act and that on oath which is not in accordance to law and therefore does not have any evidentiary value as held by the Hon'ble Supreme Court in S. Khader Khan Sons (supra).

According to Ld. A.R., the copy of the survey statement which the AO has relied upon has not been given to the assessee before framing of assessment and the assessee was not allowed to cross-examine Shri Ashish Kumar Agarwal. Therefore, the statement cannot be taken as evidence against the assessee as held by Hon'ble Supreme Court in Andaman Timbers Finance vs. CCE [CA No. 4228 of 2006]. It was pointed out by the Ld AR that the survey statement of Shri Ashish Kumar Agarwal has been taken during the survey of a third party and without it being tested on the touch-stone of cross-examination cannot be used adversely against the assessee. Moreover, according to Ld. A.R, at the fag end (six days) before the assessment was framed, the AO issued the SCN in which he confronted the assessee only against one lender i.e, M/s Fast Glow Distributors which was duly replied within the time given by the AO. Therefore, in the aforesaid facts and circumstances drawing adverse inference against entire loan taken by the assessee [Rs 4.50 crores] which has been squared up has been an arbitrary action which was rightly deleted by the Ld. CIT(A) which action does not call for any interference from our side.

11. Having heard both the parties and after perusal of records, we note that the assessee is a leading shoe maker / manufacturer of leather goods and the assessee has shown income of Rs. 7.35 crores and the assessee has taken working capital from eleven (11) lender companies in this relevant assessment year to the tune of Rs. 4.50 crores. In order to confirm the identity and genuineness of the loan transaction, it is noted that pursuant to notice issued by AO u/s 133(6) of the Act, all the lender companies have responded directly to the AO which fact is evident from perusal of page 51,73,95,123,146,169,196,220,240,263,289,311,384 of the PB. The lender companies have filed the following documents called for by the AO to establish their identity, creditworthiness and genuineness of the transaction (s) etc. Copy of PAN card of lender companies ; Income Acknowledgment for AY 2015-16; Copy of Bank Statement ; Copy of incorporation of lender companies; Company Master data from ROC of lender companies; Annual account of lender companies for FY 2014-15; Loan-confirmation from lender companies. However, the AO, it is noted , had issued another SCN first before six days of framing the assessment dated 20.12.2017 calling upon the assessee to give details to prove the identity, creditworthiness and genuineness of the transaction with M/s Fast Glow

Distributors from whom the assessee had taken Rs. 50 Lakhs and has incurred interest expenditure to the tune of Rs. 12,79,268/-. Pursuant to the SCN, the assessee had replied and given all the documents to the AO which he has reproduced at page 4 & 5 of assessment order (refer Page 126-148 of PB). Thereafter, the AO has framed the assessment by relying on the statement of Shri Ashish Kumar Agarwal which was recorded u/s 133A of the Act (on oath) dated 27.01.2015 in a third party case and thereafter made an addition of Rs. 4.50 crores and disallowed interest expenditure of Rs. 74,30,571/-. On appeal, the Ld. CIT(A) had deleted the addition, which action of Ld. CIT(A) is under challenge before us. We find that in this assessment year, the assessee which is a leading shoe manufacturing State of West Bengal had taken loan of Rs. 4.50 crores from eleven (11) lender companies and squared up the loan (except 15 Lakhs) with them, which finding of fact of Ld. CIT(A) has not been challenged by the Revenue by preferring any grounds of appeal, so this fact attains finality. We find that AO in order to examine the identity and genuineness of the ibid loan transaction had issued notice u/s 133(6) of the Act directly from them along with details and supporting documents called for as discussed (supra). Thereafter the AO confronted the assessee with a SCN dated 20.12.2017 (i.e. Six days before framing assessment order) that he wants details of one lender company only (i.e. M/s Fast Glow Distributors Pvt. Ltd.) from which assessee took Rs. 50 Lakhs which was duly replied by the assessee (the reply of assessee has been reproduced by the AO in the assessment order). Thereafter, the AO framed the assessment order on 26.12.2017 wherein he drew adverse inference against the entire loan of Rs. 4.50 crores on the strength of an Inspector Report and statement of Shri Ashish Kumar Agarwal which action of AO cannot be countenanced for the following reasons. Firstly because the so-called Inspector's Report which states that the lender companies could not be traced in their respective addresses was not furnished to the assessee. Secondly because, the evidence on record show that pursuant to the notice issued by AO u/s 133(6) of the Act to all these lenders at the very same addresses, it got served upon them by the postal authorities which fact can be safely inferred because it is not the case of the AO that notices issued u/s 133(6) has been returned back 'un-served'. Thirdly all the lender companies have replied directly to the AO pursuant to the notices issued u/s 133(6) of the

