

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE**

RESERVED ON: 04.07.2022
DELIVERED ON: 14.07.2022

CORAM:

**THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE BIVAS PATTANAYAK**

**ITAT/18/2022
(IA NO: GA/02/2022)**

**PRINCIPAL COMMISSIONER OF INCOME TAX – 9, KOLKATA
VERSUS**

M/S. SREELEATHERS

Appearance:-

**Mr. Vipul Kundalia, Adv.
Mr. Anurag Roy, Adv.**

.....For the Appellant/Petitioner.

**Mr. Abhratosh Mazumder, Adv.
Mr. Avra Mazumder, Adv.
Sk. Md. Bilawal Hossain, Adv.**

.....For the Respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act for brevity) is directed against the order dated 5th February, 2021 passed by the Income Tax Appellate Tribunal, A Bench, Kolkata (Tribunal) in ITA No. 254/Kol/2020 for the Assessment Year 2015-

16. The revenue has raised the following questions of law for consideration:

(ii) *Whether on the facts and circumstances of the case and on question of law the Learned Income Tax Appellate Tribunal "A" Bench, Kolkata has held that the order passed by the Commissioner of Income Tax (Appeal) acceptable/maintainable?*

(iii) *Whether on the facts and circumstances of the case the Learned Income Tax Appellate Tribunal "A" Bench, Kolkata has answered in favour of the assessee regarding addition under Section 68 of the Income Tax Act, 1961 unsecured loan and interest there off?*

(iv) *Whether on the facts and circumstances of the case and on question of law the Learned Income Tax Appellate Tribunal "A" Bench, Kolkata has dismissed appeal of the revenue on addition under Section 68 of the Income Tax Act, 1961 unsecured loan and interest there of whereas per various case laws the onus is on the assessee to establish the existence, genuineness and creditworthiness of the new loan introduced, which he has failed to satisfy the Assessing Officer?*

2. The assessee filed the return of income for the assessment under consideration, AY 2015-16 on 28.09.2015 declaring a total income of

Rs. 7,35,35,310/-. The case was selected for scrutiny and notice under Section 143 (2) was issued and thereafter notice under Section 142(2) was issued and the case was discussed with the authorized representative of the assessee. The assessee is a firm involved in the business of trading/ retailing of footwear and other leather and non-leather accessories. The Assessing Officer on examination of the assessment records noticed that during the year under consideration the assessee had received unsecured loans from various companies and the names of 13 such companies were furnished and it was alleged that those companies were the “paper companies” having no worth. The assessee was directed to show cause on the said issue in respect of one such company. By letter dated 22.12.2017, the assessee informed the Assessing Officer that all transactions with one of such company namely, M/s. Fast Glow Distributors Pvt. Ltd. were made through banking channels. To establish the identity of the lender the assessee enclosed the copy of their PAN card, the income tax acknowledgement, copy of bank statement, certificate of incorporation, master data from the register of companies and proof to show that the notice under Section 133(6) of the Act was duly served on the lender. As regards the creditworthiness, they enclosed the annual account of the lender and the audited balance-sheet as on 31.03.2015 to show the net worth of the lender as Rs. 25.37 crores. Further the assessee pointed out that reply has been received from the lender to the notice issued by the Assessing Officer under Section 133(6) of the Act which is also valid proof of identity and genuinity of the lender company. The assessee

further stated that they availed loans during peak season of their business activity and after the season is over, the loan is repaid along with interest after deducting taxes on source. Thus, the assessee contended that the identity of the lender has been established, genuineness of the transaction has been proved and the creditworthiness of the lender is not in doubt and therefore, no adverse inference should be drawn. The Assessing Officer while completing the assessment by order dated 26.12.2017 under Section 143(3) of the Act did not accept the explanation offered by the assessee. The Assessing Officer stated that the modus operandi adopted by the assessee is typical and prevalent in this part of the country where black-money is being routed under the guise of unsecured loan. He branded the transactions to be accommodation entries and held them to be not real. On the documents produced by the assessee, the Assessing Officer commented that mere filing of the PAN details, balance-sheet does not absolve the assessee from their responsibilities of proving the transaction and that the transactions are in the nature of tax evasion by money laundering. With regard to the lender companies which in the opinion of the Assessing Officer were “paper companies”, the Assessing Officer stated that it has to be seen whether the identity and the creditworthiness of the companies are real whether the transactions were genuine and whether the transactions had been carried out at arm’s length. The Assessing Officer proceeded to examine the documents produced by the assessee held that on perusal of the balance-sheet of the company it revealed that they hardly have any

fixed assets and they are engaged in rotating money and further alleged that the operators of such bogus companies ensure that money is laundered through one Ashish Kumar Agarwal who was stated to be an entry operator from whom statement was rendered. After referring to the said statement, the Assessing Officer concludes that the assessee has received an unexplained loan by routing unaccounted money. The Assessing Officer placed reliance on the decision in the case of **CIT Versus Nipun Builders and Developers** ¹, wherein it has been held that the Assessing Officer has to adopt a reasonable approach when the initial onus on the assessee stands discharged. Ultimately, the Assessing Officer concludes that those lender companies are artificial and the transactions are not genuine. Thus, the unsecured loans availed by the assessee, were considered to be the assessee's own funds and they being unsecured cash credit was added back to the assessee's income. Penalty proceedings were to be initiated separately. Aggrieved by such order, the assessee preferred appeal before the Commissioner of Income Tax (Appeals), 09, Kolkata [CIT (A)]. Before the Appellate Authority, the Assessee contended that the Assessing Officer failed to take note of the genuineness of the transactions and failed to consider the documents which were placed before him to establish the identity and the creditworthiness of the lenders and the genuineness of the transactions. Further, with regard to the statement of Mr. Ashish Kumar Agarwal, the assessee stated that the statement was not recorded in their presence and an opportunity of cross-examination

¹ (2013) 350 ITR 407 (Del)

ought to have been provided to the assessee. Further, it was contended that no addition could be made merely on the statement given by a third party without any additional evidence. Further, the Assessing Officer erred in treating all the 13 lenders as bogus when the findings which led to the issue of the show-cause notice dated 20.12.2018 is in the name of only one lender, M/s. Fast Glow Distributors Pvt. Ltd., alleged to be a paper company and the amount involved is Rs. 62,79,268/- and, therefore, the addition made either as unexplained cash credit or unexplained expenditure is not tenable. Further, it was submitted that the unsecured loans added had been squared off during the year itself and was non-existent in the year-end which does not call for any addition. The unsecured loan during the year is on the basis of pure assumption and surmises and the interest was paid at arm's length subjected to TDS and had all the characteristics of a working capital loan. Further, the Assessing Officer ignored the reply given to the notice issued under Section 133(6) of the Act. Further, the Assessing Officer failed to appreciate that there is no reason for entity with profit of more than Rs. 20 crores to take a fictitious loan of Rs. 4.5 crores and pay interest of Rs. 74 lakhs thereon. Further the TDS which has been deducted by the assessee has not been disputed by the department which will go to indicate their statutory compliance. Further, reliance was placed on the decision in **Nipun Builders and Developers** by the Assessing Officer was unsustainable as it is an admitted fact that the notices under Section 133(6) were duly served on the companies and they have also sent their reply as called for in the

said notices. By placing reliance on the decision of the Hon'ble Supreme Court in **CIT Versus Khader Khan & Sons** ², it was contended that a statement recorded under Section 133A of the Act is not admissible in law. For the proposition that there has been violation of principles of natural justice, an opportunity of cross-examination was not given. Reliance was placed on the decision of the Hon'ble Supreme Court in **Andaman Timbers Finance Versus CCE** ³. Further, the assessee stated that nowhere the assessee has been referred to in the statement given by Shri Ashish Kumar Agarwal and, therefore, making an addition based on such statement is illegal. Further it was contended that no show-cause notice was issued before making the addition of the amounts received by the assessee as unsecured loan as the show-cause notice dated 20.12.2017 had called for explanation only in respect of the loan received from M/s. Fast Glow Distributors which was explained by submitting documents. Therefore, the Assessing Officer has travelled beyond the show-cause notice issued to the assessee. The CIT (A) perused the evidence in the nature of document and details produced by the assessee before the Assessing Officer and on examination of those documents held that the loan transactions have been squared off in the same year and therefore, it cannot be assumed and presumed that the loans are in the form of accommodation entry. Further, the CIT (A) notes that interest had been paid at 12% in most cases and tax has been deducted at source.

² (2013) 352 ITR 480 (SC)

³ CA No. 4228 of 2006 (SC)

Further, the replies received by the Assessing Officer to the notice issued under Section 133(6) of the Act was also held to be very relevant and from the reply it was established that the net worth of the each of the companies were in crores of rupees and they have declared their income to the tune of Rs. 45 lakhs, Rs. 75 lakhs etc. which is uncommon in companies providing such accommodation entries. Thus, the CIT (A) held that the three factors in the Section 68 of the Act namely, creditworthiness, identity and genuineness of the transactions have been established. The statement recorded from Shri Ashish Kumar Agarwal was held to be not admissible by referring to the decision in **Khader Khan & Sons (Supra)** and **Andaman Timbers Finance**. After referring to the various decisions of the High Court, the CIT (A) held that the creditworthiness of the parties had been established. The CIT (A) agreed with the assessee that the show-cause notice issued by the assessee referred to only one of the lenders. However, while completing the assessment, all the lender companies were branded as “paper companies” and this was held to be in violation of the principles of natural justice. Ultimately, the appeal filed by the assessee was allowed by the order dated 14.11.2019. Aggrieved by the same, the revenue filed appeal before the Tribunal. The Tribunal re-examined the factual position and dismissed the appeal filed by the revenue. Aggrieved by such order, the revenue is before us by way of this appeal.

3. We have heard Mr. Vipul Kundalia, learned Senior Standing Counsel along with Mr. Anurag Roy, learned Advocate for the appellant

and Mr. Avratosh Mazumder, learned Senior Advocate assisted by Mr. Avra Mazumder and Mr. Md. Bilwal Hossain, learned Advocates for the respondents.

4. Before we examine the correctness of the order passed by the Tribunal and consider whether a substantial question of law arises for consideration in this appeal we need to take note of Section 68 of the Act. This provision deals with cash credits. It states that 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 crucial words in the said provision are “assessee offers no explanation”. This would mean where the assessee offers no proper, reasonable and acceptable explanation as regard the amount credited in the books maintained by the assessee. No doubt the Income Tax Act places the burden of proof on the tax payer. However, this is only the initial burden. In cases where the assessee offers an explanation to the credit by placing evidence regarding the identity of the investor or lender along with their conformations, it has been held that the assessee has discharged the initial burden and, therefore, the burden shifts on the Assessing Officer to examine the source of the credit so as to be justified in referring to Section 68 of the Act. After the Assessing Officer puts the assessee on notice and the assessee submits the

explanation with regard to the cash credit, the Assessing Officer should consider the same objectively before he takes a decision to accept or reject it. In ***Srilekha Banerjee & Ors. Versus CIT*** ⁴, it was held that if the explanation given by the assessee shows that the receipt is not of income nature, the department cannot convert good proof into no proof or otherwise unreasonably reject it. On the other hand, if the explanation is unconvincing, the same can be rejected and an inference shows that the amount represents undisclosed income either from a disclosed or an undisclosed source [***CIT Versus Mohanakala (P)*** ⁵]. The explanation given by the assessee cannot be rejected arbitrarily or capriciously, without sufficient ground on suspicion or on imaginary or irrelevant grounds (***Lal Mohan Krishna Lal Paul Versus CIT*** ⁶ and ***Anil Kumar Singh Versus CIT*** ⁷).

5. Further to be noted that where the assessee furnishes full details regarding the creditors, it is up to the department to pursue the matter further to locate those creditors and examine their creditworthiness. It has been further held in ***Sivan Pillai (AS) Versus CIT*** ⁸ that while drawing the inference, it cannot be assumed in the absence of any material that there has been some illegalities in the assessee's transaction. Thus, more importantly, as held by the Hon'ble Supreme Court in ***CIT Versus Daulat Ram Rawatmull*** ⁹, the onus of proving

⁴ (1963) 49 ITR 112

⁵ (2007) 291 ITR 278 (SC)

⁶ (1944) 12 ITR 441 (Cal)

⁷ (1972) 84 ITR 307 (Cal)

⁸ (1958) 34 ITR 328 (Mad)

⁹ (1973) 87 ITR 349 (SC)

that the appellant was not the real was on the party who claims it to be so. Bearing the above legal principles in mind, if we examine the case on hand, it is clear that the assessing officer issued show cause notice only in respect of one of the lender *M/s. Fast Glow Distributors*. The assessee responded to the show cause notice and submitted the reply dated 22.12.2017. The documents annexed to the reply were classified under 3 categories namely: to establish the identity of the lender, to prove the genuineness of the transactions and to establish the creditworthiness of the lender. The assessing officer has brushed aside these documents and in a very casual manner has stated that mere filing PAN details, balance sheet does not absolve the assessee from his responsibility of proving the nature of transaction. There is no discussion by the assessing officer on the correctness of the stand taken by the assessee. Thus, going by the records placed by the assessee, it could be safely held that the assessee has discharged his initial burden and the burden shifts on the assessing officer to enquire further into the matter which he failed to do. In more than one place the assessing officer used the expression “money laundering.” We find such usage to be uncalled for as the allegations of money laundering is a very serious allegations and the effect of a case of money laundering under the relevant Act is markedly different. Therefore, the assessing officer should have desisted from using such expression when it was never the case that there was any allegations of money laundering. Paragraph 5.4 and 5.5 of the assessment order are all personal perception and opinion of the assessing officer which needs to be

ignored. Much reliance was placed on the statement of Shri Ashish Kumar Agarwal, which statement has been extracted in full in the assessment order and it cannot be disputed that there is no allegation against the assessee company in the said statement. There is no evidence brought on record by the assessing officer to connect the said entry operator with the loan transaction done by the assessee. Therefore, the statement is of little avail and could not have been the basis for making allegations. The assessing officer ignored the settled legal principle and in spite of the assessee having offered the explanation with regard to the loan transaction, no finding has been recorded as regards the satisfaction on the explanation offered by the assessee. Therefore, the assessing officer ignored the basic tenets of law before invoking his power under Section 68 of the Act. Fortunately, for the assessee, CIT(A) has done an elaborate factual exercise, took into consideration, the creditworthiness of the 13 companies the details of which were furnished by the assessee. More importantly, the CIT noted that all these companies responded to the notices issued under Section 133 (6) of the Act which fact has not been denied by the assessing officer. On going through the records and the net worth of the lender companies, the CIT has recorded the factual findings that the net worth of those companies is in crores of rupees and they have declared income to the tune of Rs. 45,00,000/- and 75,00,000/-. Therefore, the assessing officer if in his opinion found the explanation offered by the assessee to be not satisfactory, he should have recorded so with reasons. We find that there is no discussion on the explanation offered

by the assessee qua, one of the lenders. Admittedly, the assessee was not issued any show cause notice in respect of other lenders. However, they are able to produce the details before the CIT(A) who had in our view rightly appreciated the facts and circumstances of the case. As pointed out earlier, the assessing officer brushed aside the explanation offered by the assessee by stating that merely filing PAN details, balance sheet does not absolve the assessee from his responsibilities of proving the nature of transactions. It is not enough for the assessing officer to say so but he should record reasons in writing as to why the documents which were filed by the assessee along with the reply dated 22.12.2017 does not go to establish the identity of the lender or prove the genuineness of the transaction or establish the creditworthiness of the lender. In the absence of any such finding, we have to hold that the order passed by the assessing officer was utterly perverse and rightly interfered by the CIT(A). The Tribunal re-appreciated the factual position and agreed with the CIT(A). The tribunal apart from taking into consideration, the legal effect of the statement of Ashish Kumar Agarwal also took note of the fact that the notices which were issued by the assessing officer under Section 133 (6) of the Act to the lenders where duly acknowledged and all the lenders confirmed the loan transactions by filing the documents which were placed before the tribunal in the form of a paper book. These materials were available on the file of the assessing officer and there is no discussion on this aspect. Thus, we find that the tribunal rightly dismissed the appeal filed by the revenue.

6. For all the above reasons, we find that no question of law much less, substantial question of law arises for consideration in this appeal.
7. Accordingly, the appeal fails and is dismissed. No costs.

(T.S. SIVAGNANAM, J.)

I agree.

(BIVAS PATTANAYAK, J.)



(P.A.-PRAMITA/ SACHIN)