

IN THE INCOME TAX APPELATE TRIBUNAL
 DELHI BENCH "SMC": NEW DELHI
 BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

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| ITA No. 903/DEL/2018 AY: 2014-15 | | |
| AJAY KUMAR MAMGAIN VILLAGE KALUWALA, BADOWALA BHANIAWALA DEHRADUN UTTARANCHAL-248144 (PAN: CEYPM0160F) | Vs. | ITO, WARD 1(4)(1), HARIDWAR |
| (ASSESSEE) | | (RESPONDENT) |

Assessee by : Sh. Gautam Jain, Adv.
 Department by : Sh. B.S. Anant, Sr. DR.

ORDER

This appeal filed by the assessee is directed against the order passed by the Ld. CIT(A), Dehradun on 11.12.2017 in relation to the assessment year 2014-15 on the following grounds:-

1. That the learned Commissioner of Income Tax (Appeals) Dehradun has erred both in law and on facts in upholding an addition of Rs. 30,00,000/- representing unsecured loans received by the

assessee and, held to be unexplained cash credit u/s 68 of the Act.

1.1 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that unsecured loans aggregating to Rs. 30,00,000/- had been received by cash from identifiable parties who had duly confirmed that loans had been advanced to the appellant and as such, addition so sustained is invalid and untenable.

1.2 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that assessee has led complete documentary evidence in support of the unsecured loans so as to discharge the onus under section 68 of the Act and therefore, the addition sustained on subjective and arbitrary assumptions that creditworthiness has not been established is contrary to law and hence untenable.

1.3 That the learned Commissioner of Income Tax (Appeals) has further failed to appreciate that inability of the assessee to explain source of source cannot be a basis to confirm addition u/s 68 of the Act.

1.4 That furthermore the learned Commissioner of Income Tax (Appeals) has failed to appreciate that addition made of Rs. 30,00,000/- was in excess of scope of assessment and therefore without jurisdiction as circumscribed by the reason for selection of case for limited scrutiny which provided that addition ought to have been confined to investment in property.

It is therefore prayed that, addition made by the learned Assessing Officer and confirmed by the learned Commissioner of Income Tax (Appeals) may kindly be deleted and appeal of the appellant be allowed.

2. The brief facts of the case are that assessee has filed its return of income on 16.3.2016 declaring an income of

Rs. 1,96,180/-. Later on the case of the assessee was selected under scrutiny through CASS for the reasons "Large Investment in property (AIR), as compared to total income". Therefore, notice u/s. 143(2) of the I.T. Act, 1961 was issued and served upon the assessee well in time. In response to notices issued u/s. 143(2) and 142(1) of the Act, the assessee attended alongwith the AR of the assessee, from time to time and furnished details, documents and explanation as required by the AO and also submitted rely alongwith copy of bank statement of assessee and copy of detail of co-owners. After considering the same, the AO completed the assessment u/s. 143(3) of the Act vide his order dated 26.12.2016 by assessing the income of the assessee at Rs. 31,96,180/- and made the addition of Rs. 30 lacs representing advance received from some parties as unsecured loan/unexplained cash credit u/s. 68 of the Act. Against the assessment order, the assessee appealed before the Ld. CIT(A) who vide his order dated 11.12.2017 by observing that proving the creditworthiness

of the lenders is very much part of the onus placed upon the assessee, which has not been satisfactorily discharged in this case, has upheld the addition of Rs. 30 lacs made u/s. 68 of the Act. Aggrieved with the impugned order, the assessee has preferred this appeal.

3. During the hearing, Ld. Counsel for the assessee has submitted that Ld. CIT(A) has wrongly upheld the addition of Rs. 30,00,000/- representing unsecured loans received by the assessee and, held to be unexplained cash credit u/s 68 of the Act. He further submitted that Ld. CIT(A) did not appreciate that unsecured loans aggregating to Rs. 30,00,000/- had been received by cash from identifiable parties who had duly confirmed that loans had been advanced to the assessee and as such, addition so sustained is invalid and untenable. It was further submitted that Ld. Commissioner of Income Tax (Appeals) did not appreciate that assessee has led complete documentary evidence in support of the unsecured loans so as to discharge the onus under section 68 of the Act and therefore, the addition

sustained on subjective and arbitrary assumptions that creditworthiness has not been established is contrary to law and hence untenable. It was the further submission of the Ld. Counsel of the assessee that it was not appreciated by the appellate authority that inability of the assessee to explain source of source cannot be a basis to confirm addition u/s 68 of the Act. Furthermore it was submitted that lower appellate authority also not appreciated the fact that the addition made of Rs. 30,00,000/- was in excess of scope of assessment and therefore without jurisdiction as circumscribed by the reason for selection of case for limited scrutiny which provided that addition ought to have been confined to investment in property. It was further submitted that it is a settled law that creditworthiness of lender is to be examined by the AO of lender not by the AO of assessee. In support of his aforesaid contentions, he relied upon the judgment of the Hon'ble Supreme Court of India in the case of Earthmetal Electrical (P) Ltd. reversing the decision of Mumbai Tribunal reported in 4 SOT 484 and the

Hon'ble High Court in ITA No. 590/2005 dated 15.10.2008 in Civil Appeal No. 618 of 2010 dated 30.7.2010 and the decision of the Hon'ble Delhi High Court in the case of CIT vs. Real Time Marketing (P) Ltd. reported in 306 IOTR 55 and CIT vs. Value Capital Services Ltd. reported in 307 ITR 334; ITA No. 263/2011 GA No. 2856/2011 (Cal.) dated 21.9.2011 CIT vs. Dataware (P) Ltd. and ITA no. 3133/Del/2018 dated 25.6.2018 Moti Adhesives (P) Ltd. vs. ITO.

4. On the other hand, the Id. DR had relied upon the orders of the authorities below. He submitted that the case of the assessee was selected under scrutiny through CASS for the reasons "Large Investment in property (AIR), as compared to total income" and after considering the details, the AO has added Rs. 30 lacs in the hands of the assessee. He further submitted that in appeal, the Ld. CIT(A) has rightly observed that proving the creditworthiness of the lenders is very much part of the onus placed upon the assessee, which has not been satisfactory discharged in this

case and therefore, he upheld the addition of Rs. 30 lacs made u/s. 68 of the Act. Therefore, he submitted that the Ld. CIT(A) has passed a well reasoned order which does not need any interference on my part.

5. We have heard both the parties and perused the records, especially the orders of the authorities below and the case laws referred by the Id. Counsel for the assessee. At the time of hearing, Ld. Counsel for the assessee has filed the Paper Book containing pages 1 to 139 having the copy of acknowledgement of return of income alongwith computation of income alongwith trading and profit and loss account and details of cash statement for the financial year 2013-14 relevant to assessment year 2014-15; copy of notice u/s. 143(2) and questionnaire; copy of reply filed by assessee before AO alongwith its enclosures i.e. copy of bank statement of assessee and copy of detail of co-owners; copy of submission filed by assessee alongwith its enclosures i.e. details of cash received Rs. 10,33,000/- dated 12.6.2014; copy of submission filed before the Ld.

CIT(A) alongwith its enclosures; copy of sale deeds of Rs. 60 lacs and Rs. 47,35,000/-; copy of agreement to sell between the assessee and other 07 persons; details of repayment made on cancellation of sale agreement; details of property proposed to sold as per sale agreement signed on 8.12.2013; copy of statement recorded of 10 lenders from whom the assessee has taken the loan and their identity document etc. I find that the sole issue involved in the present appeal filed by the assessee is relating to addition of Rs. 30 lacs representing unsecured loans received by the assessee u/s. 68 of the I.T. Act from the 10 persons. Ld. CIT(A) while sustaining the addition of Rs. 30 lacs has observed that the assessee provided the details of the persons who have advanced him the money, the creditworthiness of these persons remains in doubt; some of the persons who supposedly advanced him money have advanced to the assessee sums that are twice their annual savings; there is nothing on record that these persons have investments made elsewhere too that match the advance

that they have made to the assessee and almost all of them claim to have kept this money at their homes in cash and then advanced it to the assessee. However, in appeal the assessee has submitted that burden of the assessee discharged since copy of acknowledgement of return of income, bank statement and further lenders has been produced before AO and statement of them has been recorded by the AO; creditworthiness of lender is to be examined by AO of lender not by AO of assessee; that low income of lender is an irrelevant consideration and net worth is the relevant test to determine the creditworthiness of the lender. I further note that from the perusal of the evidence furnished would reveal that, funds/ sums received by the assessee has been fully substantiated not only by documentary evidence including permanent account number, confirmation, address, and further more lenders has been produced before Assessing Officer and statement were duly recorded, therefore, such sum could not be held to be unexplained cash credit u/s 68 of the Act. It is noted

that no material has been placed by the Assessing Officer to even allege that such funds/sums raised was from the coffers of the appellant. The material on record reveals that lenders have net worth to advance to assessee. That few of the lenders are duly assessed to tax. This shows that the assessee has furnished complete details and evidences to discharge the burden in respect of funds/sums raised by the assessee. This view is fortified by the following judgment/decisions:-

- Hon'ble Supreme Court in the Civil Appeal no. 618 of 2010 dated 30.07.2010 in case of Earthmetal Electrical (P) Ltd. reversing the decision of Mumbai Tribunal reported in 4 SOT 484 and Hon'ble High Court in ITA No. 590/2005 dated 15.10.2008. In the above-said case, the Assessing officer, having found certain share capital money and unsecured loan in the books of account of the assessee company directed the assessee to explain the

share capital money as well as unsecured loan. In response to the Assessing Officer's query, the assessee submitted confirmation and disclosed that share capital and unsecured loan had been taken from the family members of the directors. The learned Assessing officer, having noted that the alleged confirmation did not contain the necessary details, issue notice u/s 133(6) to all those persons who had allegedly contributed to the share capital of the assessee company as well as given unsecured loan. In response to notice, no one gave any reply. The Assessing officer also procured information u/s 131 from the bankers and compared the transaction from information gathered from bank but could not correlate them. He then issued notice to the assessee, but assessee never appeared

before the Assessing Officer. The Assessing Officer, therefore treated the share capital money and unsecured loan as unexplained cash credit failing u/s 68 and accordingly, made addition to the income of the assessee.

The Hon'ble Supreme Court allowed the SLP filed by assessee and held that, if the share application money is received by the assessee company from alleged bogus shareholders whose names are given to 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.

- ITAT, Delhi Bench decision wherein the aforesaid judgment of the Hon'ble Supreme Court was followed i.e. in ITA No. 2525/D/2015 for Assessment year 2011-12

M/s Prabhatam Investment (P) Ltd. v. ACIT
in following and has held as under:

“The assessee on the basis of these documentary evidences have been able to establish that both the shareholders are genuine parties and they are not bogus and fictitious. The decision of the Hon’ble Supreme Court in the case of M/s. Earthmetal Electrical P.Ltd. (supra) clearly support the case of the assessee. It may also be noted that the facts considered in this case by 1TAT, Mumbai Bench and Hon’ble Bombay High Court (copies of the judgement are placed on record) are not on better footing as brought on record in the case of the assessee. The facts of the case of the assessee and material evidence brought on record are on better footing as compared to the facts considered in the case of M/s

Earthmetal Electrical P. Ltd. (supra). The assessee specifically pleaded before the CIT(A) and filed the details supported by evidence that net worth of both the investor companies are very substantial so as to make investment in assessee company. They were having sufficient funds with them to make investment in assessee company. The material produced by the assessee have not been doubted and rebutted by the authorities below.” [Emphasis supplied]

- C.O.No.163, 164 & 165/Del./2016 M/s. Garuda Imaging & Diagnostics Pvt. Ltd v. ACIT.

9.5 Decision of Hon’ble Supreme Court in the case of Earthmetal Electrical Pvt. Ltd., vs. CIT dated 30th July, 2010 in SLP.No.21073 of 1999, in which it was held as under: “We have examined the position, we find that the

shareholders are genuine parties. They are not bogus and fictitious therefore, the impugned order is set aside.” 13 ITA.Nos.449, 450, 451 /Del./2016 & C.Os.

5.1 I also find support from the decision of the Hon'ble Delhi High Court in the case of CIT vs.Real Time Marketing (P) Ltd. reported in 306 ITR 55 and CIT vs. Value Capital Services Ltd. reported in 307 ITR 334 wherein, it has been held that burden is on the Assessing Officer to show that money received originated from the coffers of the assessee and since in the instant case, burden had not been discharged addition made is not valid.

5.2 I further find that it is a settled law that creditworthiness of lender is to be examined by Assessing Officer of lender not by Assessing Officer of assessee. This view is fortified by the following decision:-

ITA No. 263/2011 GA No. 2856/2011 (Cal) dated 21.9.2011 CIT vs. Dataware (P) Ltd.

“In our opinion, in such circumstances, the Assessing officer of the assessee cannot take the burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. After getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing officer should enquire from the Assessing Officer of the creditor as to the genuineness of the transaction and whether such transaction has been accepted by the Assessing officer of the creditor but instead of adopting such course, the Assessing officer himself could not enter into the return of the creditor and brand the same as unworthy of credence. So long it is not established that the return submitted by the creditor has been rejected by its Assessing Officer, the Assessing officer of the assessee is bound to accept the same as genuine when the identity of

the creditor and the genuineness of transaction through account payee cheque has been established.”

5.3 I further find that when a question as to the creditworthiness of a creditor is to be adjudicated and if the creditor is an Income Tax assessee, it is now well settled by the decision of the Calcutta High Court that the creditworthiness of the creditor cannot be disputed by the AO of the assessee but the AO of the creditor. In this I support the decision of the Hon'ble High Court, Calcutta in the COMMISSIONER OF INCOME TAX, KOLKA TAX-11 Versus DATAWARE PRIVATE LIMITED ITAT No. 263 of 2011 Date: 21st September 2011 wherein the Court held as follows:

“....6. Keeping in view of the facts and circumstances of the case and respectfully following the aforesaid decisions, I held that mere non production of Director of said share holder company cannot justify adverse inference u/s 68 of the Act. Even if there was any doubt if any

regarding the creditworthiness of the share applicants was still subsisting, then AO should have made enquiries from the AO of the share subscribers as held by Hon'ble High Court in CIT vs DATAWARE (supra) which has not been done, so no adverse view could have been drawn. In this case on hand, the assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants, thereafter the onus shifted to AO to disprove the documents furnished by assessee and in my view it cannot be brushed aside by the AO to draw the adverse view which here in present facts cannot be countenanced. Therefore addition of Rs. 25,45,000 made by AO and sustained by Ld CIT(A) are hereby deleted."

6. Keeping in view of the facts and circumstances of the case and respectfully following the aforesaid precedents, I am of the considered view that section 68 of the Act

provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source shall be assessed as its undisclosed income. In the facts of the present case, both the nature & source of the share application received was fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. Accordingly all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction was placed before the AO and the onus shifted to AO to disprove the materials placed before him. Without doing so, the addition made by the AO is based on conjectures and surmises cannot be justified. In the facts and circumstances of the case as discussed above, no addition was warranted under Section 68 of the Act. Therefore, I delete the addition of Rs. 30 lacs and cancel the orders of the authorities below.

7. In the result, the Appeal filed by the Assessee stands allowed.

Order pronounced on 31-10-2018.

Sd/-

**[H.S. SIDHU]
JUDICIAL MEMBER**

Date: 31/10/2018

SR Bhatnagar

Copy forwarded to: -

1. Assessee
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY

By Order,

Assistant Registrar, ITAT, Delhi Benches