Act, which fact is evident from pages 51,73,95,123,146,169,196,220,240,263,289,311,384 of the PB.

12. Coming to the statement of Shri Ashish Kumar Agarwal it is noted that the statement of Shri Ashish Kumar Agarwal was recorded on 27.01.2015 u/s 133A of the Act (survey). And the following legal infirmities are found for this statement. Firstly the survey statement has been recorded by DDIT(Inv) in some third party case and not that of assessee. Secondly the deponent has been administered oath before his statement was recorded, which is not in accordance to Section 133A of the Act and the Hon'ble Supreme Court in Khader Khan & Sons (surpa) has held that the statement recorded u/s 133A of the Act is not given evidentiary value for the reason that officer is not authorized to administer oath and to take any sworn statement in contra distinction to the power vested in authorities to record statement under oath during search u/s 132 of the Act. Therefore on the sole statement recorded u/s 133A of the Act of Shri Ashish Kumar Agarwal, no adverse view can be taken against the assessee since there is no evidentiary value to be given to it. Moreover, if the AO still felt that he needs to use Shri Ashish Kumar Agarwal's statement against the assessee, then in all fairness he should have given a copy of the statement well in advance and called for explanation from assessee and thereafter if the AO is not satisfied then he should have summoned and examined (Ashish Kumar) and thereafter given an opportunity to assessee to cross-examine Shri Ashish Kumar Agarwal. After doing these exercises, still if the AO finds that from the statement which has undergone cross-examination, a wrong-doing on the part of assessee, then he could have drawn adverse inference against the assessee. However admittedly these actions were not taken by AO. So the statement of Shri Ashish Kumar cannot be relied upon against the assessee as held by Hon'ble Supreme Court in Andaman Timbers (supra). So when both foundation on which the AO drew adverse inference against the assessee goes, applying the legal maxim '**sublato Fundaments credit opus**' meaning in a case foundation is removed, the super-structure falls, the additions goes. Therefore, in the light of the fact that all the eleven (11) lender companies from which the assessee had taken loan of Rs. 4,50 crore had replied directly to AO pursuant to section 133(6) notice of copy of which we have seen in the PB as discussed supra and the fact that all the lender companies are

regular income tax assessee's & having PAN as well as their ROC details were brought to the notice of AO & their respective balance sheet shows that all of them have enough creditworthiness to lend the amounts in question to assessee and the assessee had squared up the loan transaction with all these lenders (except 15 Lakhs) and all the payments/TDS were made & payments were made through banking channel, the addition made by AO was untenable and therefore the Ld. CIT(A) rightly deleted the addition which action is confirmed. And therefore Revenue appeal is dismissed.

13. In the result, the appeal of the revenue is dismissed.

Order is pronounced in the open court 5th February, 2021.

Sd/-
(J.S. Reddy)
Accountant Member

Sd/-
(A. T. Varkey)
Judicial Member

Dated: 05.02.2021

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- ACIT, Circle-33, Kolkata.
2. Respondent – M/s. Sreeleathers, 3&4, Lindsay Street, Kolkata-700 087
3. The CIT(A)- 9, Kolkata (sent through e-mail)
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata