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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Date of Decision: 07.03.2023***

\+ **ITA 135/2023**

PCIT-07, DELHI ......Appellant

Through: Mr Sunil Agarwal, Sr Standing Counsel with Mr Utkarsh Tiwari, Adv.

versus

M/S WEL INTERTRADE PVT. LTD. ......Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MS. JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

CM Appl.11087/2023

1. Allowed, subject to just exceptions.

CM Appl.11086/2023

2. The above-captioned application has been filed on behalf of the appellant/revenue, seeking condonation of delay in filing the appeal.

2.1 According to the appellant/revenue, the period of delay involved is 117 days.

3. For the reasons stated in the application, the delay is condoned. The application is, accordingly, disposed of.

ITA 135/2023

4. This appeal is directed against the order dated 13.06.2022 passed by the Income Tax Appellate Tribunal [in short "Tribunal"] concerning

Assessment Year (AY) 2011-12.

5. The record shows, that the Tribunal *via* the impugned order had disposed of the respondent/assessee's appeal, concerning not only AY 2011-12, but also AY 2012-13.

6. The appellant/revenue has proposed the following questions of law for consideration, which are contained in paragraph 3.1 to 3.6 of the appeal:

> *"3.1 Whether the ITAT is correct in deleting the addition of Rs.1,83,00,000/- made U/s 68 of the Income Tax Act, 1961 despite the fact that neither creditworthiness of lender and genuineness of transaction was proved by Assessee.*
> *3.2 Whether the ITAT is correct in deleting the addition of Rs.5,62,81,575/- made U/s 68 of the Act as creditworthiness and genuineness of transaction was proved by Assessee.*
> *3.3 Whether the ITAT is correct in deleting the addition of Rs.1,90,64,516/- made U/s 68 of the Act, despite the fact that the Assessee company failed to offer satisfactory explanation as to how the above mentioned amount qualifies for writing off.*
> *3.4 Whether the finding of ITAT on the services and facilities offered by the Assessee to the hirers of the office space, the income should be assessed as business income, is based on any relevant evidence or arbitrary.*
> *3.5 Whether the ITAT is correct in allowing deduction/expenses claimed by the Assessee against the head Income from House property by treating it income from business and profession.*
> *3.6 Whether ITAT is correct in allowing deduction/expenses claimed by the Assessee U/s 36(1)(iii) against the head Income from House property by treating it income from business and profession."*

7. Insofar as the first two proposed questions of law [hereafter referred to as "issues"] are concerned i.e., (i) and (ii), these relate to the addition made under Section 68 of the Income Tax Act, 1961 [in short, "Act"] by the Assessing Officer [AO] and confirmed by the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"] on the ground of purported failure by the assessee to establish the creditworthiness of the lender and the genuineness of the transaction.

8. It appears, that the Tribunal examined the record, and thereafter returned the finding of fact. The relevant parts of the order of the Tribunal are extracted hereafter:

"8. Ground No. 6,6.1,6.1.1, 6 .1.2, 6.2 , 6.2.1, 6.2.2 and 6 .2.3 relate to addition of Rs. 7,45,81 ,575/ - made by the Ld. AO as income from undisclosed sources which have been confirmed by the Ld. CIT(A)-1. The issue has been discussed by the Ld. AO in para 4.3 of his order. The impugned addition comprised of Rs. 5 ,62,81,575/ - being unsecured loans received from Binaguri Tea Company Pvt. Ltd., Kolkata, W.B. and Rs.1,83,00,000/- being advances received from customer, M/s. Searock Developers Pvt. Ltd., Thane, Maharashtra.

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8.4 On appeal, the Ld. CIT(A)-1 discussed this issue in para 4.4 of his appellate order. The assessee submitted before the Ld. CIT(A)-1 that in respect of unsecured loan of Rs. 5 ,62,85,575/ - received from Binaguri Tea Company Pvt. Ltd., it filed before the Ld. AO a confirmation of account from the said company which is an income-tax payee and is assessed at PAN: AABCD 1008P. The bank statement of the assessee was also filed from where it is seen that the said company had paid a sum of Rs.5,50,00,000/- to the assessee company on 28.05.2010 through Banking Channel. Regarding advance received from M/s. Searock Developers Pvt. Ltd. of Rs.1.83 crore, the submission made before the Ld. AO was reiterated. Accepting the findings of the Ld. AO, the Ld. CIT(A)-1 held that the assessee has not been able to establish the credentials of loan shown from M/s. Binaguri Tea Company and advance received from M/s. Searock Developers Pvt. Ltd. Neither genuineness of transaction nor the creditworthiness of the lender companies, the onus which rested on the assessee has been discharged. He, therefore upheld the impugned additions.

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8.8 The onus of proving the source of a sum of money found to have been received by the assessee is on him as held by the Hon'ble Supreme Court in Kale Khan Mohammad Hanif vs. Commissioner of Income-Tax (1963) 50 ITR 1 (SC) and Roshan Di Hatti VS. crT (1997) 107 ITR 938 (SC).

8.9 It is also well settled that in the case of cash credit entry it is necessary for the assessee to prove not only the identity of the creditors but also to prove the capacity of the creditors to advance the money and the genuineness of the transaction. In C. Kant & Co. vs Commissioner Of

Income-Tax (1980) 126 ITR 63 (Cal), the Hon'ble Calcutta High Court held that on whom the onus of proof lies in a particular case is a question of law. But whether the onus has been discharged in a particular case is a question of fact.
8 .10 Hon'ble Kolkata High Court observed in the case of S.K. Bothra & Sons (HUF) vs. ITO (2011) 203 TAXMAN 436 (Kol) that the law is settled that if the initial burden is discharged by the assessee by producing sufficient materials in support of the loan transaction, the onus shifts upon the Assessing Officer and after verification, he can call for further explanation from the assessee and in the process, the onus may again shift from the Assessing Officer to the assessee.

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9 . Let us test the case of the asessee on the anvil of the law set out above.
9.1 ***Binaguri Tea Company Pvt. Ltd.: The assessee's explanation before the Ld. AO/CIT(A)-I has been that the assessee has taken an interest bearing loan of Rs. 5,50,00,000/ - from Binaguri Tea Co. Pvt. Ltd. during the previous year relevant to AY 2011-12. The assessee filed before the Ld. AO copy of account of the creditor appearing in its books, duly confirmed by the creditor, bearing PAN No.: AABCDI008P (page 93 of the Paper Book). It also filed statement of HDFC Bank account bearing No.00082000010021 (opened on 30.03.2000) of the creditor reflecting therein that the creditor company had paid a sum of Rs.5,50,00,000/-on 28.5.2010 (page 94 of Paper Book). Copy of acknowledgement of the return of income filed by the creditor on 22 .09.2011 for AY 2011-12 before ACIT, Circle-4, Kolkata showing therein tax payable Rs.68 ,83,685 and paid Rs.45,00,000/- by way of advance tax, Rs.16,47,893/ - by way of TDS and Rs.7,35,792/- by way of self assessment tax (page 95 of the Paper Book).***
9.2 ***The Ld. AO did not consider the explanation of the assessee satisfactory. Firstly, because notice under section 133(6) issued by him was not answered by the creditor. In written submission dated 24.04.2017 filed before the Ld. CIT(A)-1 the assessee stated that it had discharged the onus of proving the nature and source of the impugned credit which lay upon it. Merely because notice under section 133(6) issued to the creditor which was not complied with, the addition is not justified placing reliance on the judgement of the Hon'ble Supreme Court in CIT vs. Orissa Corporation Pvt. Ltd. 159 ITR 78 (sq. In that case the assessee had given the names and addresses of the alleged creditors who were income-tax assessees and their index numbers were on the file of the Revenue. Apart from issuing notices under section 131 at the instance of the assessee, the revenue did not pursue the matter further. In those circumstances, the Hon'ble Supreme Court held that if***

the Tribunal came to the conclusion that the assessee has discharged the burden which lay on him, then it could not be said that such conclusion was unreasonable or perverse or based on no evidence.

9.3 Secondly, according to the Ld. AO there is deposit of Rs.5,85,00,000/- on 25.05.2010 just three days earlier in the account of the creditor in HDFC bank. In this regard , the submission of the assessee is that the said deposit is through clearance of a cheque. It is not a deposit in cash.

9.4 Thirdly, as per Ld. AO the account of the creditor reflected few transactions, the submission of the assessee is that the Ld. AO overlooked the fact that the said account was only one of the account and not all (page 274 of the Paper Book).

9 .5 Lastly, the Ld. AO observed that income of the creditor for AY 2011-12 as per return is NIL. The assessee stated that during appellate proceeding the Ld . CIT(A)- 1 directed to file further details. In response thereto, the assessee filed written submission dated 09.10.2018 and enclosed therewith Financial Accounts of the creditor company for the year ending 31.03.2011; a copy of ledger account of the creditor in the books of the assessee; list of directors of the creditor company as on 31.03.2011 and list of shareholders of the creditor company with their share holding. (pages 265-293 of the Paper Book).

9.5.1 It is seen from the P&L Account of the creditor for the year ending 31.03.2011 (page 273 of the Paper Book) that it showed profit from Tea Division of Rs.11,51,81,845/- as against Rs.8,96,05,323/- of the preceding year.

9.6 In the backdrop of the above factual matrix and the legal position, we hold that the assessee discharged its onus of proving the identity of the creditor, the capacity of the creditor to advance loan to the assessee and the genuineness of the transaction. The impugned addition does not rest on sound footing. We accordingly delete the addition of Rs.5,62,81,575/-.

10. M/s Searock Developers Pvt. Ltd.: During assessment proceedings the assessee submitted that it had received an advance of Rs. 2 crores from M/s. Searock Developers Pvt. Ltd. through RTGS in the previous year relevant to the AY 2011-12. On 09.03.2011 the assessee had refunded Rs.17,00,000/- to the creditor. For the balance amount of Rs.1,83,00,000/- the assessee submitted that due to non-cooperation by the said party the confirmation may be obtained by the Ld. AO directly from the said party and furnished the complete address of the creditor. The Ld. AO issued notice under section 133(6) of the Act to the creditor. The notice was duly served but no reply was received. The Ld. AO drew adverse inference and made the impugned addition under section 68 of the Act.” [Emphasis is ours]

9. According to us, insofar as the first two issues are concerned, the

Tribunal has examined the material on record.

9.1 Insofar as the addition of Rs.5,62,81,575/- is concerned, it is evident, that the AO's concern, largely, was that the entity i.e., Binaguri Tea Co. Pvt. Ltd., which had granted the loan, had not responded to the summons.

10. In our view, the Tribunal, after taking into account, the legal principles on the subject, and the facts obtaining in the instant case, came to the correct conclusion. *Inter alia*, the respondent/assessee had placed before the AO, the books of accounts. Furthermore, the PAN of the creditor was also furnished. The statement of accounts of the subject bank account, which reflected the credit entry was also placed on record. The acknowledgement of the creditor's return concerning the very same AY was also placed before the AO. The return of the creditor disclosed, that advance tax, withholding tax and self-assessment tax had been paid.

11. In our view, the second issue does not arise for consideration.

12. As regards the first issue which is proposed, the AO raised the very same concern, which is that there was no response received from the entity i.e., M/s Searock Developers Pvt. Ltd., which had advanced Rs.2 crores to the respondent/assessee. The respondent/assessee had demonstrated, that out of Rs.2 crores, Rs.17 lakhs had been returned. The respondent/assessee also conveyed to the AO, that because of the disruption in relationship, there was, perhaps, non-cooperation by the said entity, with regard to the notice issued under Section 133(6) of the Act.

13. The AO, it appears, drew an adverse inference, and made an addition under Section 68 of the Act. This was confirmed, as noticed above, by the CIT(A).

14. The Tribunal examined this issue as well, which is evident from the

following parts of the impugned order:

> *"10.2* ***Before us, the assessee submitted that the mere fact that the assessee could not repay the said sum cannot be the basis of the addition. In fact inability of the assessee to refund the amount back to the creditor is the cause of dispute between the assessee and the creditor. Drawing our attention to the ledger account of the creditor for the subsequent year (page 462 of the Paper Book), it is submitted that the assessee had further refunded Rs. 1 lac. It is pointed out that the Ld. AO has not disputed either the creditworthiness or the source of the credit. The assessee has placed on record Financial Account of the creditor for the year ending on 31.03.2011 (page 438-451). Profit and Loss Account shows the income of Rs.39,55,609/- in AY 2011-12 as against income of Rs.25,33,745/- of the preceding year***.
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> *10.3 Having heard the submission of the parties and on careful consideration thereof, we have reached to the conclusion that the assessee has discharged the primary onus which lay upon it. The identity of the creditor, the creditworthiness of the creditor and genuineness of the transaction have been proved by the assessee. In CIT vs. Bedi & Co. Pvt. Ltd. (1998) 230 ITR 580 (SC), the Hon 'ble Supreme Court held that where the explanation offered by the assessee as to the nature and source of credit is prima facie credible, it cannot be rejected on mere surmises. We, therefore, delete the impugned addition of Rs.1,83,00,000/-, Ground No, 6 and its sub-grounds are decided in favour of the assessee.*
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> [Emphasis is ours]

15. In our view, the Tribunal adopted the correct approach. Merely because the respondent/assessee had not repaid the balance amount i.e., Rs.1.83 crore, and the creditor had not responded to the notice issued under Section 133(6) of the Act could not have been used as a reason by the AO to make an addition.

16. This brings us to the addition made by the AO, concerning the amount written off by the respondent/assessee. The addition made on this account was Rs.1,90,64,516/-.

17. The Tribunal examined this aspect as well, as is evident upon a perusal of paragraphs 15, 15.1 and 15.2 of the impugned order. For the sake of convenience, the same are extracted hereafter:

> *"15.Ground No.7.7 relates to write off of outstanding credit balance of Rs.1,90,64,516/- in the account of M/s. Bell Ceramics Ltd. The Ld. AO made the disallowance holding that its nexus with income earned during the year is not established (page 14 of the Assessment Order). Before the Ld. CIT(A)-1 the assessee submitted that the impugned sum has been claimed by the assessee as having written off out of interest claimed from the said company. He, however, confirmed the disallowance observing that the assessee did not tender satisfactory explanation as to how the amount qualifies for writing off.*
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> *15.1 The assessee is now before us. It is submitted that the amount of Rs.1,90,64,516/ - is interest accrued and offered to tax in the preceding year. Since the said sum could not be recovered from the debtor M/s. Bell Ceramics Ltd. the assessee has written it off during the year in its account. The contention of the assessee is that the write off of an income which has not been realised is an allowable deduction which the assessee had claimed. On being asked by the Ld. CIT(A)-l, the assessee submitted before him account of M/s. Bell Ceramics Ltd. in the books of the assessee along with details of amounts paid on loan, interest accrued year-wise, TDS certificate and receipt of interest on loan amount (pages 408-434 of the Paper Book).*
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> *15.2 On consideration of the rival submissions, we agree with the contention of the assessee that the impugned sum is allowable as deduction for the reason that the Ld. AO has not disputed that the said sum has been offered as income in the preceding year which has been brought to tax. The writing off of the impugned sum during the year in the accounts of the assessee has also not been disputed by the Ld. AO/CIT(A)-1. We, therefore, decide this ground in favour of the assessee."*

18. In sum, the Tribunal has returned a finding of fact, that the amount reflected the interest accrued which had been offered for tax in the preceding year. In the AY in issue, since the amount could not be recovered from the debtor i.e., Bell Ceramics Ltd., the respondent/assessee had written off the same.

19. In our view, the Tribunal came to the correct conclusion, based on the appreciation of the material placed before it.

