

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 390 of 2022

=====

THE PRINCIPAL COMMISSIONER OF INCOME TAX(CENTRAL), SURAT
Versus
NEOTECH EDUCATION FOUNDATION

=====

Appearance:
MR.DEV D PATEL WITH MR VARUN K.PATEL(3802) for the Appellant(s)
No. 1
for the Opponent(s) No. 1

=====

CORAM:HONOURABLE MS. JUSTICE SONIA GOKANI
and
HONOURABLE MR. JUSTICE SANDEEP N. BHATT

Date : 02/01/2023

ORAL ORDER
(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)

1. This appeal under Section 260-A of the Income Tax Act, 1961 ('IT Act' hereinafter) is preferred questioning the order dated 13.1.2022 made by the Income Tax Appellate Tribunal ('ITAT' hereinafter), Ahmedabad in ITA/Ahd No.194 of 2019 for the assessment year 2014-15 raising the following substantial questions.

"2 (A) Whether on the facts and circumstances of the case and in law, the Appellate Tribunal is justified in upholding the decision of the Ld.CIT(A) in deleting the addition of

Rs.1,35,00,000/- made by the Assessing Officer on account unexplained investment under Section 69B of the Act, without considering that the addition was made on the basis of incriminating documents found and seized during the course of search proceedings in the case of the Director of the assessee company and also ignoring the detailed findings given by the Assessing Officer in the assessment order?

(B) Whether on the facts and circumstances of the case and in law, the Appellate Tribunal is justified in upholding the decision of the Ld.CIT(A) in deleting the addition of Rs.1,62,44,073/- made by the Assessing Officer on account unexplained unsecured loans for the reason that the assessee as well as the lenders failed to prove their creditworthiness?

(C) In addition and in alternative to ground [B], whether on the facts and circumstances of the case and in law, the Appellate Tribunal is justified in deleting the addition made by the Assessing Officer on account of unexplained loans, without considering that the assessee has failed to prove the creditworthiness of the lenders and these were only managed entries?"

2. The brief facts leading to the present appeal are as follows :

2.1 The assessee company is a company incorporated on 24.11.2011 and is running as an educational institution. A survey operation under Section 133A was carried out on the premises of M/s.Neotech Education Foundation on 13.11.2014 and incriminating materials had been found reflecting unaccounted payments made in cash for the land as well as unaccounted expenses incurred.

2.2 The statements recorded of Shri Manish Shah, Director of Neotech Education Foundation on 14.11.2014 revealed that Neotech Technical Campus was built on 12.1.2012 through three different sale deeds of Rs.1.06 crore, Rs.2.05 crore, Rs.1.20 crore totalling to Rs.4.31 crores from Shri Shashikant Patel and Shri Prashant Patel.

2.3 During the course of assessment proceedings, it was noticed by Assessing Officer that a larger portion of land was proposed to be acquired for construction of educational campus. Shri Shashikant Patel was in possession of a large parcel of land in Virod. A public notice was issued for title clearance.

2.4 The Assessing Officer compared the entries with the payment details as per the books of accounts and found the payment schedules to have been followed on the page which had been found. In absence of any signature against the payment of Rs. 40 lacs, 21 lacs and Rs.24 lacs respectively paid on 18.7.2014, the Assessing Officer concluded that since the cheque payments were made before the date, even the cash payments must have been made as per the schedule. The Assessing Officer taxed a sum of Rs.5.68 crores as unexplained investment under Section 69B and had made an addition of Rs.1.35 crores.

2.5 The CIT (Appeals), when this was challenged, had closely examined and also had admitted the additional evidence furnished by the assessee. After calling for the remand reports from the Assessing Officer had held that there was no evidence found during the survey in the case of appellant and, during the course of search, in the case of Directors of the company.

2.6 The CIT (Appeals) held that Rs.1.35 crores for the assessment year 2014-15 cannot be sustained as the

amount was not transacted and accordingly deletion was directed.

2.7 The Appellate Tribunal, ITAT was approached by the revenue which has been dismissed endorsing the reasonings and conclusion given by the CIT (Appeals).

3. Learned Senior Standing Counsel Mr.Varun Patel appearing for the department has emphatically pointed out before this Court that for the year 2012-13 and 2013-14, the very piece of document has been admitted and taken into consideration by the authority and accordingly the additions have been deleted on the ground that the Director had admitted this amount and the only difference in the present year is of absence of signatures of either the seller or anybody else. We deem it appropriate to hear the other side by issuing the notice on finding prima facie substance in the version given by learned senior standing counsel.

4. So far as the second question is concerned, we notice that during the course of assessment proceedings, the assessing officer noticed that the assessee has

received loans from the Directors as well as others aggregating to Rs.1,62,44,073/-. The list of unsecured loans is forming part of the record in the assesment order. The assesseees were required to prove the identity, creditworthiness and the genuineness of the loan.

5. According to the Assessing Officer, the assessee failed to establish this and accordingly invoking the provision under Section 68, an addition of Rs.1.62 crores (rounded off) has been made determining the total income of the appellant accordingly. The company has not accepted the money from these individuals and entities as mentioned by the Assessing Officer. According to the assessee, the details were incorrect and the additions were made on the premise that the company had failed to furnish any document to establish the identity, creditworthiness and genuineness of the depositors/lenders. A reliance also was placed on the Apex Court's decision in the case of *CIT V/s Mohankala*, 291 ITR 278(SC).

6. The remand reports were called for from the assessing officer by the CIT (Appeals) and they were

sent on 9.3.2018 and 11.7.2018. It has been accepted by the Assessing Officer by stating that identity of 13 depositors was not a question but had doubted the nature of transactions and creditworthiness.

7. According to the assessee, the monies were received and subsequently repaid through the account payee cheques/bank transfers and same had been recorded in the books of accounts. The lenders also confirmed the transactions and thus, the company discharged the onus regarding the said deposits. CIT Appeals deleted the addition by holding thus:

“26.3. I have examined the submission of the appellant vide dated 01/08/2018 and gone through the supporting evidences furnished earlier and I am of the considered view that the appellant has discharged its onus of proving identities, the sources of the loans and the genuineness of the transactions in accordance with the provisions of section 68, and thereafter the onus has shifted to the AO to prove the transactions to be otherwise. The same has not been done by the AO. Relying upon the decision of the Hon’ble High Court of Gujarat in CIT vs Chanakya Developers (supra) and in absence of any contrary evidence brought on record, I hold that the addition of Rs.1,62,44,073/- cannot be upheld.

The AO is directed to delete the addition and the appeal on this ground succeeds.”

8. When challenged before the Tribunal, it has also for the assessment year under question 2014-15, concurred with the findings of the CIT (Appeals).

“90. We have heard the rival contentions of both the parties and perused the materials available on record. The provision of section 68 of the Act fastens the liability on the assessee to provide the identity of the lenders, establish the genuineness of the transactions and creditworthiness of the parties. These liabilities on the assessee were imposed to justify the cash credit entries under section 68 of the Act by the Hon’ble Calcutta High Court in the case of CIT Vs.Precision finance (p) Ltd reported in 208 ITR 465 wherein it was held as under:

“It was for the assessee to prove the identity of the creditors, their creditworthiness and the genuineness of the transactions. On the facts of this case, the Tribunal did not take into account all these ingredients which had to be satisfied by the assessee. Mere furnishing of the particulars was not enough. The enquiry of the ITO revealed that either the assessee was not traceable or there was no such file and, accordingly, the first ingredient as to the identity of the creditors had not been established. If the identity of

the creditors had not been established, consequently, the question of establishment of the genuineness of the transactions or the creditworthiness of the creditors did not and could not arise. The Tribunal did not apply its mind to the facts of this particular case and proceeded on the footing that since the transactions were through the bank account, it was to be presumed that the transactions were genuine. It was not for the ITO to find out by making investigation from the bank accounts unless the assessee proved the identity of the creditors and their creditworthiness. Mere payment by account payee cheque was not sacrosanct not could it make a non-genuine transaction genuine.”

91. The assessee has discharged its onus by furnishing the necessary details such as a copy of PAN, bank details and ITR etc. in support of identity of the parties, genuineness of transaction and creditworthiness of the parties. Admittedly the AO has accepted the identity and genuineness of transaction but doubted the creditworthiness of the parties. However the learned CIT(A) held that the assessee has discharged the primary onus cast under section 68 of the Act and onus shifted on the AO to prove otherwise based on contrary materials on record.

92. Now coming to the third condition, i.e. creditworthiness of the parties, regarding this we note that the assessee has

refunded the amount through banking channel to all the parties. The repayment of the loan amount by the assessee was duly accepted by the Revenue. In this regard, we find support and guidance from the judgment of Hon'ble Gujarat High Court in the case of the CIT Vs.Rohini builders reported in 256 ITR 360 wherein it was held 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.”

93. Thus there remains no doubt that the transaction of the advance received by the assessee from the parties was genuine. In our considered view, once the assessee is able to prove that the money received by it was returned in the subsequent assessment year in the account of the parties, then there remains no doubt that the advances received by the assessee were unexplained cash credit.”

8. Much had been emphasized by the learned senior Standing Counsel with regard to the creditworthiness. According to him, return of the lower income through the bank channel also raised a serious doubt and the assessing officer had rightly made the

additions by cogent reasons. He also pointed out that there are two remand reports called for by the CIT (Appeals). We are not in agreement with the submissions on the ground that both the CIT (Appeals) and the Tribunal have concurrently held against the revenue by giving cogent reasons. Even otherwise, it is a settled law that once the identity, genuineness of transactions and the creditworthiness have been established, no additions can be made.

9. In the instant case, initially the Assessing Officer had doubted all the three, however, subsequently in the remand reports, he had not questioned the identity as well as the genuineness of the transactions. He had later questioned only the creditworthiness of all the lenders. The CIT (Appeals) and Tribunal, when have found that the transactions were made through the banking channels, the first also and that had been admitted by the person concerned, the report of the money, substantially in most of the cases and a small portion of the total amount in some, would not, in any manner question the creditworthiness of the transaction. We are reminded of the decision rendered by this Court

in the case of *Commissioner of Income Tax V/s Chanakya Developers*, where this Court was considering the cash credit received by the assessee from four different persons on account of booking the flat. For establishing the genuineness of transaction, the address and pan card had been supplied by the assessee. The Assessing Officer has rejected the assessee's explanation and had added the amount to the taxable income. The Court has held that when primary onus which is cast upon the assessee discharged, it is the assessing officer who will need to make an inquiry under Section 133(6). In absence of such inquiry, the Tribunal had deleted the addition. The Court held that there was substantial question that arose for it to admit.

10. Relying on the decision of *Principal Commissioner of Income-Tax V/s NRA Iron and Steel Pvt.Ltd.*, [2019] 412 ITR 161(SC), there the basic principle continues to remain the same that it is the assessee's legal obligation to prove the genuineness of transactions, the identity of the creditors and the creditworthiness of the investors who would have the financial capacity to make the investment in question.

Once the primary onus is discharged, it is for the assessing officer to inquire into this aspect. In the matter before the Apex Court, the transactions were worth Rs.17.60 crores received through the share capital or premium from the companies situated at Mumbai, Kolkata, Gauhati. Where the Assessing Officer, after the initial onus was discharged by the assessee, had conducted a detailed inquiry which had revealed that there was no material on record to prove or even remotely to suggest the share application money was received from any independent legal entities. The entire transactions seemed bogus and lacked credibility. The field inquiry conducted by the Assessing Officer revealed that in several cases investor companies were found to be non-existent and the onus to establish the identity of the investor companies was not discharged by the assessee.

11. Here that does not appear to be the case. Initially, in inquiry under Section 133(6) of the IT Act, in the remand reports which have been tendered by the Assessing Officer pursuant to the directions issued by the CIT Appeals, he does not dispute the identity as well as

the genuineness of the transactions. The only question was with regard to the creditworthiness. We are in agreement with both the authorities which have concurrently held that the initial burden, even if not discharged at the level of the assessing officer, but by production of documents before the CIT (Appeals) where two remand reports have been called for, every transaction having been made through banking channel, there was no reason to also question the creditworthiness. No question of law even otherwise arises for this Court to consider and hence the question (B) is not entertained. Question (C) being only the explanation to question (B), the same is also not entertained.

12. Notice for final disposal so far as question (A) is concerned, returnable on 23.1.2023.

(SONIA GOKANI, J)

(SANDEEP N. BHATT,J)

SRILATHA