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IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA 80/2022

**PRINCIPAL COMMISSIONER OF INCOME TAX, DELHI –
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.....Appellant

Through: Mr. Shlok Chandra, SSC, Ms.
Naincy Jain & Ms. Madhavi
Shukla, JSCs.

versus

M/S. RADIUS INDUSTRIES

.....Respondent

Through: Mr. Gautam Jain and Mr.
Manish Yadav, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

**HON'BLE MR. JUSTICE HARISH VAIDYANATHAN
SHANKAR**

ORDER

23.01.2025

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1. The Commissioner seeks to impugn the order of the Income Tax Appellate Tribunal [“**Tribunal**”] dated 17 September 2019 and posits the following questions of law for our consideration:

“i) Whether the Hon'ble Tribunal has erred on facts and circumstances of the case and prevailing laws, in deleting the additions of Rs 8,22,70,000/- made by the Ld. AO by ignoring the fact that the evidence collected by the Ld. AO during the course of assessment proceeding clearly shows that the Respondent failed to prove the genuineness of the transactions and creditworthiness of the advance loan taken from the parties?

ii) Whether the Hon'ble Tribunal erred on facts and circumstances of the case and prevailing laws, by not considering the fact that the notices under Section 133(6) of the Act were issued to the parties from whom unsecured loan was taken by the Respondent, however, some of the notices were returned as unserved. Only two parties confirmed the transactions made with the Respondent but refused to accept that the unsecured loan provided by them to the Respondent?

iii) Whether the Hon'ble Tribunal has erred on facts and circumstances of the case and prevailing laws, by deleting the addition made by the Ld. AO amounting Rs. 18,00,000/- on



account of disallowance of remuneration which was in accordance under Section 40(b) (ii) of the Act, in view of the fact that the said addition was made by relying upon the judgment passed by the Hon'ble Delhi High Court in the case "Sood Brij & Associates vs CIT"?

iv) Whether the Hon'ble Tribunal has erred on facts and circumstances of the case and prevailing laws, by deleting the addition made by Ld. AO amounting Rs. 7,69,097/- on account of TDS which was in accordance with provision of Section 40(a)(ia) of the Act and was also confirmed by the Ld. CIT(A)?”

2. We had on a previous occasion and more particularly on 15 March 2024, after hearing learned counsels for respective sides at some length, passed the following order:-

“1. The instant appeal has been filed against the order of the Income Tax Appellate Tribunal [“ITAT”] dated 17 September 2019 on the following questions of law:

“i) Whether the Hon'ble Tribunal has erred on facts and circumstances of the case and prevailing laws, in deleting the additions of Rs 8,22,70,000/- made by the Ld. AO by ignoring the fact that the evidence collected by the Ld. AO during the course of assessment proceeding clearly shows that the Respondent failed to prove the genuineness of the transactions and creditworthiness of the advance loan taken from the parties?

ii) Whether the Hon'ble Tribunal erred on facts and circumstances of the case and prevailing laws, by not considering the fact that the notices under Section 133(6) of the Act were issued to the parties from whom unsecured loan was taken by the Respondent, however, some of the notices were returned as unserved. Only two parties confirmed the transactions made with the Respondent but refused to accept that the unsecured loan provided by them to the Respondent?

iii) Whether the Hon'ble Tribunal has erred on facts and circumstances of the case and prevailing laws, by deleting the addition made by the Ld. AO amounting Rs. 18,00,000/- on account of disallowance of remuneration which was in accordance under Section 40(b) (ii) of the Act, in view of the fact that the said addition was made by relying upon the judgment passed by the Hon'ble Delhi High Court in the case "Sood Brij & Associates vs CIT"?

iv) Whether the Hon'ble Tribunal has erred on facts and circumstances of the case and prevailing laws, by deleting the addition made by Ld. AO amounting Rs. 7,69,097/- on



account of TDS which was in accordance with provision of Section 40(a)(ia) of the Act and was also confirmed by the Ld. CIT(A)?”

2. Having heard Mr. Chandra, learned counsel appearing for the appellant, we take note of the following particulars in respect of alleged lenders which had come to be captured by the Assessing Officer [“AO”]:

S. No.	Name of the lender	Returned Income	Confirmation provided	Amount of loan financed	Response to notice u/s 133(6)
1	Jiya Bindra	No return filed	Yes	2,89,20,000	No reply
2	Amrik Singh Chawla	80,82,860	Yes	1,45,00,000	No reply
3	M.S. Bindra (HUF)	31,83,160	Yes	1,55,00,000	No reply
4	Preetinder Kaur Bindra	39,30,430	Yes	1,41,00,000	No reply
5	G.S.T. Corporation Ltd.	-2,90,33,609	Yes	30,00,000	No loan provided
6	Multi Bond Trading Corporation	No return filed	Yes	27,50,000	Unserved
7	JBL Intervention Associates	No return filed	Yes	30,00,000	No reply
8	Prem Dua	No return filed	Yes	5,00,000	Unserved
	Total			8,22,70,000	

3. Mr. Chandra sought to lay emphasis on the fact that of the aforementioned applicants, at least four were non-filers and consequently there was no means to verify the assertion made by the assessee.

4. However, the Income Tax Appellate Tribunal [“ITAT”] while dealing with the aforesaid has observed as follows:

“5. We have heard both the parties and perused the records, especially the impugned order; Synopsis; Paper Book filed by the Assessee’s counsel and case law relied by both the parties. As regards sustaining of addition of Rs.62,50,000/- on account of sums received as unsecured loan is concerned, we find that the AO has made sum of Rs.8,22,70,000/- on account of sum received from 08 parties as mentioned in the assessment order at page no. 3 and in appeal Id. CIT(A) has partially deleted the addition and sustained the addition of Rs.



62,50,000/- . We note that the unsecured loan received by the assessee has been fully substantiated not by substantial documentary evidence including copy of audited financial statement, acknowledgement of return of income, confirmation from lender, bank statement of lender, therefore such sum could not in law or fact be held to be unexplained cash credit u/s. 68 of the Act. It is noted that no material has been led by the AO to even allege that such amount representing unsecured loan are emanating from the coffers of the assessee company. It is further noted that the lenders are corporate entities duly assessed to tax and, have made unsecured loans through banking channels, which fact has neither been denied and, nor rebutted in the assessment order, which is also duly confirmed by each of the lender. In view of above, we are of the considered view that assessee has furnished complete details and evidences to discharge the burden in respect of unsecured loan reflecting in the financial statement of the assessee company. This view is supported by the Hon'ble Supreme Court of India decision in the case of Earthmetal Electrical (P) Ltd. in Civil Appeal No. 618 of 2010 dated 30.07.2010 wherein the assessee's SLP was allowed by holding that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the department is free to proceed to reopen their individual assessment in accordance with law, but it cannot be regarded as undisclosed income of the assessee company. Further in the decision of the Hon'ble Supreme Court of India in the case of Orissa Cement Corporation vs. CIT reported in 159 ITR 78 it has been held that it is for the department to pursue a creditor particularly once the assessee had duly furnished the complete particulars of the person from whom monies have been received by the assessee. In absence of such a burden having been discharged, the AO could not have mechanically proceeded to make impugned addition in the instant case. It is a settled law that non-compliance of notice issued u/s. 133(6) of the Act of all the entities giving unsecured loan cannot be a basis to make the addition u/s. 68 of the Act. The nature of income and source of income can be examined only by the AO of the lenders and not by the AO of the assessee. In this case there is lack of inquiry by the AO to rebut the burden discharged by the assessee as no enquiries were made either from corporation entity providing unsecured loan or enquiry from AO of such corporate entity or its banker or Registrar of Companies by issuing notice u/s. 131 of the Act. We further note that the judicial decisions relied upon by the Ld. DR have been duly considered. In our considered view, we do not find any parity in the facts of the decisions relied upon with the peculiar facts of the case in



hand. In view of above, we delete the addition of Rs.62,50,000/- on account of sums received as unsecured loan and erroneously held as unexplained cash credit under Section 68 of the Act, which was confirmed by the Ld. CIT(A) and accordingly, we allow the ground no. 1 to 1.1 raised by the assessee.

5.1 Apropos ground no.2 to 2.2 relating to confirmation of addition of Rs. 18,00,000/- on account of alleged excess remuneration paid to the partners and disallowed by invoking clause (v) of section 40(b) of the Act is concerned, we find that this amount was disallowed by holding that, the partnership deed does not specify the amount of the remuneration payable to the partners and as such, the same is not allowable in view of the section 40(b)(v) of the Act. The AO was of the view that the expenditure incurred cannot be allowed as deduction unless the partnership deed either specifies the amount of remuneration payable to each individual working partner or lays down the manner of quantifying such remuneration and similarly, Ld. CIT(A) in appeal has sustained this disallowance. We note that in the instant case, remuneration to the working partners are duly authorized by the partnership deed dated 1.4.2013 (page 1-12 of the Paper Book) and such payment has been made as per clause 7 and 8 of the deed of partnership, 'working partners' and the amount of remuneration payable and the manner of quantifying such remuneration is to be decided mutually between them from time to time. We further note that this disallowance is contrary to the principle of consistency as no disallowance made in the preceding years i.e. from assessment year 2010-11 to 2014-15 and only from the instant assessment year i.e. AY 2015-16 the addition was made which action is not tenable. This view is fortified by the decision of the Hon'ble Supreme Court of India in the case of CIT vs Excel Industries Ltd. 358 ITR 295 (SC). Respectfully, following the aforesaid precedent, the addition confirmed by the Ld. CIT(A) is hereby deleted and accordingly, the ground no. 2 to 2.2 raised by the assessee are allowed.

5.2 Apropos ground no.3 to 3.2 relating to confirmation of addition of Rs. 7,69,097/- by invoking Section 40(a)(ia) of the Act is concerned, we note that since assessee is not liable to deduct TDS on interest payment on borrowed loan and the second proviso to Section 40(a)(ia) of the Act read with Section 194A of the Act were inapplicable and as such, disallowance so made is not in accordance with law. In any case since the payee had paid the taxes on the interest paid by the assessee, no disallowance was warranted in view of second proviso to section 40(a)(ia) of the Act. Accordingly, the addition confirmed by the Ld. CIT(A) is hereby deleted.



and accordingly, the ground no.3 to 3.2 raised by the assessee are allowed. Accordingly, the appeal filed by the Assessee is allowed.”

5. We however could not proceed further today since Mr. Gautam Jain, learned counsel for the respondent, was unavailable.

6. Consequently, let the appeal be called again on 22.05.2024.”

3. As we take up the appeal for review today, we find that the Tribunal had categorically found that the twin test of credit worthiness and genuineness of the investing entities had been duly established and the onus discharged by the respondent-assessee. This becomes apparent from a reading of the conclusions which appear in Para 5 and 5.1 of the order of the Tribunal and which have been extracted hereinabove.

4. The appellants have woefully failed to establish that those findings and conclusions suffer from any perversity or that the Tribunal could not have justifiably come to record a finding in favour of the respondent-assessee based on the material which existed on the record. We also bear in mind the indubitable fact of the Tribunal being the final arbiter of facts.

5. In our considered opinion, the appeal fails to raise any substantial question of law. It shall consequently stand dismissed.

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.
JANUARY 23, 2025/nd