20. *Inter alia*, the respondent/assessee not only submitted to the AO/CIT(A), the details of the amount given on loan to Bell Ceramics Ltd., as also the interest accrued from year to year, but also the TDS certificate

and interest received on the amount of loan extended to the said entity.

20.1 The addition, as noted above, was rightly deleted by the Tribunal.

21. Insofar as the remaining proposed questions of law are concerned, the issue involved is: whether the income earned from business centre, run and managed by the respondent/assessee should have been treated as income under the head "income from Business and Profession" or, as held by the AO/CIT(A), as "income from House Property".

22. In this regard, it may be relevant, once again, to note the findings of fact returned by the Tribunal. The Tribunal has concluded, that the respondent/assessee earned income from the business centre, by exploiting it as a commercial asset. In other words, the Tribunal concluded, that the business centre was not let out for the purposes of earning rent.

23. In this regard, the following parts of the Tribunal's order being apposite, are extracted hereafter:

> *"6.8.1 In written submission filed before the Tribunal it is submitted that the assessee is running a Business Centre at 5E, Local Shopping Centre, Masjid Moth, Greater Kailash II, a premises owned by it. In the course of carrying on such a business activity it provides office space as also the infrastructure such as facilities of security, facility of receptionist etc. During the year the assessee entered into an agreement with three space holders namely, Aten Capital Pvt. Ltd., Eminent Networks Pvt. Ltd. and Country Development & Management Services Pvt. Ltd.*
> *6.8.2 It is stated that income from such activity has been assessed as 'Business income' since inception i.e. AY 2002-03 till AY 2015-16 except AYs 2010-11,2011-12 and 2012-13 when it has been held by the Ld. AO as assessable under the head 'Income from house property' which has been upheld by the Ld. CIT(A). It is emphasised that in assessment framed under section 143(3) of the Act for subsequent AY 2013-14 and 2014-15 the Ld. AO has accepted that income derived from Business Centre is Business income. Therefore, the principle of consistency applies as in the preceding and subsequent assessment years the income from Business Centre has been assessed as Business income. Reliance is placed on the judgement of the Apex Court in CIT vs. Excel Industries Ltd . (201 3) 358 I'm 295 (SC), CIT vs. J .K. Charitable Trust 308 ITR 161 (SC) and CIT vs.*

Maruti Suzuki India Ltd. 416ITR 613 (SC) .
6.8.3 The contention of the assessee is that it has not let out any property or part thereof, instead it has been allowing the spaces for commercial use by commercially exploiting the property for the purpose of business. Therefore the impugned income from Business Centre is assessable as business income and not as income from house property. In support, reliance is placed on Chennai Properties & Investment Ltd. vs. CIT (2015) 373 ITR 673 (SC); Rayala Corporation (P) Ltd. vs. ACIT (2016) 386 ITR 500 (SC); PCIT vs. Sri Bharathi Warehousing Corporation (2017) 392 ITR 160 (AP).
6.8.4 Likewise, it is submitted that the amount of Rs.13,43,161/- received by way of reimbursement of expenses forms part of business receipt and had the same character i.e. as income from Business Centre.
6.8.5 It is also a grievance of the assessee that while computing total income of the assessee the Ld. AO did not allow expenditure debited in the P&L Account which has been allowed since inceptions.
6.9 We have given our careful thought to the rival submissions. The intention of the assessee in letting out the property is determinative of the nature of income. Whether a particular letting is business or not has to be decided on the particular circumstances of each case. Each case has to be looked at with a view to find out whether the letting was doing of a business or exploitation of his property as an owner. It is well settled that if an assessee derived any income by exploitation of its commercial assets, whether by itself or through other agencies, such income should normally be considered to be the business income of the assessee. Thus, in order to determine whether rent is assessable as income from property or business income what has to be seen is whether the asset is being exploited commercially by letting out or whether it is being let out for the purpose of enjoying the rent.
6.9.1 *The case of the assessee company has all along been that it has been running the Business Centre since AY 2002-03 in its property known as No.S-E , Local Shopping Centre, Masjid Moth, Greater Kailash, Part-II, New Delhi. In the course of carrying on such a business activity, the assessee company provides office space as also the infrastructure such as facilities of security, receptionist etc..*
6.10 We have perused the Business Centre Agreement ("Agreement") entered into between the assessee company and three space holder companies appearing at pages 72-90 of the Paper Book. The Agreement mentions that the licensor assessee is owner and in possession of commercial building situated in Greater Kailash-II, New Delhi and that it is authorised to utilise commercial space appx. 1852 sq. ft. located at Mezzanine Floor of the said complex for running Business-cum-Facility Centre therefrom. In pursuance of the same the assessee has set up a fully airconditioned Business-cum-Facility Centre in the said commercial space for providing temporary office and other secretarial services and-facilities

to different individuals, companies and entities against payment of monthly Licence Fee and other charges to enable them to carry on their business operations within the basic structure and framework of the Business Centre.

6.10.1 In the backdrop of the above factual matrix, we find substance in the submission of the assessee that it was never the intention of the assessee to let out its commercial building for the purpose of enjoying the rent but to commercially exploit the same by letting it out Therefore, income derived therefrom partakes the character of income from business.

6.10.2 During the assessment proceedings it was brought to the notice of the Ld. AO that since inception starting from AY 2002-03 the assessee company has been receiving Business Centre income which has duly been assessed as Business income till AY 2007-08. The activity of the Business Centre was dormant in AY 2008-09 for which the assessee furnished explanation. The inability of the assessee to make use of the commercial building in one year will not change its nature. In the following AY 2009-10 Business Centre receipts were taxed as Business income. Except the AYs 2010-11, 2011-12 and 2012-13 Business Centre receipts have again been taxed as Business income in assessments framed under section 143(3) for the AYs 2013-14 and 2014-15. It is thus obvious that income derived from Business Centre has been accepted by the Revenue as Business income in preceding years as well as subsequent assessment years.

6.10.3 We are aware that the principle of estoppel and res-judicata do not apply in income tax proceedings, since each assessment year is a separate unit. However, it is necessary to maintain consistency when the facts are not different. There has been judicial consensus on this issue in the interest of certainty in tax litigation. The assessee has forcefully asserted that in its case there is neither change in facts nor there is any change in the position of law. Therefore, we agree with the submissions of the assessee that in its case, it is expedient to follow the rule of consistency.

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14.2 It is submitted before us that the assessee has been claiming deduction of interest on the amount borrowed by it from M/s. Binaguri Tea Co. Pvt. Ltd. It is further submitted that interest paid by the assessee to the said company on borrowal has not been disputed by the Ld. AO from AY 2013-14 onwards and interest claimed by the assessee has not been disallowed .

14.3 On consideration of the submission of the parties we are of the view that the impugned interest paid on borrowal for the purpose of assessee's business has to be allowed under section 36(1)(iii) of the Act. We, therefore, direct the AO to allow the interest (inclusive of TDS deposited by the assessee to the credit of the lender) while computing

income of the assessee under the head 'business'. It may not be out of place to mention that the loan obtained by the assessee appearing in its books as credit has been held to be genuine by us. Accordingly, interest on the capital borrowed for the purposes of business is a deductive expenditure. We direct the Ld. AO to modify the assessment."

24. Having regard to the aforesaid findings of fact, as indicated hereinabove, the Tribunal, in our view, has correctly ruled that the business centre was being exploited by the respondent/assessee as a commercial asset. Therefore, the income from the same, as rightly concluded by the Tribunal, should have been treated by the AO/CIT(A) as business income. Consequently, the deduction of expenses as well as interest on borrowed capital would have to be allowed, in terms of Section 36(1)(iii) of the Act.

25. We find that no substantial question of law arises for consideration. The Tribunal has rendered findings of fact qua each issue, which in our opinion, are not unmerited. The appellant/revenue has not labelled any of the findings as perverse.

26. The appeal is, accordingly, closed.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

MARCH 7, 2023/pmc