IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI

BEFORE SHRI G.S. PANNU, VICE PRESIDENT AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA NO. 6166/MUM/2012	:	**A.Y : 2005-06**
M/s. Nozaki Finance & Investment Private Ltd. (now merged with Maestro Ventures Pvt. Ltd.) Piramal Tower, Ganpatrao Kadam Marg, Lower Parel, Mumbai 400 013. **PAN : AAHCM0976B** (Appellant)	Vs.	DCIT, Circle-7(1), Mumbai. (Respondent)
ITA NO. 2136/MUM/2009	:	**A.Y : 2005-06**
M/s. Nozaki Finance & Investment Private Ltd. Nicholas Piramal Tower, Ganpatrao Kadam Marg, Lower Parel, Mumbai 400 013. **PAN : AAACN5039R** (Appellant)	Vs.	DCIT, Circle-7(1), Mumbai. (Respondent)

Appellant by : Shri Ronak Doshi
Respondent by : Shri Neil Philip

Date of Hearing : 17/05/2019
Date of Pronouncement : 09/08/2019

O R D E R

PER G.S. PANNU, VICE PRESIDENT

The captioned appeals filed by the assessee are directed against the orders passed by the CIT(A)-VII, Mumbai dated 07.01.2009 and CIT(A)-12,

Mumbai dated 27.07.2012 pertaining to the Assessment Year 2005-06, which in turn, have arisen from the orders passed by the Assessing Officer under Sections 143(3) and 271(1)(c) respectively of the Income Tax Act, 1961 (in short 'the Act').

2. Firstly, we may take-up the appeal of the assessee in ITA No. 2136/Mum/2009, in which the assessee has raised the following Grounds of appeal :-

"1. On the facts and in the circumstances of the case in law, the Dy. Commissioner of Income tax, Circle 7(1), Mumbai ("the A.O") erred in making an addition of Rs.2,16,12,329/-, being the difference appearing as per Books of Accounts of the Appellants and as per Books of Accounts of M/s Piramal Retail & Merchandising P. Ltd. and Zivon Marketing P. Ltd., by treating such difference as interest income of the Appellant and thereby taxing the Appellant at notional profit.

2. He further erred in not admitting the evidence produced in support of the contention during the course of appeal proceedings by treating it as additional evidence and applying Rule 46A of the Income tax Rules, 1962.

3. He failed to appreciate and ought to have held that :

i. the Appellant has only earned Rs. 41,72,766/- and Rs. 19,837/- as interest income, which has been offered for tax and has not received any amount over and above that, hence the question of taxing any excess amount doesn't arise;

ii. the account with PRMPL has been settled during the current Assessment Year;

iii. the accounts of the Appellant have been prepared on accrual basis which have been duly audited by the Statutory Auditors and Tax Auditors and hence the entire interest which has accrued during the year has been duly accounted;

iv. an affidavit produced in support of the contention is not additional evidence."

3. Briefly put, the relevant facts are that the assessee is a company incorporated under the provisions of the Companies Act, 1956 and is, inter alia, engaged in the business of finance and investment activities. It filed its return of income on 31.10.2005 declaring loss of ₹4,40,52,562/- which was revised on 06.07.2006 declaring Nil income. Thereafter, again a revised return was filed on 13.10.2006 declaring total income of ₹92,14,925/-. The assessment of the assessee was finalised u/s 143(3) of the Act assessing total income of ₹3,14,25,700/-. In the course of assessment proceedings the Assessing Officer noted that the assessee had given loans to the companies viz. M/s. Pyramid Retails & Merchandising Pvt. Ltd. (hereinafter referred to as "PRMPL") and M/s. Zivon Marketing Pvt. Ltd. (hereinafter referred to as "ZMPL") from which assessee earned income by way of interest of ₹41,72,766/- and ₹19,837/-, respectively and the same was credited to the Profit & Loss Account of the assessee whereas as per AIR information received by the Assessing Officer, these two companies had shown the payment of interest to the assessee of ₹2,57,37,730/- and ₹47,365/-, respectively. Therefore, there was discrepancy in the interest income offered by the assessee and the amount reported in AIR as paid to the assessee to the extent of ₹2,15,64,964/- and ₹27,528/-. The assessee was thus asked to reconcile the difference. The assessee submitted that assessee has received only ₹41,72,766/- as interest income @ 7% p.a. from PRMPL and thus, the income reported by it was correct. To cross check the details, the Assessing Officer issued notice to PRMPL seeking copy of the ledger account of the assessee in its books. On perusal of the copy of ledger account, from narration of the entry passed for crediting the interest in the name of the assessee, Assessing Officer noted that PRMPL has stated interest amount to be ₹2,53,48,300/- calculated

at 7.82% p.a. and accordingly arrived at conclusion that the PRMPL has credited the said amount in the name of the assessee. Further, Assessing Officer noticed the fact that PRMPL has issued the TDS certificate for the interest income of ₹2,57,37,730/- on which TDS was deducted at ₹5,38,178/- which further lead to inference that the actual interest income of the assessee was ₹2,57,37,730/-. The Assessing Officer further noticed that in the original return of income filed by the assessee, it claimed credit for the entire TDS of ₹5,38,178/- deducted on the gross interest income of ₹2,57,37,730/-. Subsequently, in the course of assessment proceeding, vide letter dated 04.07.2007 assessee claimed that the TDS certificate issued by the PRMPL is factually incorrect and due to the same, inadvertently assessee claimed higher TDS amount to the extent of ₹4,51,154/- and withdrew the higher claim. Further, in the second revised return filed by the assessee, assessee disallowed the proportionate interest expenditure claimed by it pertaining to these loans. However, the Assessing Officer rejecting all the arguments of the assessee made an addition of ₹2,15,64,964/-, being difference in interest income reported by the assessee and interest income reflected in the books of PRMPL as paid to the assessee and ₹47,365/- as interest income from ZMPL.

4. Before CIT(A), assessee reiterated the submissions made before Assessing Officer and further submitted the affidavits of its CA and Vice-President to contend that the assessee has not received any amount over and above ₹41,72,766/- from PRMPL towards interest and, therefore, no further income should be taxed in the hands of the assessee. The CIT(A) treated the affidavits of the CA and Vice-President of assessee as 'additional evidence' and noting that nothing prevented the assessee from filing this evidence before the Assessing Officer and, in view of Rule 46A of the Income Tax Rules, 1962 did

not admit the affidavits filed by the assessee. Aggrieved by the said decision of the CIT(A), assessee is in appeal before us.

5. Before us, the Ld. Representative for the assessee submitted that the Assessing Officer has proceeded on a wrong footing that ₹2,57,37,730/- has actually been received by the assessee. However, there is no finding in the orders of lower authorities that assessee has in fact received anything over and above ₹41,72,766/-. The burden is on the Department to prove that assessee has in fact received higher income than what has been reported in its books of account. The assessee has, by way of affidavits from its CA and Vice-President, established the fact that it has not received any interest income higher than ₹41,72,766/-. Therefore, the burden shifts on the Department to prove the contrary by way of supporting documents. It was further argued that even the ledger account of PRMPL reflected the payment of only ₹40,85,742/- on 11.03.2005. Though the interest was credited at higher amount, only ₹40,85,742/- was paid to the assessee. It was further pointed out that the Assessing Officer in the assessment order has stated that PRMPL has credited the interest of ₹2,53,48,300/- in the name of the assessee, whereas the actual interest credited in the name of the assessee as per ledger account of the PRMPL is ₹2,21,60,262/-, net of TDS of ₹5,30,038/-. The Assessing Officer has considered the amount mentioned in the narration as the amount actually credited in the name of the assessee, which is incorrect. Thus, the interest credited in the name of the assessee as per the ledger of PRMPL is also ₹2,26,90,300/-, whereas assessee has offered interest income of ₹41,72,766/-. Thus, the difference, if any, is of ₹1,85,17,534/- and not ₹2,15,64,964/- claimed by the Assessing Officer. It was further pointed out that the TDS certificate issued by the PRMPL reflected interest income of ₹2,57,37,730/-, whereas in

the books of PRMPL, interest income is reported at ₹2,26,90,300/-. Thus, there is discrepancy in the ledger of PRMPL and TDS certificate issued by them. Our attention was also drawn to the calculation of the interest earned by the assessee from PRMPL, which is placed at Page 12 of the Paper Book according to which interest works out to ₹41,72,766/-. It was also argued that the assessee had used borrowed funds to advance loan to PRMPL and has thus claimed finance cost in its return of income. Since assessee had not charged interest on the funds advanced to PRMPL for part of the period, assessee had also suo-moto disallowed the corresponding interest expenditure of ₹1,89,48,000/- u/s 36(1)(iii) of the Act. In view of the above, it was submitted that no addition can be made in respect of the difference in the amount reflected in the AIR and in the ledger of PRMPL, when no such amount was actually received by the assessee.

6. On the other hand, the ld. DR has reiterated the stand of the Assessing Officer on the basis of the reasoning contained in the assessment order, which has already been noted by us in the earlier part of this order, and is not being repeated for the sake of brevity.

7. We have carefully considered the rival submissions and perused the material on record. The limited issue before us is whether addition can be made on the basis of the information contained in AIR and on the basis of the ledger of the payer when assessee disputes the correctness of the details contained in the said documents. Admittedly, the assessee has offered interest income of ₹41,72,766/- from PRMPL. The AIR reflected the interest income from PRMPL of ₹2,57,37,730/-. Thus, there was difference of ₹2,15,64,964/- between the amount reported in AIR and the account books of the assessee.

Further, the ledger of assessee in the books of PRMPL reflected interest income credited in the name of the assessee at ₹2,26,90,300/-. Thus, there was difference between amount reported in AIR and amount recorded in the books of PRMPL. The account of the assessee in the books of PRMPL, however, reported the interest payment of only ₹40,85,742/- net of TDS. No further amount was recorded as paid to the assessee. This fact has not been disputed by the lower authorities. The assessee stated before lower authorities that the actual interest income due from PRMPL and received by it is only ₹41,72,766/- which has been correctly reported in its books of account and return of income and the figures contained in AIR and ledger of the PRMPL are incorrect. It further submitted that after these receipts, the account of the PRMPL in the books of the assessee was settled and there was no further amount receivable or payable as on 31.03.2005.

8. We find that evidence cannot be used against the assessee unless assessee is given a chance to rebut the same. In the present case, the AIR and the ledger details of PRMPL were reflecting higher income than what was reported by the assessee in its return of income which went against the assessee. The assessee was provided with the said documents and assessee contested the contents of the said documents stating that it has not received any higher sum than what has been reported in its books of account and, therefore, the amount reported in AIR or as per books of account of PRMPL cannot be treated as income of the assessee. The burden thereafter shifts on the Assessing Officer to establish the fact that the contents of the document relied upon by him is in fact true with supporting evidence. The Assessing Officer was free to make further inquiries with PRMPL as to the status of payment of balance interest to the assessee when the assessee objected to the

amount reported by them. He instead chose to restrict himself to the documents in his possession to make the addition. The Assessing Officer was very well empowered to summon the party, call for additional details from the parties to establish how that income pertained to the assessee and when the same was paid to the assessee. The Assessing Officer has not carried out any such exercise to rebut the contention of the assessee that they have not received any higher sum than what has been reported in its books of account. Further, the Assessing Officer has the power to pass on the information to the Assessing Officer having jurisdiction over PRMPL to find out the correctness of claim of interest expenditure of the PRMPL and if not found to be correct, the same could be added to the income of the PRMPL. The mere fact that TDS has been deducted on a particular amount cannot *ipso facto* lead to an inference that assessee has a right to receive and has in fact, received the corresponding amount when the assessee disputes the correctness of the said figure. The presumption is applicable when the deduction of TDS is followed-up by the actual payment to the party and not applicable in cases wherein there is no receipt of amount by the parties as there is no right to receive the said amount. We find that though the AIR and ledger of the PRMPL reflects higher amount, no addition can be made based on the said evidence when the Assessing Officer has not rebutted the contention of the assessee that no amount over and above what is recorded in the books of the assessee have been ever received by the assessee. We accordingly set-aside the order of CIT(A) and direct the Assessing Officer to delete the addition of ₹2,15,64,964/-, being difference in interest income reported by the assessee and interest income reflected in the books of PRMPL as paid to the assessee, and ₹47,365/- as interest income from ZMPL.

9. The assessee has also raised an alternate Ground that if the addition of deemed interest income is upheld, the assessee should be allowed deduction of corresponding interest expenditure of ₹1,89,48,000/- u/s 36(1)(iii) of the Act which was suo-moto disallowed by the assessee. Since we have already decided the appeal on merits, we are not inclined to adjudicate the alternate argument raised by the assessee.

10. In the result, appeal of the assessee is allowed, as above.

11. The appeal of assessee in ITA no. 6166/Mum/2012 is filed against the penalty imposed under Section 271(1)(c) of the Act. The penalty has been imposed with respect to the addition of ₹2,15,64,964/- made in the quantum proceedings on account of interest income declared by the assessee. Since we have already deleted this addition in ITA No. 2136/Mum/2009 in earlier paras, the very basis for levy of penalty does not survive and accordingly, the penalty is liable to be deleted. We hold so.

12. Resultantly, both the appeals of the assessee are allowed, as above.

Order pronounced in the open court on 9th August, 2019.

Sd/-	Sd/-
(RAM LAL NEGI)	**(G.S. PANNU)**
JUDICIAL MEMBER	**VICE PRESIDENT**

Mumbai, Date : 9th August, 2019

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Copy to :

1) The Appellant
2) The Respondent
3) The CIT(A) concerned
4) The CIT concerned
5) The D.R, “B” Bench, Mumbai
6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai