

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 786 OF 2016

Pr. Commissioner of Income Tax-27

.. Appellant

v/s.

M/s. Parth Enterprises

.. Respondent

Mr. N.C. Mohanty a/w Ms. Padma Divakar for the appellant
None for the respondent

**CORAM : AKIL KURESHI &
M.S. SANKLECHA, J.J.**

DATED : 11th DECEMBER, 2018.

P.C.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 10th June, 2015 passed by the Income Tax Appellate Tribunal (the Tribunal). This appeal relates to Assessment Year 2009-10.

2. The Revenue has urged the following question of law for our consideration :-

“Whether in the facts and circumstances of the case and in law, the Tribunal is correct in law by deleting the addition made by the AO on account of bogus unsecured loans u/s 68 of the I.T. Act?”

3. The respondent is engaged in the business of builders and developers. It filed its return of the income for the subject assessment year declaring income at Rs.7.72 lakhs. The Assessing Officer completed the assessment by order dated 26th December, 2011 under Section 143(3) of the Act determining the income at Rs.3.40 crores. This enhancement of income was essentially on account of the fact that the respondent had taken unsecured loans from 90 persons. However, confirmations were filed only in respect 77 persons. This resulted in the Assessing Officer concluding that unsecured loans to the extent of Rs.3.35 crores were hit by Section 68 of the Act. Thus, added to the income of the respondent assessee.

4. Being aggrieved by the assessment order dated 26th December, 2011, the respondent filed an appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. In appeal, by an order dated 21st November, 2012, the CIT(A) found that creditworthiness of the parties were not doubted. On facts, it came to the conclusion that out of 90 parties, loan reflected in the names of 13 parties was hit by Section 68 of the Act. Accordingly, an addition of Rs.36 lakhs was confirmed against the addition of Rs.3.35 crores made by the Assessing Officer. In regard to

the balance of Rs.2.99 crores, the CIT(A) found that the loans were genuine and therefore not hit by Section 68 of the Act resulting in its deletion.

5. Being aggrieved by order dated 21st November, 2012, further appeals were filed by the assessee as well as respondent to the Tribunal. The Revenue challenged the deletion of Rs.2.99 crores while the respondent challenged the upholding of addition of Rs.36 laksh as being hit by Section 68 of the Act. The Tribunal after considering the facts recorded its finding as under :-

“5. We had heard the rival submissions and perused the material before us. We find that there were total 90 loan creditors from whom unsecured cash credit amounting to Rs.3,35,00,000/- had been introduced in the books of accounts by the assessee, that out of the 90 loan creditors confirmations were submitted only in the case of 77 parties and for the remaining 13 parties confirmation were not furnished during the assessment proceedings, that during the course of appellate proceedings of the remaining loan confirmation were filed along with other supporting documents that enquiries were conducted in a few cases, to be precise four in number are based on the statement given by those parties enquiries under section 142(2) of the Act, a survey action under section 133A of the IT Act was conducted on 01.12.2011 at the premise of DK by the DDIT (investigation), unit IX(3), Mumbai that his statement was also recorded, that in his statement he admitted that he had provided entries for loans in lieu of cash received from the assessee and also explained that the modus operandi is of giving cheques and receiving cash back which were then returned to those parties whose names are appearing as unsecured creditors in the books of account of the appellant, that DK also stated that all those 18 parties were his clients and the job of providing the entries was done

in the names for the reason that they were having requisite build up capital, that he paid a comission of 0.6% by the assessee, that on the basis of the statement given by DK addition of Rs.89 lacs were made with regard to 18 parties, that the FAA upheld the addition of Rs.36 lakhs and deleted the remaining addition, that the FAA upheld that interest paid to 14 parties only should be disallowed that were held to be non-genuine.

As stated earlier, the AO did not make any inquiry about 76 creditors out of the 77 Creditors. The FAA has given a categorical finding of fact that no inquiry was made and hence the addition made by the AO for those creditors was not justifiable, except one case. It is said that in the matters related to section 68 burden of proof cannot be discharged to the hilt-such matters are decided on the particular facts of the case as well as on the basis of preponderance of probabilities. Credibility of the explanation, not the materiality of evidences, is the basis for deciding the cases falling under section 68. The assessee had produced all the required documentary evidences and discharged its onus as far as those 76 creditors are concerned. The AO did not make any further inquiry. So, in our opinion, order of the FAA does not suffer from any legal infirmity. In case of remaining 14 (JVA and 13 creditors about whom the assessee filed details before the FAA) creditors the FAA had rightly held that it had failed to discharge the initial burden. In matters regarding cash credit, the onus of proof is not a static one – the initial burden of proof lies on the assessee. Amount appearing in the books of a/cs of the assessee is considered a proof against him. But, if it produces evidences about identity, genuineness and credit worthiness of the lender onus of proof shifts again to the Revenue. In the matter before us, the FAA-after considering the remand report and reply of the assessee – found that the assessee had failed to discharge the burden cast upon it by the provisions of section 68 of the Act. All those creditors were filing below taxable return and there was dispute about deduction of taxes as well as form no.15G/H. She has specifically held that it had not proved the genuineness and credit worthiness of the lenders. The assessee did not ask for cross examination of DK. In our opinion, the so-called retraction by him also of no help to the assessee. He is a professional and he very well knew as to what statement he had given. Withdrawing the same after a period of nine months, without assigning any reason for retraction, goes

against him and the assessee. Neither DK nor the assessee has denied their acquaintances with VB. All these surrounding circumstances, in our opinion strengthen, the stand taken by the FAA. So, confirming her order, we decide the effective ground of appeal against the assessee with regard to the creditors who had advance Rs.36 lacs to it. In our opinion, the FAA had rightly restricted the interest disallowance.

6. While deciding the appeal of the assessee we have held that the FAA had rightly deleted the addition of Rs.2.99 crores. The AO had made no effort to verify the details filed by the assessee before him. He could have at least made preliminary inquiry about them. He made inquiry about the persons directly and on the basis of such inquiry made an addition of Rs.3.55 crores. The provisions of Section 68 do not permit such action – on the basis of specific inquiry general additions cannot be made. Hon'ble Rajasthan High Court in the case of R S Rathore (supra) has clearly laid down the said principle. No discrepancy was found by the AO in the documents filed by the assessee. Therefore, upholding the order of the FAA, we decide the first limb of the first ground of appeal against the AO. Second part of the first ground deals with deletion of interest amount of Rs.40.37 lakhs. While deciding the appeal filed by the assessee, we have upheld the decision of the FAA in restricting the interest disallowance. Second ground of appeal is also decided against the AO.”

6. Mr. Mohanty, learned Counsel appearing for the Revenue relies upon the order of the Assessing Officer to contend that this appeal would require admission.

7. We find that there are concurrent finding on facts rendered by the CIT(A) and the Tribunal holding that only Rs.36 lakhs can be added to the declared income and the balance amount of Rs.2.99 crores was

not hit by section 68 of the Act. This finding is premised on the fact that no enquiry was made in respect of 76 creditors out of 77 creditors and the respondent had provided required documentary evidence in respect of the 76 creditors. Thus, these are essentially finding of fact and the view taken by the Tribunal is a possible view on these facts. In view of the above, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

8. Accordingly, appeal is dismissed. No order as to costs.

(M.S. SANKLECHA, J.)

(AKIL KURESHI, J.)