

THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH

**Before: Shri P.M. Jagtap, Vice President
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA No. 645/Ahd/2012
Assessment Year 2005-06**

Softtouch Cosmetic (Mktg) P. Ltd., 321, Madhav Hill, Waghawadi Road, Bhavnagar-364001 PAN: AAFCS7461R (Appellant)	Vs	The ITO, Ward-1(2), Bhavnagar (Respondent)
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**Assessee by: Shri Kiran C. Shah, A.R.
Revenue by: Shri Purushottam Kumar, Sr. D.R.**

Date of hearing : 10-05-2022
Date of pronouncement : 27-07-2022

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order of the Id. Commissioner of Income Tax (Appeals)-XX, Ahmedabad in Appeal no. CIT(A)-XX/127/10-11 vide order dated 16/01/2012 passed for the assessment year 2005-06.

2. The assessee has taken the following grounds of appeal:-

“The learned Commissioner of Income-tax (Appeals) - XX Ahmedabad has erred on facts and in law in:

1. Confirming the action of the AO in making addition of Rs.1,78,66,925/- under section 68 of the Act.

The Appellant craves leave to add, amend, delete or alter one or more grounds of appeal.”

3. The brief facts of the case are that assessee filed return of income on 31-10-2005 declaring the total income at ₹ “Nil”. The case of the assessee was taken up for scrutiny assessment and the AO noted that during the year under consideration, the assessee had received loan of ₹ 1,78,66,925/- from M/s S. M. Traders, proprietary firm of Shri Hareshbhai R. Parmar. During the course of assessment proceedings, the assessee furnished permanent account number (PAN), confirmation of the said party and bank statement of the assessee to prove identity, genuineness and creditworthiness of the transaction. However, the Ld. Assessing Officer recorded the statement of Shri Hareshbhai R. Parmar and on basis of the same held that though the identity of the creditor is established, genuineness of the transaction and creditworthiness of the party is not established and therefore the amount of ₹ 1,78,66,925/- is treated the assessee’s own account fund which was credited as and when needed in the name of Shri Hareshbhai R. Parmar. Accordingly, the AO added the same to the total income of the assessee under section 68 of the Act.

4. In appeal, Ld. CIT(A) confirmed the additions with the following observations:

“3.2 In the assessment order dated 31-12-2007 under section 143(3), AO observed that the appellant company was engaged in the purchase and dismantling of ships; however, since long it had not carried out any ship breaking activities; during the year under consideration it had shown loan received at Rs. 1,78,66,925/- from Shri Hareshbhai R.Parmar, Prop. M/s. S.M. Traders, Bhavnagar; statement of creditor was recorded in the presence of Shri Sandip Jaswantraai Mehta, director of the appellant company; though the identity of the creditor was established the genuineness of the transaction and the creditworthiness of the creditor were not established and therefore, addition of the said sum was being made under section 68.

3.3 The contentions of the learned AR during the course of proceedings pursuant to the Tribunal's order are that in the assessment order, the Assessing Officer interpreted the statement of the creditor in a manner convenient to him; the PAN, confirmation and bank statement of the creditor had been furnished; the contention of the AO that the appellant had provided cash to buy cheques from the creditor is mis-interpretation of the statement; the identity and creditworthiness of the creditor as well as the genuineness of the transactions stand explained and in support thereof he relied on a number of case laws. In the additional submission filed a request was made to admit additional evidence in the form of Affidavit dated 30-01-2009 from the creditor wherein it was stated that he had advanced money through account payee cheques only and had not received any cash from the appellant for that purpose.

3.4 In the remand report, the AO observed that the creditor could not be traced; the address shown by the creditor in the affidavit pertains to slum type area as against the substantial amount of loan allegedly given by him; the creditor had not filed return of income for A. Y.2005-06. In the rejoinder to the remand report the learned AR contended that all the 3 ingredients required under section 68 were satisfied. In the additional submission filed on 24-11-2011, it

was contended that in the F.Y.s 2009-10 and 2010-11, the appellant had sold goods to the creditor; it offered sales to the Income-tax and therefore the amount received by way of advance cannot be treated as unexplained cash credit.

3.5 *Having considered the facts of the case, I am of the view that the creditworthiness of the creditor is far from established. In this regard, the statement recorded from the creditor u/s. 131 during the course of assessment proceedings is of vital importance. The statement is reproduced below:*

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3.5 *The contents of the above statement can be summed up as follow:*

The creditor Shri Hareshbhai R. Parmar was aged 28 years as on 29-12-2007; he was unemployed in the preceding 8 months due to his being bedridden on account of accident; in the preceding 3 years he had taken cash from one or two parties, deposited the cash in bank account and issued cheques to the parties (the names of which he did not remember); he advanced loan to the appellant company during the F.Y.2004-05, but did not remember the amount of loan given; he was in the business of purchasing waste/garbage items from Alang shipyard and selling the same; the said business was started in the year 2003 and was stopped 3 years before; he did not remember the turnover of the said business for the F.Y.2004-05; he had maintained only a 'Kachha book' in respect of the said business; the said kachha book went missing during his accident; he did not remember the source of his funds out of which the loan of Rs.1,78,66,425/- was given to the appellant company between 05-04-2004 and 08-12-2004; he did not remember whether any amount was paid back to him or not; he had never submitted Income-tax returns; his family consisted of himself, his wife and a daughter; there was no movable or immovable property in the names of any one of them; he had not lodged any police complaint and did not advertise the loss of the kachha diary maintained by him. He met with an accident in June, 2007 and the total expenses towards the

Ayurvedic treatment he was receiving were of Rs.25,000/-; he was yet to recover the diary. Thus, the creditor is a man of no means, never filed return of income, never maintained proper books of accounts and did not have any movable or immovable property. Given the contents of the statements (on which the appellant company relied on during the course of appellate proceedings) it is clear that the creditor has no means whatsoever to give a loan of such substantial amount. The learned AR's contention that (once the PAN is furnished and the creditor confirms the transaction the onus on the appellant to establish the creditworthiness stands discharged) does not hold substance. There are any number of judicial pronouncements wherein it has been held that it is for the assessee to establish the three ingredients - identity and creditworthiness of the creditor and genuineness of the transactions - for the purpose of section 68. In the instant case, the appellant has miserably failed to establish the creditworthiness of the creditor.

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3.8 One more contention raised by the learned AR is that in the F.Ys. 2009-10 and 2010-11, the appellant had sold goods to the creditor and it offered such sales to Income-tax and therefore the amount received in advance cannot be treated as unexplained cash credit. In support thereof he relied on the decisions in the cases of -

Stretchlon (P) Ltd. v/s. ITO -IITD 627(Bom.)(1982)

Archana Developers Vs. ITO (Mum.) (order dated 14-10-2011 in ITANo.641/Mum./2010)

As seen from the ledger accounts enclosed in support of the claim, sales of Rs.1.14 crores were supposed to have been made between 10-05-2009 and 15-05-2009 and the balance amount of Rs.0.64 crores was still outstanding. The sales were supposed to be of non excisable commodity. It is pertinent to note here that neither in the statement given nor the affidavit filed, the creditor claimed the amount given to be towards advance for purchase of goods from the appellant. Further, if this plea is to be accepted, the advance was given during F.Y. 04-05 whereas the purchases were effected during the F.Ys.09-10 i.e. after a gap of 5 years, during which period the creditor met with accident, lost the 'kachha diary'³ and did not do any business in 3

intervening years. Therefore, I am of the view that the so called sales made by the appellant do not get established by mere filing of ledger extracts. Even if it is presumed that sales were effected subsequently, it does not establish the creditworthiness of the creditor during the year under consideration and the contention that amount advanced was towards purchase of goods. Therefore, this plea of the learned AR also is to be rejected.”

5. Before us, the counsel for the assessee submitted that company has gone into liquidation and he is appearing on behalf of the official liquidator. He submitted that in the instant facts the matter may kindly be decided on merits of the case. The counsel for the assessee has not offered to place on record any written submissions in support of his contention and has requested that the matter may be decided on merits from perusal of the relevant documents. In response, Ld. Departmental Representative has relied upon the observations made by the Ld. CIT(A) and Ld. Assessing Officer in their respective orders.

6. We have heard the rival contentions and perused the material on record. In our considered view, the assessee though has been able to establish the identity of creditor/lender, but has not been able to establish either the genuineness of the transaction nor his creditworthiness. The Courts have taken a consistent position that the assessee is expected to establish proof of identity of creditors, capacity of creditors and genuineness of creditors in order to discharge onus cast on assessee. Mere production of party or confirmation from party will not suffice, unless the assessee is also able to substantiate their creditworthiness i.e. ability to advance the sum to the assessee.

6.1 The Supreme Court of India in the case of **Sadiq Sheikh v. Commissioner of Income Tax, Bangalore [2021] 124 taxmann.com 202 (SC)** dismissed SLP against High Court ruling that where Tribunal deleted addition under section 68 made to assessee's income on account of cash receipts in its bank account by accepting assessee's explanation that said amount was transferred in his bank account from out of bank accounts of his brother-in-law and a close friend, **since Tribunal ignored vital fact emanating from record that said creditors had not produced evidence to establish their capacity to raise such a huge amount, its order was to be set aside.** The facts of the case were that the Assessing Officer made certain addition owing to unaccounted cash receipts on ground that assessee failed to establish identity and creditworthiness of creditors from whom he had received a huge amount of Rs. 8.49 crores. On appeal, Tribunal accepted assessee's explanation that said amount was transferred into its bank account from out of bank accounts of his brother-in-law and a close friend and, further, **that said creditors confirmed to have made payment to assessee. On basis of above, Tribunal held that identity of source was thus established and requirement of section 68 was proved beyond any doubt by assessee and, therefore, addition made by Assessing Officer was not sustainable.** High Court held that since Tribunal ignored vital facts emanating from record that **said creditors had not produced evidence to establish their capacity to raise such a huge amount** and also that they were not clear about their precise role in transaction involving said amount, its order was to be set aside. **High Court further held that creditors admitting that they had**

made payments to assessee was not sufficient to discharge burden placed on assessee by section 68. The Hon'ble Supreme Court dismissed the SLP filed against the order of High Court.

6.2 Again, the Supreme Court in the case of **Sunil Thomas v, ITO [2021] 127 taxmann.com 275 (SC)** dismissed SLP against High Court ruling that where donor (creditor) who was assessee's brother, apart from furnishing his employment particulars and confirming gift, couldn't explain genuineness of transactions or his creditworthiness by proving his monetary ability to make such gifts of substantial amount, gift amount was to be treated as undisclosed income. The facts of this case were that assessee claimed to have received gift from his NRI brother. The Assessing Officer treated it as assessee's undisclosed income on ground that same was not real and genuine. **The Assessee's brother, apart from furnishing his employment particulars, confirmed that he had made the gift. However, assessee's brother did not make any endeavour to explain genuineness of transactions or his creditworthiness by producing necessary documents proving his monetary ability to make such gift of substantial amount.**

6.3 The Hon'ble Supreme Court in the case of **Pr. CIT v NRA Iron & Steel (P.) Ltd [2019] 103 taxmann.com 48 (SC)** held that that where assessee received share capital/premium, **however there was failure of assessee to establish creditworthiness of investor companies,** Assessing Officer was justified in passing assessment order making

additions under section 68 for share capital / premium received by assessee company.

6.4 The High Court of Andhra Pradesh in the case of **Gayathri Associates [2014] 41 taxmann.com 526 (Andhra Pradesh)** has held that Identity, creditworthiness and genuineness of transaction is not established merely by filing bank account details.

6.5 The High Court of Allahabad in the case of **Sagitraious Builders & Colonisers 2012] 17 taxmann.com 198 (Allahabad)/[2012]** held that not only the identity of parties, but their creditworthiness also needs to be established by the assessee.

6.6 The Pune ITAT in the case of **Sanjay Waman & Co. [2002] 81 ITD 1 (Pune) (TM)** held that it is part of the duty of the assessee to furnish evidence regarding the creditworthiness of the creditors.

6.7 The Delhi ITAT in the case of **Anandtex international (P.) Ltd. v. ACIT [2022] 137 taxmann.com 146 (Delhi - Trib.)** held that where assessee received share application money and claimed that same was invested by its director by taking advance from a company P, however **assessee failed to establish creditworthiness of share applicant or genuineness of transaction**, AO was justified in making additions under section 68 and concluding that assessee routed its own money in books of account through conduit of investor companies.

6.8 Now, in the instant facts, in our view, the assessee has not been able to establish the creditworthiness of lender nor has he been able to establish the genuineness of transaction. A perusal of the statement taken on record of the creditor raises serious doubt both on the creditworthiness of the party and genuineness of the transaction. Therefore, in our considered view, since the assessee has failed to establish both the genuineness of transaction and creditworthiness of party, in our view, he has not been able to discharge the onus cast upon him u/s 68 of the Act. Therefore, we are of the considered view that Ld. CIT(A) has not erred both in law and on the facts of the case in confirming the action of AO of making an addition of ₹ 1,78,66,925/- as unexplained cash credit u/s.68 of the Act in respect of loan taken from lender.

7. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on 27-07-2022

Sd/-
(P.M. JAGTAP)
VICE PRESIDENT
Ahmedabad : Dated 27/07/2022

Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

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By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद