

IN THE INCOME TAX APPELLATE TRIBUNAL
“H” Bench, Mumbai
Before S/Shri B.R. Baskaran (AM) & Pawan Singh (JM)

I.T.A. No. 2034/Mum/2014
(Assessment Year 2009-10)

M/s. H.K. Pujara Builders 2 nd Floor Pennisula Heights C.D. Barfiwala Road Andheri West Mumbai-400 058.	Vs.	Add. CIT, Range 21(1) Pratyakshkar Bhavan, BKC Bandra East Mumbai-400 051.
(Appellant)		(Respondent)

I.T.A. No. 2491/Mum/2014
(Assessment Year 2009-10)

ACIT Range-25(2) Pratyakshkar Bhavan, BKC Bandra East Mumbai-400 051.	Vs.	M/s. H.K. Pujara Builders 301, Krishna Kunj V.L. Mehta Road Vile Parle (West) Mumbai-400 056.
(Appellant)		(Respondent)

PAN No.AAAFH7230H

Assessee by	Shri Prakash K. Jotwani
Department by	Shri Vachaspati Tripathi
Date of Hearing	4.2.2016
Date of Pronouncement	9.5.2016

CORRIGENDUM

The above said appeal was disposed of by us on 09.05.2016. Later it came to our notice that we have not disposed of the issues urged in the revised grounds of appeal filed by the revenue, which is filed along with the prayer to admit certain additional evidence, even though lengthy argument took place on the above said matter during the course of hearing. Hence we issue this corrigendum to dispose of the matters relating to the above said items. Accordingly, after paragraph 11 of the order, following paragraphs shall be inserted:-

"11A. The revenue has moved a petition praying for admission of additional evidence, which is in the form of sworn statement taken from Shri Jagdish Prasad Purohit. The Ld D.R submitted that the investigation wing has taken a statement from the above said person during the course of search action conducted in the Pride Group of Pune and he has admitted in the statement while giving answer to Q.no.11 that the Pride group had approached him to invest in their group in the form of Share Capital as an accommodation entry through M/s ACPL. The revenue has moved a petition to admit the copy of statement taken from Shri Jagdish Prasad Purohit as additional evidence. The grounds of appeal have also been revised bringing above facts. On the contrary, the Ld A.R objected to the admission of the additional evidences by submitting that Shri Jagdish Prasad Purohit has not implicated the assessee in the sworn statement and it is only a inference drawn by the Ld D.R in order to improve the case of the AO. Further Shri Jagdish Prasad Purohit has retracted from the statement given by him before the investigation wing by filing an affidavit. The Ld A.R also furnished a copy of affidavit filed by Mr. Purohit retracting from the statement. Accordingly he contended that the additional evidence sought to be filed by the revenue should not be admitted and even if it is admitted, the revenue cannot place reliance thereon. He further submitted that these materials were not available or considered either by the AO or by Ld CIT(A) and accordingly objected to the admission of the same.

11B. We have heard the parties on this issue and perused the record. It is an admitted fact that the statement taken from Shri Jagdish Prasad Purohit was not considered by the AO. Under the scheme of the Act, the order passed by the assessing officer is being contested by the assessee before Ld CIT(A) and thereafter, by both the parties before the Tribunal, if they feel aggrieved by the order passed by Ld CIT(A). After passing the assessment order, the assessing officer becomes functus officio and hence, if any material or information comes to the knowledge of the AO subsequently, then the assessing officer is required to follow the course of action provided under the Act and the Income tax Act

does not provide for modification of the order that has already been passed. The appellate procedure has been designed to adjudicate the matters that were originally framed in the assessment order. Hence, in our considered view, it may not be correct an altogether new material at this stage. Further, the Ld A.R has submitted that Shri Jagdish Prasad Purohit has not implicated the assessee in the statement and he has retracted from the statement by filing an affidavit. He has also furnished a copy of retraction statement. These limited facts show that the statement given by Shri Jagdish Prasad Purohit and its reliability are debatable. Since the additional evidence sought to be relied upon by the revenue is a debatable one; since the same was not considered or relied upon by the AO and since alternative course of action is available to the revenue under the Act to deal with the same, in our view, it should not be admitted at this stage. Accordingly we are of the view that the grounds urged by placing reliance on the same are also liable to be dismissed. Accordingly we decline to admit the additional evidence filed by the revenue and the revised grounds urged by the revenue in connection there with are also dismissed.

Ordered accordingly on 10-05-2016.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

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

Mumbai; Dated : 10/5/2016

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
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BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai

PS

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Assessee by	Shri Prakash K. Jotwani
Department by	Shri Vachaspati Tripathi
Date of Hearing	4.2.2016
Date of Pronouncement	9.5.2016

ORDER

Per B.R. Baskaran, AM :-

These cross appeals are directed against the order dated 05-02-2014 passed by Id CIT(A)-32, Mumbai and they relate to the assessment year 2009-10. The additions made by the AO u/s 68 of the Act, having been partially deleted by the Ld CIT(A), both the parties have filed these appeals.

2. We heard the parties and perused the record. The assessee is a partnership firm and is engaged in the business of builders & developers. During the course of

assessment proceedings, the AO noticed that the assessee has declared unsecured loans to the tune of Rs.57.20 crores. The AO noticed that the assessee has availed loans from the following parties located in Kolkatta.

(a) M/s Albright Consultant Pvt Ltd (ACPL)	- Rs.9.85 crores
(b) M/s Nataraj Vinimay Pvt Ltd (NVPL)	- Rs.1.30 crores
(c) M/s Spectrum Vintrade Pvt Ltd (SVPL)	- Rs.0.25 crore

	Rs.11.40 crores
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The AO chose to verify the above said loans and accordingly requested the ADIT (Inv), Kolkatta to verify these parties. The ADIT (Inv) deputed an Inspector, who reported that these companies are not available at the addresses given by them. Accordingly, the ADIT (Inv) reported that the identity of the creditors could not be established and further investigation could not be carried out. In the mean time, the assessee filed documents like PAN Card, Income tax return copies, copy of Balance Sheet & Profit and Loss account as on 31.3.2009, details of mode of payment, copy of bank statements showing the transactions, ledger account of assessee etc. to prove the identity and credit worthiness of the creditors and genuineness of the transactions. The AO noticed that these companies have declared very meager amount as their respective income. Further the AO also took the view that the identity of these companies, genuineness of transactions and credit worthiness of these parties have not been proved. Further the AO noticed that these creditors have not charged any interest from the assessee. Accordingly he assessed the above said amount of Rs.11.40 crores as income of the assessee.

3. Before the Ld CIT(A), the assessee furnished confirmation letters obtained from these creditors along with the copies of letters addressed by these parties to ADIT (Inv) confirming their existence in the address given by them. Further the assessee also furnished various documents to prove the identity and credit worthiness of the parties and also the genuineness of the transactions. Hence the Ld CIT(A) called for a remand report from the assessing officer. The Ld CIT(A) also requested the Investigation wing of Kolkatta to conduct certain enquiries. The DDIT (Inv) reported that these companies were represented by an authorised representative named Shri

S.K. Purohit. He further reported that these companies have received funds from other group companies and it has been used to give unsecured loans to the assessee company. All the companies have common address, common chambers and common directors. The sources were reported to be the sale proceeds of shares of certain Private Limited Companies, which in turn were related to the same group. All the other companies were also represented by Shri S.K. Purohit only. In view of these facts, the DDIT expressed the view that there is reason to believe that the loans / advances taken by the assessee from the three Kolkatta based companies may be viewed as well planned accommodation entries. The Ld CIT(A) also forwarded a copy of the report given by the DDIT to the AO.

4. The AO has also confronted the report of the DDIT with the assessee in the scrutiny assessment proceedings for AY 2010-11. In reply the assessee submitted that it has discharged the primary onus placed upon it by sec. 68 of the Act by establishing the identity and credit worthiness of the creditors and the genuineness of the transactions. However, the AO expressed the view that these companies have reported very low income and it will not be possible for them to give such huge sums as loan. The AO endorsed the view taken by DDIT and opined that the assessee has routed its unaccounted money through these loans and they have provided only accommodation entries.

5. The Ld CIT(A) furnished copy of the remand report and the report of the DDIT, Kolkatta to the assessee. The assessee submitted that the identity of these companies have been proved through various documents. Since the loan amounts were received through banking channels, the genuineness of the transactions also stand proved. With regard to the credit worthiness, the assessee placed reliance on the Balance sheets of these companies and submitted the sources of loans stand established. The assessee also explained as to how these companies have generated funds. Accordingly the assessee contended that it has discharged the primary onus placed upon it u/s 68 of the Act and also proved source or source also. The assessee also placed reliance on a host of case laws in this regard. With regard to the observation of the AO that these

companies have reported low income, the assessee submitted that the wealth position of these companies have to be looked into and not the income returned by these companies. The assessee submitted that these companies are having following amount of own funds:-

ACPL	-	Rs.20.00 crores
NVPL	-	Rs.19.35 crores
SVPL	-	Rs.19.64 crores

Accordingly the assessee submitted that the own funds have been used to give loans to it.

6. The Ld CIT(A) held that the funds position of these three companies clearly establish the credit worthiness of these companies (Para x in page 24). He further held that the identity of these companies cannot be disputed (Para xii in page 25). Even though the assessee contended that the genuineness of the transactions cannot be disputed, since they have been routed through banking channels (para xiii in page 25), yet the Ld CIT(A) expressed doubt about the same for the reasons discussed infra.

7. Having observed so, the Ld CIT(A) went on further to analyse each creditors separately. He noticed that the assessee has repaid the loans taken from M/s ACPL on various dates in March 2012 together with a lump sum compensation of Rs.1.00 crore. Hence the Ld CIT(A) took the view that the loan transactions of M/s ACPL stands substantiated and accordingly directed the AO to delete the addition of loan amount of Rs.9.85 crores taken from M/s ACPL. The revenue is aggrieved by this decision of Ld CIT(A).

8. In respect of loan taken from M/s NVPL, the Ld CIT(A) noticed that it was a NBFC and the assessee has repaid the loan amount to M/s NVPL without interest. Since it was a NBFC, the Ld CIT(A) took the view that it was beyond ordinary commercial prudence that a NBFC would advance loan interest free. He also expressed that the above said company has not deployed its funds for the stated objectives and accordingly held that the genuineness of the transactions cannot be said to have been proved. Further the non-charging of interest defies the logic. Accordingly he held that

the loan taken from M/s NVPL could be only accommodation entry and accordingly confirmed the addition made u/s 68 of the Act.

9. In respect of loan taken from M/s SVPL also, the Ld CIT(A) noticed that it was a NBFC and it did not charge interest on the loan given to the assessee company. Accordingly, for identical reasons, he confirmed the addition of the loan received from M/s SVPL also.

10. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the addition of loans taken from M/s NVPL and M/s SVPL.

11. We heard the rival contentions and perused the record. The dispute before us relates to the addition made u/s 68 of the Act. It is a well settled proposition that the primary onus is placed upon the assessee u/s 68 of the Act to prove the cash credits. In order to discharge the primary onus, the assessee has to prove the identity of the creditor, credit worthiness of the creditor and the genuineness of the transactions. If the assessee discharges the initial onus, then the burden shifts to the shoulder of the AO to disprove the claim made by the assessee. With these settled legal propositions, we shall now examine the facts prevailing in the instant case.

12. We have noticed that the AO did not consider various documents furnished by the assessee during the course of assessment proceedings in order to discharge the initial onus placed upon him u/s 68 of the Act. The AO gave importance to the report of the Inspector belonging to the investigation wing, who had stated that the loan creditors did not exist at the address given by them. However, it is pertinent to note that the said report of the Inspector was proved to be false during the course of subsequent enquiries.

13. The Ld CIT(A) also requested the DDIT, Kolkatta to carry out certain investigation. Even though all the companies were represented by a single authorised representative, yet the fact remains that all these companies have furnished necessary details. Further the assessee herein also furnished necessary documents to prove the

identity of the creditors and credit worthiness of the creditors. There is no dispute with regard to the fact that the funds have been routed through banking channels. Hence the Ld CIT(A) himself has observed that the identity of the creditors and credit worthiness of the creditors have been established by the assessee.

14. The Ld CIT(A) has accepted the genuineness of the transactions in respect of loan obtained from M/s ACPL. However with regard to the other two loans, the Ld CIT(A) has gone a step further and expressed doubt as to how these companies, being NBFC, could have given loan interest free, as the same is not in accordance with their objectives.

15. We have earlier noticed that the provisions of sec. 68 places initial burden of proof upon the assessee. In the instant cases, there is no dispute between the parties that the identity of the loan creditors has been established. Even though the assessing officer has expressed doubt about the credit worthiness of the creditors on the basis of low income reported by them, yet the Ld CIT(A) has rightly appreciated the fact that these companies have used their own capital funds for advancing loan to the assessee company. The quantum of own funds held by these companies has also been discussed by Ld CIT(A). In our view, the Ld CIT(A) was justified in holding that the income declared by these loan companies are not the criteria, but the source for giving the loans to the assessee company is the determinative of the credit worthiness. Thus, the Ld CIT(A) has rightly held that the credit worthiness of the loan creditors has also been established.

16. It is a well settled proposition that the genuineness of the transactions shall stand established if the transactions are routed through banking channels. In the instant case, the loan transactions have been routed through the banking channels. Hence the genuineness of the transactions also stand established. However, the Ld CIT(A) has expressed doubt about the genuineness in respect of loan taken from M/s NVPL and M/s SVPL, since he was of the view that a NBFC company shall not give interest free advances to unrelated parties. In our view, the doubt so expressed by the

Ld CIT(A) is beyond the scope of the provisions of sec. 68 of the Act. Since the provision of sec. 68 is a deeming provision, the same is required to be interpreted strictly. The Courts have held that the assessee is required to discharge the initial burden of proof placed on his shoulders. In the instant case, we are of the view that the assessee has discharged the initial onus placed upon it. Hence the burden of proof gets shifted to the assessing officer.

17. From the foregoing discussions, we notice that the tax authorities have not discharged the burden of proof shifted upon their shoulders by bringing any material on record to disprove the claim of the assessee. On the contrary, the tax authorities have merely suspected the genuineness by making certain adverse inferences. It is pertinent to note that they have not disputed the genuineness of various documents furnished by the assessee to prove the identity and credit worthiness of the creditors and genuineness of the transactions. Accordingly, we are of the view that the tax authorities have not discharged the burden of proof placed upon them.

18. We have noticed earlier that the Ld CIT(A) has deleted the addition pertaining to M/s ACPL, but confirmed the addition pertaining to M/s NVPL and M/s SVPL. Since we have held that the tax authorities have failed to discharge the burden of proof shifted upon them, we are of the view that they are not justified in making the addition in respect of all the three loans. Accordingly, we confirm the order of Ld CIT(A) in granting relief in respect of loan taken from M/s ACPL . Accordingly, we set aside the order passed by Ld CIT(A) in respect of loan taken from M/s NVPL and M/s SVPL and direct the AO to delete the additions relating to them.

19. In the result, the appeal filed by the assessee is allowed and the appeal of the revenue is dismissed.

Order has been pronounced in the Open Court on 9.5.2016.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER
Mumbai; Dated : 9/5/2016

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

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BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai