

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

BEFORE SHRI B.P. JAIN, ACCOUNTANT MEMBER

ITA No. 4036/DEL/2017 [A.Y. 2008-09]

Shri Danveer Singh
S/o Shri Bhagal Singh
Village Iteda, Post Chipiyana
Gautam Budh Nagar
Noida

Vs.

The Income-tax Officer
Ward - 1(1),
New Delhi

PAN : AWYPS 9033 P

[Assessee]

[Respondent]

Date of Hearing : 29.11.2017
Date of Pronouncement : 14.12.2017

Assessee by : Dr. Rakesh Gupta, Adv
Shri Arichit Relan, Adv

Revenue by : Shri Atiq Ahmed Sr. DR

ORDER

This appeal of the assessee arises from the order of the ld.
CIT(A), Ghaziabad vide order dated 27.04.2017 for A.Y. 2008-09.

2. The assessee has raised the following grounds of appeal:

“1. That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in confirming the action of Ld. AO in framing the impugned reassessment order u/s 144/147 and that too without assuming jurisdiction as per law and without

complying with the mandatory conditions u/s 147 to 151 as envisaged under the Income Tax Act, 1961.

2. That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in framing the impugned reassessment order u/s 144/147, is bad in law and against the facts and circumstances of the case.

3. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making addition of Rs.22,01,000/- allegedly on the ground that assessee has deposited cash in his SB Account and that too by recording incorrect facts and findings and without observing the principles of natural justice.

4. That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in making addition of Rs.22,01,000/-, is bad in law and against the facts and circumstances of the case.

5. That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other.”

3. Briefly stated, the facts giving rise to this appeal are that the case was selected for scrutiny u/s 148 of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short] by obtaining approval on the basis of AIR information that the assessee had deposited cash

amounting to Rs. 22,01,000/- in the Savings Bank account with Bank of India during the year. Subsequently, notice u/s 148 of the Act was issued at the available address on AIR information which, in fact, was not served and finally, the assessment made was u/s 144 of the Act. The issue raised by the assessee has been dismissed by the Id. CIT(A) for the reasons mentioned in his order.

4. I have heard the rival submissions and perused the relevant material on record. At the outset, the Id. counsel for the assessee Dr. Rakesh Gupta pointed out the reasons dated 09.03.2015, which are reproduced hereinbelow:

“On the basis of AIR information received, it is found that Shri Dan Veer Singh, the assessee deposited cash to the tune of Rs. 22,01,000/- in saving bank account held in his name, during the F.Y. 2007-08 relevant to A.Y. 2008-09. Since no return of income has been filed by the assessee, the source of this cash report remains unexplained.

In view of the facts above, I have reasons to believe that cash deposit in saving bank to the tune of Rs. 22,01,000/- is out of undisclosed sources and the same is chargeable to tax as escaped assessment within the meaning of section 147 of the Income Tax Act, 1961.

Dated : 09.03.2015

*Sd/-
ITO, Ghaziabad*

Whether the Addl. Commissioner satisfied for issue of notice u/s 148, Recorded by the ITO/A.C.I.T. that it is fit case for the issue of a notice u/s 148.

Yes, I am satisfied

Dated : 18.10.2015

*Sd/-
Addl. CIT, Range I
Ghaziabad*

5. It has been held by various courts of law that cash credited in the bank book is not a book maintained by the assessee and the same cannot be treated as income u/s 68 of the Act. The relevant decision has been delivered by the ITAT 'SMC' Bench in ITA No. 3247/DEL/2015 for assessment year 2011-12 vide order dated 21.6.2017. The relevant operative portion of the order from pages 1 to 5 is reproduced hereinbelow for ready reference:

“Learned counsel for the assessee argued the legal grounds no. 1 and 2 which are reproduced hereinbelow:

“1. That having regard to the facts and circumstances of the case, Ld CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making addition Rs.39 75,0001- on account of cash deposits in bank account by treating it as alleged unexplained cash credit u s 68 of the I. T. Act, that too by

recording incorrect facts and findings and without giving adequate opportunity of hearing and in violation of principles of natural justice and by ignoring the theory of peak credit.

2. *That in any case and in any view of the matter, action of Ld. CTT(A) in confirming the action of Ld. AO in making addition Rs.39,75,000/- on account of cash deposits u/s. 68 is bad in law and against the facts and circumstances of the case. ”*

2. *It was argued by the learned counsel for the assessee, Dr. Rakesh Gupta, Advocate that the addition u/s.68 cannot be made on account of cash deposits in bank and he relied upon the decision of courts of law in this regard. The cases relied upon are 171 ITR 532 (Del), 141 ITR 67 (Bombay), 292 ITR 232 (Mad.), 71 ITD 324 (Chd ITAT). In particular he relied upon the decision of ITAT Delhi Bench in the case of Roopak Jain vs. ITO, ITA No.5592/Del/2015 vide order dated 30.08.2016 on identical issue.*

4. *Learned DR, on the other hand, relied upon the orders of both the authorities below.*

5. *I have heard the rival contentions and perused the facts of the case. It is quite evident that the issue is covered by the decisions of various courts of law referred to by Dr. Rakesh Gupta, Advocate and in particular of in the case of Roopak Jain vs. ITO, New Delhi decided by ITAT Delhi Bench dated*

30.08.2016. The relevant portion of the order is reproduced hereinbelow:

“3. After hearing the rival contentions, I find that admittedly, the assessee does not maintain any books of account. Under these circumstances, no addition can be made u/s 68 of the Act as held in the following case laws:-

i) The Hon'ble Bombay High Court in the case of CIT. Pune Vs. Bhaichand II Gandhi 141 ITR 67, held as follows:

"Income-Cash Credit-Bank Pass book is not a book maintained by assessee or under his instructions - cash credit for previous year shown in assessee's bank pass book - not shown in cash book of assessee for that year - cannot be treated as income of that previous year -1. T.Act, 1961 Sec. 68.

When moneys are deposited in a bank the relationship that is constituted between the banker and the customer is one of debtor and creditor and ITA No.5592/Del/2015 not of trustee and beneficiary. The pass book supplied by the bank to its constituent is only a copy of the constituent's account in the books maintained by the bank. It is not as if the pass book is maintained by the bank as the agent of the constituent nor can it be said that the pass book is maintained by the bank under the instructions of the constituent. Hence, the pass book supplied by the bank to the assessee cannot be regarded as the book of the assessee, that is, a book maintained by the assessee or under his instructions. Therefore, a cash credit for the previous year shown in the

assessee's bank pass book but not shown in the cash book maintained by the assessee for that year, does not fall within the ambit of S. 68 of the Act and as such the sum so credited is not chargeable to tax as income of the assessee of that previous year."

ii) The Hon'ble Delhi High Court in the case of CIT vs.

Ms. Mayawati reported in 338 ITR 563 (Del) held as follows:-

"As the ITAT has come to the conclusion that Section 68 has no applicability to the facts of the present case as the assessee is not maintaining any books of accounts. If that be so Section 68 does not apply in this case for the simple reason cheque received from Mr. Pankaj Jain has been deposited in her bank account in this regard. The ITAT was of the opinion that balance sheet/statement of the affairs cannot be equated to books of account because a pass book of the bank cannot be treated as a book of account of the assessee because this is proved by the banker, which is given to its customer and is only a copy of the customer's account in the books maintained by the bank. The bank does not act as an agent of the customer nor can it be said that the banker maintains the pass book under instructions of the customer (assessee) the relationship between the banker and customer is one of the debtor and creditor only. Therefore, a cash credit appearing in assessee's pass book relevant to a particular previous year, in a case where the assessee does not maintain books of account, does not attract the provisions of Section 68.

Keeping in view the above in the instant case neither the gifts relating to immovable property can be covered under Section 68 nor the gift of Rs.2 lacs received by the assessee can be covered under the provisions. In view of the ITAT all gifts satisfied the requirement of a valid and genuine gift. The assessee has fully explained the same and therefore it cannot be said the addition can be sustained even u/s 69 of the Income Tax Act. In ITA No.5592/Del/2015 this manner the ITAT has dismissed the appeal of the Revenue Department."

3. *The ITAT Lucknow "B" Bench of the Tribunal in the case of ITO vs. Kamal Kumar Mishra 143 ITD 686 (Lucknow Trib.) at para 7 and 8 held as follows.*

"7. The aforesaid provisions of section 68 of the Act can only be invoked where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Income-tax Officer, satisfactory. In that eventuality, the said sum so credited may be charged to income-tax as the income of the assessee of that previous year. Meaning thereby maintenance of books of the assessee, in which credit entry so found, is a condition precedent for invoking the provisions of section 68 of the Act. Now the question arises whether the passbook issued by the bank with regard to the accounts of the assessee can be termed to be the books of the assessee for the purpose of section 68 of the Act. This issue was examined by the Hon'ble

Bombay High Court in the case of CIT vs. Bhaichand N. Gandhi (supra) and while answering the question i.e. whether on the facts and circumstances of the case, the Tribunal was justified in holding that cash credit for the previous year shown in the assessee's bank passbook issued to him by the bank, but not shown in the cash book maintained by him for that year does not fall within the ambit of section 68 of the Act and as such the sum so credited is not chargeable to income tax as the income of the assessee of that previous year, their Lordships of the Hon'ble Bombay High Court categorically held that passbook supplied by the bank to the assessee could not be regarded as book of the assessee, that is, a book maintained by the assessee or under his instruction. The relevant observations of the Hon'ble Bombay High Court are extracted hereunder:-

"In Baladin Ram v. CIT 119691 71 ITR 427, it has been held by the Supreme Court that it is now well settled that the only possible way in which income from an undisclosed source can be assessed or reassessed is to make the assessment on the basis that the previous year for such an income would be the ordinary financial year. Even under the provisions embodied in s. 68 of the said Act it is only when any amount is found credited in the books of the assessee for any previous year that the ITA No.5592/Del/2015 section will apply and the amount so credited may be charged to tax as the income of that previous year, if the assessee offers no explanation or the explanation offered by him is not satisfactory. As the Tribunal has pointed out, it is fairly well settled that when moneys are deposited in a bank, the

relationship that is constituted between the banker and the customer is one of debtor and creditor and not of trustee and beneficiary. Applying this principle, the pass book supplied by the bank to its constituent is only a copy of the constituent's account in the books maintained by the bank. It is not as if the pass book is maintained by the bank as the agent of the constituent, nor can it be said that the pass book is maintained by the bank under the instructions of the constituent. In view of this, the Tribunal was, with respect, justified in holding that the pass book supplied by the bank to the assessee in the present case could not be regarded as a book of the assessee, that is, a book maintained by the assessee or under his instructions. In our view, the Tribunal was justified in the conclusions at which it arrived."

8. In the case of Anand Ram Ratiani vs. CIT (supra), the Hon'ble Gauhati High Court has also held that perusal of section 68 of the Act shows that in relation to expression "books", the emphasis is on the word "assessee" meaning thereby that such books have to be the books of the assessee himself and not of any other assessee. In that case, the books of account of the partnership firm were not treated as those of the individual partner and accordingly the additions made in the hands of the individual partners on the basis of the books of the partnership firm was deleted."

4. Even otherwise, the alternative contention of the assessee that the peak credit has to be taken into account by considering

both the bank accounts has much force. On a perusal of the cash credit of the peak submitted by the assessee, the addition cannot be sustained. On this ground also the addition cannot be sustained.

ITA No. 5592/Del/2015

5. In the result, the appeal of the assessee is allowed. ”

6. The assessee is not maintaining the books of account, and therefore, the bank statement or passbook supplied by the bank of the assessee cannot treated as record. The books of account of the assessee and cash credit in such bank passbook or bank statement cannot fall within the ambit of Section 68 of the Act. Accordingly, the legal grounds of the assessee are allowed. ”

In view of the above, the Assessing Officer does not get jurisdiction to assess the said deposit of the amount in the bank as income of the assessee u/s 68 of the Act. In that view of the matter, the addition so made by the Assessing Officer and confirmed by the Id. CIT(A) is directed to be deleted. Accordingly, the legal grounds raised by the assessee are allowed.

6. In the result, the appeal of the assessee in ITA No. 4036/DEL/2017 is allowed.

The order is pronounced in the open court on 14.12.2017.

Sd/-

[B.P. JAIN]
ACCOUNTANT MEMBER

Dated: 14th December, 2017

VL/

Copy forwarded to:

1. Assessee
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi