

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/TAX APPEAL NO. 533 of 2023**

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THE PRINCIPAL COMMISSIONER OF INCOME TAX 1 VADODARA
Versus
M/S. OJAS TARMAKE PVT. LTD.

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Appearance:

MR NIKUNT K RAVAL(5558) for the Appellant(s) No. 1
for the Opponent(s) No. 1

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CORAM: HONOURABLE MR. JUSTICE BIREN VAISHNAV
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 22/08/2023

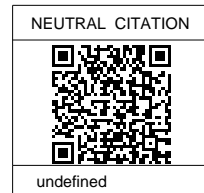
ORAL ORDER

(PER : HONOURABLE MR. JUSTICE BIREN VAISHNAV)

1 This Tax Appeal has been filed challenging the order dated 24.03.2023 made by the Income Tax Appellate Tribunal ('ITAT' for short), Ahmedabad, in ITA No. 95/AHD/2015 for Assessment Year 2013-2014.

The Appeal raises the following substantial questions of law:

“(i) Whether on the facts and circumstances of the case and in law, the Appellate Tribunal’s decision is perverse on facts and therefore, was it justified in deleting the addition of Rs.6,10,38,513/- made u/s. 68 of the Income Tax Act, 1961 without appreciating the findings arrived at by the Assessing Officer and Ld. CIT (A) which are based on proper appreciation of the facts and the material available on record and surrounding circumstances, which clearly drags support from the view taken by the Hon’ble Apex



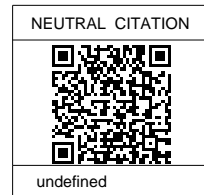
Court decision in the case of CIT vs. P.Mohankala, [2007] 161 taxman 169(SC)?

(ii) Whether the Appellate Tribunal erred on facts and in law by relying upon the ration of Hon'ble Gujarat High Court decision in the case of CIT vs. Rohinin Builders, 256 ITR 360 and holding that the amount was received and repaid through banking channel, which is fundamentally incorrect, since assessee miserably failed to discharge initial onus to prove the identity of the creditor so also the genuineness of the transactions as envisaged in the provisions of Section 68 of the Act?

(iii) Whether the Appellate Tribunal erred in not considering the Hon'ble Gujarat High Court decision in the case of Ariel Sarees (P) Ltd vs. Income Tax Officer, [2014] 46 taxmann.com 417 (guj.), wherein the Hon'ble Court has dismissed assessee's appeal by confirming the addition made u/s 68 of the Act in absence of any evidence or material from the side of the assessee, even though the loans have been taken from group company through banking channels?

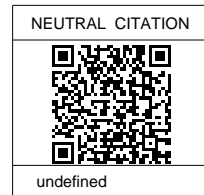
(iv) Whether the Appellate Tribunal erred in not considering the Hon'ble Supreme Court decision in the case of CIT Vs. P.Mohankala, (supra), wherein Hon'ble Apex Court has affirmed that, may be the money came by way of bank cheques and paid through the process of banking transaction but that itself is of no consequence.?

(v) Whether on the facts and under the circumstances of the case and in law, the Appellate Tribunal's decision is perverse on facts and has erred in not appreciating the fact that the loan liabilities are outstanding for so many years and there is no demand from the creditors, therefore, in the absence of confirmation or any evidence to prove that these loan liabilities were utilized for



capital investment, the same is deemed to have been ceased and would be the income of assessee as provided under Section 41(1) of the Act?"

2 Facts of the case indicate that the assessee e-filed his return of income on 29.09.2013 declaring his income. During the assessment proceedings, on verification of the Audit Report and Balance-sheet of the assessee, it was noticed that the assessee had shown particulars of unsecured loan / deposits received during the year and outstanding at the end of year under consideration. During the assessment proceedings on verification of Audit Report and Balance Sheets, the assessee had shown particulars of unsecured loans / deposits received from 5 entities. The Assessing Officer issued letters u/s. 133(6) on the creditors of unsecured loans. According to Section 68, where any sum is found credited in the books of an assessee maintained for any prervious year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not satisfactory in the opinion of the Assessing Officer, the sum so credited may be charged to income tax as the



income of the assessee of that previous year. In a case of liability of unsecured loan it is a matter entirely within the assessee's knowledge as to how same to be introduced. It is obligatory on the part of the assessee to prove the source of sum so credited with giving details such as identity of the creditor, the capacity of such creditor to advance the money and lastly the genuineness of the transaction. The assessee failed to establish the loan transactions by all sort of parameters as laid down in section 68 of the Act even though the assessee was provided with sufficient opportunity. Thus, to discharge the onus of liability lies upon the assessee under the provisions of section 68 of the Act. Accordingly, the amount of Rs.6,10,35,513/- is added in the total income as income of the year u/s 68 of the LT. Act as an unexplained cash credit of the assessee company. Penalty proceedings u/s. 271(1)(c) of the I.T.Act, 1961 are also intitiated separately.

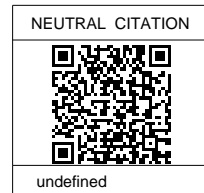
2.1 When the matter was carried in appeal, the CIT(A), after considering the various decisions, held as under:



“In view of the ratio laid down in above decisions, I am of the view that through accommodation entries of unsecured loans, money laundering takes place and since the appellant has failed to establish creditworthiness as well as genuineness of the transaction in respect of unsecured loan entries shown in the names of Ashmi Marketing Pvt. Ltd, Harish Ambikaprasad and Smt.Kaushalyaben Rajesh, the addition made u/s.68 by the AO is justified. It is also worthwhile to mention here that the appellant has not produced any of the creditors before A.O in support of its claim.

4.2.3 Cash credit in the name of Pooja Garments Pvt. Ltd. - Rs.5,84,43,771/- & in the name of Prakash Fortan Softech Ltd - Rs.94,742/-

The appellant has claimed liability of unsecured loan in the names of above mentioned parties since assessment year 2006-07. In the written submission dated 29.02.2016 filed before the A.O, the appellant has furnished only un-signed copy of confirmation without providing complete address of the creditor. Despite several notices and reminders, no other details including bank statement, return of income, PAN etc. have been furnished. Although liabilities are outstanding for more than 7 years, the creditor has not attempted any recovery from the appellant. Undisputedly, no compliance u/s 133(6) was made by the above mentioned creditors. In the written submission filed before me, the Ld. AR has admitted that despite best efforts, the confirmation could not be obtained. The only defense put forth by the Ld. AR is that the transactions were made through banking channels and loan credits are outstanding since A.Y. 2006-07 and hence no addition is called for. The above argument of the Ld.AR is not acceptable because when the loan liabilities are outstanding for so many years and there is no demand from the creditors, in the absence of confirmation, the same deemed to have been ceased.



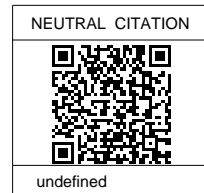
The appellant has not furnished any evidence to prove that these loan liabilities were utilized for capital investment and therefore, I treat the same to have been utilized for normal business transactions. In this regard, the following decisions which are in favour of revenue, are worth mentioning:-”

2.2 The ITAT for some of the lenders held as under:

“(B) II-Harish Ambika Prasad

I. The assessee during the year from the captioned party received loan of Rs. 8 lakh dated 7th April 2012 which was repaid during the year dated 23rd May 2012. The party namely Shri Harish Ambika Prasad also confirmed the transaction in reply to notice issued under Section 133(6) of the Act and also furnished the required documents such as ledger copy, bank statement and copy of ITR. However, the lower authorities treated such credit of loan as unexplained merely for the reason that the bank of account of the party was credited just before transferring the fund to the assessee bank. In our considered opinion, the credit of loan cannot be held unexplained merely for the reason that bank account of the loan party was credited from unknown sources. As the obligation of the assessee under section 68 of the Act was to explain the nature and source of credit in its books only and not the sources of source. In the case on hand, the assessee’s obligation has been duly discharged by furnishing necessary document which was also confirmed by the party independently in response to notice issued under Section 133(6) of the Act.

ii. Be that as it may be, the undisputed fact that the amount of loan received by the assessee was returned back to the loan party during the year itself and all the transactions were carried out through banking channel. Therefore, in the light of judgment of Hon’ble Gujarat High Court in the case



of the CIT Vs. Rohinin Builders reported in 256 ITR 360, the genuineness of such credit of loan cannot doubted. The relevant observation of Hon'ble Court in the aforementioned case reads as under:

“The genuineness of the transaction is proved by the fact that the payment to the assessee as well as repayment of the loan by the assessee to the depositors is made by account payee cheques and the interest is also paid by the assessee to the creditors by account payee cheques.”

10.10 Thus, in view of the above and after considering the facts in totality we hereby set aside the finding of the learned CIT(A) and direct the AO to delete the addition made by him with regard to loan credit of Rs. 8 lakh from the party namely Shri Harish Ambika Prasad.

(C) III-Kaushalya Ben

10.11. The assessee shown receipt of loan amounting to Rs.7 lakh dated 7th April 2012 from Smr. Kaushalya Ben which was repaid by the assessee in the month of May 2012. All the transactions were carried out through banking channel. However, the lower authorities treated the same as unexplained credit for the following reason:

- I. Confirmation letter not signed.*
- II. Copy of ITR, bank statement and other details of Smt. Kaushalya Ben were not furnished to establish genuineness and credit worthiness.*
- III. The notice issued under Section 133(6) of the Act was not responded.*

10.12 In this regard, we note that the amount was received through banking channel and the same was repaid through banking channel within the period of a month or so. There is no finding of the lower authorities that the amount was not received

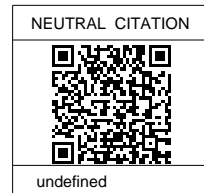


from the impugned party or repayment of the amount gone to any third party. Therefore, in our considered view and applying the ratio laid down by the Hon'ble jurisdictional High Court in case of CIT Vs. Rohini Builders (supra) the action of the authorities below are not justified. Hence, we hereby set aside the finding of the learned CIT(A) and direct the AO to delete the addition made on account of loan credit from the party namely Smt. Kaushalya ben for Rs. 7 lakh.

(D) IV & V- M/s. Pooja Garments P Ltd and M/s. Parkash Fortan Softech Ltd.

10.13 The assessee was having outstanding unsecured loan from past several years for Rs.5,84,43,771/- and Rs.94,742/- from the party namely M/s. Pooja Garments P Ltd and M/s Parkash Fortan Softech Ltd respectively which was treated as unexplained cash credit under Section 68 of the Act. However, the learned CIT(A) while confirming the addition made by the AO held that the assessee has not furnished any detail of the party except unsigned confirmation copy. The amount has been outstanding for last several years and there being no information that party is perusing the recovery of the amount. Accordingly, the learned CIT(A) held the liability of the assessee came to be ceased as provided under section 41(1) of the Act. Therefore, the same was liable to be taxed in the hands of the assessee. The learned CIT(A) in holding so made reference to the several judicial pronouncements.

10.14 In this regard, we note that the amount was not credited during the year under consideration, as such the same was carried forward from earlier years. Therefore, the provision of section 68 of the Act cannot be made applicable on the same in the year under consideration."



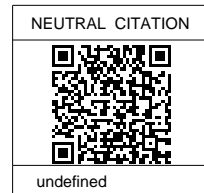
3 What is evident is that the Tribunal found on facts that the amount of loan received by the assessee was returned to the loan party during the year itself and all transactions were carried out through banking channel. The ITAT on the decision of Deputy Commissioner of Income Tax Vs. Rohini Builders reported in **(2002) 256 ITR 360 (Guj)**, held in favour of the assessee.

4 On facts therefore, having perused the orders under challenge, we are of the opinion that no error of law is committed by the Ld.ITAT. In the case of **Rohini Builders (supra)**, the Court held as under:

“ We have considered the rival submissions and have also gone through the order passed by the Assessing Officer, the relevant portion of which we have also extracted in para. 2 above. The Commissioner of Income-tax (Appeals) more or less confirmed the addition on the reasoning given by the Assessing Officer in the assessment order. A perusal of the chart given by us in para. 3 above indicates that out of 21 creditors the Assessing Officer has recorded the statements of only six creditors, viz., creditors at serial Nos. 1, 2, 3, 4, 6, and 7. However, in respect of all the 21 creditors the assessee has furnished their complete addresses along with GIR numbers/permanent account numbers as well as confirmations along with the copies of assessment orders passed in the cases of creditors at serial Nos. 1, 2, 4, 5, 6, 7, 9, 10, 11, 12 and 16. In the remaining



cases where the assessment orders passed were not readily available, the assessee has furnished the copies of returns filed by the creditors with the Department along with their statement of income. All the loans were received by the assessee by account payee cheques and the repayments of loans have also been made by account payee cheques along with the interest in relation to those loans. It is rather strange that although the Assessing Officer has treated the cash credits as non-genuine, he has not made any addition on account of interest claimed/paid by the assessee in relation to those cash credits, which has been claimed as business expenditure and has been allowed by the Assessing Officer. It is also pertinent to note that in respect of some of the creditors the interest was credited to their accounts/paid to them after deduction of tax at source and information to this effect was given in the loan confirmation statements by those creditors filed by the assessee before the Assessing Officer. Thus it is clear that the assessee had discharged the initial onus which lays on it in terms of section 68 by proving the identity of the creditors by giving their complete addresses, GIR numbers/permanent accounts numbers and the copies of assessment orders wherever readily available. It has also proved the capacity of the creditors by showing that the amounts were received by the assessee by account payee cheques drawn from bank accounts of the creditors and the assessee is not expected to prove the genuineness of the cash deposited in the bank accounts of those creditors because under law the assessee can be asked to prove the source of the credits in its books of account but not the source of the source as held by the Bombay High Court in the case of [Orient Trading Co. Ltd. v. CIT](#) [1963] 49 ITR 723. The genuineness of the transaction is proved by the fact that the payment to the assessee as well as repayment of the loan by the assessee to the depositors is made by account payee cheques and



the interest is also paid by the assessee to the creditors by account payee cheques. Merely because summons issued to some of the creditors could not be served or they failed to attend before the Assessing Officer, cannot be a ground to treat the loans taken by the assessee -from those creditors as non-genuine in view of the principles laid down by the Supreme Court in the case of Orissa Corporation [1986] 159 ITR 78. In the said decision the Supreme Court has observed that when the assessee furnishes names and addresses of the alleged creditors and the GIR numbers, the burden shifts to the Department to establish the Revenue's case and in order to sustain the addition the Revenue has to pursue the enquiry and to establish the lack of creditworthiness and mere non-compliance of summons issued by the Assessing Officer under section 131, by the alleged creditors will not be sufficient to draw an adverse inference against the assessee. In the case of six creditors who appeared before the Assessing Officer and whose statements were recorded by the Assessing Officer, they have admitted having advanced loans to the assessee by account payee cheques and in case the Assessing Officer was not satisfied with the cash amount deposited by those creditors in their bank accounts, the proper course would have been to make assessments in the cases of those creditors by treating the cash deposits in their bank accounts as unexplained investments of those creditors under section 69.

Further, we may point out that section 68 under which the addition has been made by the Assessing Officer reads as under :

"68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no



explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year."

The phraseology of section 68 is clear. The Legislature has laid down that in the absence of a satisfactory explanation, the unexplained cash credit may be charged to income-tax as the income of the assessee of that previous year. In this, case the legislative mandate is not in terms of the words "shall be charged to income-tax as the income of the assessee of that previous year". The Supreme Court while interpreting similar phraseology used in section 69 has held that in creating the legal fiction the phraseology employs the word "may" and not "shall". Thus the unsatisfactoriness of the explanation does not and need not automatically result in deeming the amount credited in the books as the income of the assessee as held by the Supreme Court in the case of [CIT v. Smt. P. K. Noorjahan \[1999\] 237 ITR 570.](#)"

5 For the aforesaid reasons, we do not see any merit in the appeal, and therefore, the same is accordingly dismissed with no orders as to costs.

(BIREN VAISHNAV, J)

(BHARGAV D. KARIA, J)

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