

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC-II', NEW DELHI**

Before Sh. N. K. Saini, Accountant Member

ITA No. 3693/Del/2016 : Asstt. Year : 2005-06

Sh. Arun Kumar Jain, R-5/25, Raj Nagar, Ghaziabad (UP)-201002 (APPELLANT)	Vs	Income Tax Officer, Ward-1(1), Ghaziabad (UP) (RESPONDENT)
PAN No. ADDPJ5103B		

**Assessee by : Sh. Anoop Sharma, Adv. &
Sh. Sanjay Parashar, Adv.
Revenue by : Sh. Rajesh Kumar, Sr. DR**

Date of Hearing : 17.10.2016	Date of Pronouncement : 19.10.2016
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ORDER

This is an appeal by the assessee against the order dated 22.03.2016 of ld. CIT(A), Muzaffarnagar.

2. Following grounds have been raised in this appeal:

“1. That the Ld. CIT(A), erred on facts, in law and in surrounding circumstances in sustaining the whopping addition of Rs 47,50,000/- in an arbitrary manner on the basis of assumptions, presumptions, surmises, conjectures and speculations.

2. That in doing so, both Ld. CIT(A) as well as Ld. AO, erred in law, on facts, and in surrounding circumstances, in failing to give credit of Rs. 22,24,676 by way of turnover allowable u/s 44AF of IT Act as also Rs.10,00,100 as shown by transfer on 20-04-2004 in Bank as well as Rs, 15,25,424 being

advance from customers, without assigning any justification for such sweeping disallowances.

3. That knowingly well that addition u/s 68 of IT Act being unsustainable in the light of various case law including verdict of Hon'ble Supreme court relied upon by the appellant that the Ld. CIT(A), with due apology, in a zeal to sustain impugned additions, by invoking plenary powers vested with CIT(A), converted section 68 of IT Act into Section 69A of IT Act in an abrupt manner, without providing opportunity of being heard, to the appellant on this crucial and crux issue.

4. That the Ld CIT(A) as well as AO, erred in law, on facts and in surrounding circumstances, in failing to follow the principle of "Audi Alteram Partem" thereby rendering the assessment- cum appellate proceeding, unsustainable in law, ab-intio.

5. That without prejudice to above, the Ld CIT(A) as well as AO both erred in law, on facts and in surrounding circumstances, in failing to appreciate that under the retail traders beneficial section 44AF of IT Act, no documentations of any transactions is mandatory and so called inability of the appellant to file any documentary evidence being uncalled for, is not liable for damaging comments.

6. The appellant craves leave to add, to alter, amend or modify the ground/grounds of appeal."

3. The main grievance of the assessee in this appeal relates to the proper opportunity not being provided by the AO/CIT(A) while making/sustaining the addition.

4. Facts of the case in brief are that the assessee filed the return of income on 30.03.2006 declaring an income of Rs.1,33,481/-. Later on, the case was selected for scrutiny. The AO framed the assessment at an income of Rs.49,73,811/- by making an addition of Rs.47,50,100/- on account of unexplained cash deposits.

5. Being aggrieved the assessee carried the matter to the Id. CIT(A) who sustained the addition made by the AO. However, the Id. CIT(A) sustained the addition u/s 69 of the Income Tax Act, 1961 (hereinafter referred to as the Act) instead of Section 68 of the Act invoked by the AO.

6. Now the assessee is in appeal. The Id. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that the AO asked the assessee to furnish various details relating to the cash credits which were furnished on 25.03.2013 but the AO without giving proper opportunity of being heard to explain the case framed the assessment within a period of 3 days on 28.03.2013, so, there was violation of principle of natural justice. It was further submitted that the Id. CIT(A) changed the section under which addition was made by the AO i.e. from Section 68 to Sec. 69 of the Act but no opportunity was given to the assessee to

explain the cases. Therefore, the action of the Id. CIT(A) in sustaining the addition u/s 69 of the Act when the AO originally made the addition u/s 68 of the Act was not justified. He requested to set aside the issue back to the file of the AO to be decided after providing a proper and due opportunity of being heard to the assessee.

7. In his rival submissions the Id. DR strongly supported the orders of the authorities below and further submitted that the AO as well as the Id. CIT(A) had given ample opportunities of being heard to the assessee. Therefore, the addition made by the AO and sustained by the Id. CIT(A) was fully justified, particularly when, the assessee had not given proper explanation in support of his claim.

8. I have considered the submissions of both the parties and perused the material available on the record. In the present case, it is noticed that the assessee furnished the details asked by the AO vide reply dated 25.03.2013. However, the AO without pointing out any shortcoming in the reply of the assessee and without pointing out to the assessee that the reply was not satisfactory made the addition by framing the assessment on 28.03.2013. It, therefore, appears that proper opportunity of being heard was not given to the assessee while making the addition u/s 68 of the Act. It is also noticed that

the Id. CIT(A) sustained the addition by invoking the provisions of Section 69 of the Act while the addition made by the AO was u/s 68 of the Act. At the sametime, no opportunity was given to the assessee to explain his case and no intention was shown by the Id. CIT(A) that the addition would be made u/s 69 of the Act instead of Section 68 of the Act. I, therefore, by considering the peculiar facts of this case, deem it appropriate to set aside the issue back to the file of the AO to be decided afresh in accordance with law after providing due and reasonable opportunity of being heard. The assessee is also directed to cooperate and not to seek undue and unwarranted adjournments.

9. In the result, appeal of the assessee is allowed for statistical purposes.

(Order Pronounced in the Court on 19/10/2016)

Sd/-
(N. K. Saini)
ACCOUNTANT MEMBER

Dated: 19/10/2016

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR