IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR.

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER
AND SH. N. K. CHOUDHRY, JUDICIAL MEMBER

I.T.A. No. 719/Asr/2013
Assessment Year: 2007-08

Asstt. Commissioner of Income Tax, Hoshiarpur Circle, Hoshiarpur	Vs.	Maninder Singh Cheema, H. No. 298, St. No. 20, Guru Nanak Nagar, Hoshiarpur [PAN: AEYPC 4778B]
(Appellant)		**(Respondent)**

Appellant by : Sh. Rajeev K. Gubgotra (D.R.)
Respondent by: Sh. Surinder Mahajan, (C.A.)

Date of Hearing: 26.06.2018
Date of Pronouncement: 31.07.2018

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Revenue directed against the Order by the Commissioner of Income Tax (Appeals)-1, Ludhiana ('CIT (A)' for short) dated 10.09.2013, allowing the assessee's appeal contesting its assessment u/s. 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) dated 30.12.2009 for the Assessment Year (AY) 2007-08.

2. The appeal raised three grounds, as under; the fourth being general in nature, warranting no adjudication:

'1. That, on the facts and in the circumstances of the case, the ld. CIT(A) has erred in law in deleting the addition of Rs.10 lacs made by the A.O. u/s. 68 of the Income Tax Act, 1961 by

holding that the assessee in the garb of earnest money introduced his own unaccounted money.

2. That, on the facts and the circumstances of the case, the ld. CIT(A) has erred in law in deleting the addition of Rs.15 lacs made by the A.O. u/s. 69 of the I.T. Act, 1961, being unexplained investment made for the purchase of land.

3. That, on the facts and circumstances of the case, the ld. CIT(A) has erred in law in deleting the addition of Rs.2,50,000/- made by the A.O. as income from undisclosed sources by disallowing the excessive agriculture income claimed by the assessee in the absence of any evidence for the sale of agricultural produce.'

3. The first ground is in respect of an addition for Rs.10 lacs made u/s. 68 of the Act. The assessee, an agriculturist and colonizer, was during the relevant year engaged in development of a colony by the name 'Kartar Estates', at Phagwara. Earnest money (at Rs.101.77 lacs) was stated as received from various persons toward booking of plots in the said colony. On examination, during the course of the assessment proceedings, it was found that of the same, Rs.32.55 lacs was received in cash, which was explained to have been either adjusted against the plot registered in the names of the depositor-allottees, or repaid, i.e., where for some reason the concerned depositor did not opt to purchase the plot. Eight persons, from whom an aggregate sum of Rs.10 lacs, is stated to have been received in cash, were found to have been repaid, which though was by way of a single cheque of Rs.10 lacs favouring one, Raj Sher Singh, on whose advice, it was claimed, the said depositors had booked the plots, paying the earnest money, as under:

Name of the person from whom earnest money was received	Amount (Rs.)	Mode of payment
S/Shri		
1. Gurvinder Singh	50,000/-	Cash
2. Gagandeep Singh	50,000/-	Cash
3. Sanjiv Mehta	2,00,000/-	Cash
4. Inderjit Singh	1,50,000/-	Cash
5. Satish Kumar	1,50,000/-	Cash

6. Dalwinder Singh	1,50,000/-	Cash
7. Hoshiar Singh	1,00,000/-	Cash
8. Surinder Bansal	1,50,000/-	Cash
Total	Rs.10,00,000/-	

Affidavits from six of them were filed, i.e., other than the persons listed at serial nos. 1 and 2 above, who were neither produced by the assessee nor attended in response to the summons issued to them by the Assessing Officer (AO) u/s. 131 (PB pgs. 27-30, 34-36). The deponents were called for being produced by the AO, i.e., as assessee's witnesses. Except for Dalwinder Singh (serial no. 6), the other five were produced and deposed before the AO, confirming to have received back the deposit, which was stated to be out of personal savings, through Raj Sher Singh. None of them, however, was found to have a capacity to pay the deposit amount. In fact, their stated income was so meager so as to be insufficient to make their both ends meet. The amount was repaid not to them directly, but to a third person, who had nothing to do, or shown to have anything to do, with the booking of their plots. It was also not the case that the amount had been repaid to the third person in the presence of the depositors. The booking itself was *sans* any agreement, specifying the particulars, viz. the plot size, purchase price, payment period, etc. Under the circumstances, the deposit amount (Rs.10 lacs) was inferred by the AO as the assessee's unaccounted income, introduced in cash in the garb of earnest money, and accordingly brought to tax u/s. 68 of the Act (paras 2 to 2.2 of the assessment order). In appeal, the assessee found favour with the ld. CIT(A) on the basis that the assessee had discharged the initial onus on him by furnishing affidavits from the concerned persons as well as producing them before the AO, and who had confirmed having received back their deposits through Sh. Raj Sher Singh. The assessee was not in the business of raising money, but of selling plots;

as such, enquiry into the creditworthiness of the ostensible buyers was outside the purview of the assessee and, thus, the AO (para 5 of the impugned order).

4. We have heard the parties, and perused the material on record.

4.1 Our first observation in the matter is that the issue involved is principally factual, with the primary fact of receipt of money by the assessee being not in dispute. It is therefore on account of a variance in the inferences drawn, i.e., the inferential findings, which are again findings of fact, that the difference obtains between the findings issued by the AO and the ld. CIT(A). While, one, the latter, regards the cash credits as proved, the other considers them as not, i.e., on the parameters of section 68, (also) stated before us as not applicable to a trade credit - and which is what the earnest money essentially is, relying on the following decisions:

CIT v. Bhital Das Modi [2005] 276 ITR 517 (All)
CIT v. Pancham Dass Jain [2006] 156 Taxman 507 (All)
ITO v. Lachhman Das Makhija [2009] 116 ITD 47 (Agra) (TM).

4.2 Even as observed by the Bench during hearing, whether in the given facts and circumstances, i.e., the explanation offered, and the materials led in support, could the 'depositors' be said to have deposited the earnest money, which only would qualify them to be regarded as trade creditors, is the question arising. This would also be apparent from a reading of the assessment order as well as the narration of the facts afore-noted. The legal plea raised by the assessee is therefore misplaced. *If they indeed had, as the plea raised presumes, where is the question of the same being deemed as unexplained and, thus, as the assessee's income by way of an unexplained credit?* Further, this would be so irrespective of whether they had paid the assessee money toward booking of plots, as claimed, or otherwise.

That is, in either case, section 68 cannot be invoked. The explanation of the same as representing earnest money, it needs to be appreciated, is an explanation toward the 'nature' of the credit, which, along with 'source', is to be satisfactorily explained, i.e., established on the parameters of identity and creditworthiness (of the creditor) and the genuineness (of the transaction), as is well settled and emphasized time and again by the Apex Court, to some decisions by which, as also by the Hon'ble jurisdictional High Court, settling the law in the matter, we may refer to for the sake of completeness of discussion:

Govinda Rajulu Mudaliar v. CIT [1958] 34 ITR 807 (SC)

Sreelekha Banerjee & Othrs. v. CIT [1963] 49 ITR 112 (SC)

Kalekhan Mohammed Hanif v. CIT [1963] 50 ITR 1(SC) [affirming 34 ITR 669 (MP)]

CIT v. Durga Prasad More [1971] 82 ITR 540 (SC)

CIT v. Biju Patnaik [1986] 160 ITR 674 (SC)

S*umati Dayal v. CIT* [1995] 214 ITR 801 (SC)

CIT vs. P. Mohanakala &Others [2007] 291 ITR 278 (SC)

CIT v. Lachhmandass Oswal [1980] 126 ITR 446 (P&H)

Hari Chand Virender Paul v. CIT [1983] 140 ITR 148 (P&H)

CIT v. Y.M. Singla [2014] 366 ITR 242 (P&H)

Namdev Arora v. CIT [2016] 389 ITR 434 (P&H)

The reason for the same is simple; the assessee being in receipt of a sum of money, the onus is on him to show that the same was not in the nature of income, or, even so, is outside the ambit of taxation under the provisions of the Act. In the absence of such proof, the Assessing Officer is entitled to treat it as the assessee's taxable income (refer para 4 of the decision in *Kale Khan Mohammad Hanif v. CIT* (supra), reproduced in *Lachhman Dass Oswal* (supra) (at pg. 448)). Whether the credit is, or can be said to be so proved, or not, is the question, and which is principally a question of fact, as again emphasized time and again by the Apex

Court, as recently in *Vijay Kumar Talwar v. CIT* [2011] 330 ITR 1 (SC); *P. Mohankala* (supra) (also refer *Balbir Singh v. CIT* [2011] 334 ITR 287 (P&H)).

4.3 Coming to the facts of the case, we are unable to persuade ourselves to be satisfied with the credits under the reference as proved, or that the AO, in rejecting the assessee's explanation *qua* the nature and source thereof, was not acting reasonably, and ought to have been satisfied therewith. To begin with, no confirmation has been produced from the first two creditors, stated to have advanced Rs. 1 lakh. It is difficult, therefore, to say that the identity stands proved qua these two credits. It is definitely so for the balance six, affidavits from whom stand furnished, besides five of them being produced before the AO. However, their capacity is wholly unproved; rather, disproved in-as-much as they have admitted their income/s, which is meager by any standards. Much less than thinking in terms of buying a residential plot of land (costing Rs. 6 lacs), such a person would be hard put to meet his day-to-day needs, i.e., the maintenance cost of self and family. That is, being engaged wholly in providing for sustenance; the cost of living itself being ever increasing, much less upgrade it, i.e., improve his standard of living, the question of thinking of investment, much less make so, does not arise. There is no basis for the 'accumulation of personal savings', to which the amount paid is attributed, with we finding that their income (Rs. 80,000 to Rs. 1 lakh per annum) would barely suffice for their survival. Why, there is nothing on record to show that they own assets, apart from some agricultural land, where the stated source of income is agricultural. Purchase of a plot – the stated purpose of the credit, would in fact require capital far in excess, further severely impinging on the genuineness of the transaction. Further still, why did they pay in cash, as any prudent person would, for record purposes, prefer to pay through the banking channel. The receipts are not stamped, so that that issued is not an evidence of debt

owed. That apart, the deposit is without any accompanying agreement, which, even if not registered, is a normal incidence of the trade, specifying the terms and conditions on which the deposit stands given. Nobody would give money without arriving at an agreement, reduced in the writing to eschew any differences arising as well as for record and, thus, documenting the various aspects of the transaction, viz. the identity of the plot, i.e. , its size & address, specifying the name as well as the status of the residential area, i.e., approved or unapproved or pending approval; the validity period of the deposit (booking); the period in which the allotment is to be made; its purchase price; how is the same to be paid, etc. - in short, all such information as anyone entering the transaction would need to crystallize before entering the same, binding himself therewith. The amount is then stated to be paid back. Surprisingly, this is again without any documentary evidence. It is not to these persons, but to another. There is no contemporaneous material to show that Sh. Raj Sher Singh (RSS) is the person through whom the 'booking transaction' was made. Why, he is also not shown to be, as claimed before us, a broker, soliciting customers for a fee (commission). Why, one of the depositors, Shri Sanjay Mehta, states the assessee to be his friend (PB pgs. 46-47). Why would he, then, approach another person, a solicitor, and why, again, would the assessee not refund him the booking amount on cancellation, rather than to another. The reason for the cancellation of the 'booking' is stated to be the litigation in which the colonizer was embroiled. Does that imply that the assessee did not disclose his friend about the ongoing litigation and its status, for him to have invested/caused investment, and canceling soon thereafter, citing litigation as the reason? Rather, any prudent businessman would not only repay the depositors directly, but also obtain the signature of the broker, where so, as a confirming party, as well as a declaration to the effect that the same (repayment) shall operate to terminate all the rights of the depositor in the plot booked. Then, again, expectedly, there is nothing

to show that RSS paid the creditors. No doubt, the creditors have so stated, but then what value their statement when neither the payment by them is substantiated nor have they been shown to have capacity for the same, so that the transaction is wholly unevidenced. That is, the same is only a self-serving statement/s, as is their confirmation/s of the deposit/s (refer: *CIT v. Durga Prasad More* (supra); S*umati Dayal v. CIT* (supra)). How could, then, it be said that payment to them by RSS stands evidenced? Per contra, the same is completely unproved. Rather, RSS, having received the amount advanced, assuming so, under trust, would take all possible steps to evidence the repayment to the depositors. In fact, RSS himself is conspicuous by his absence. What is his occupation? How does he know these persons residing in the different districts of the state? How many customers, that is, besides these eight, credit from whom is not established, has he solicited? Did he accept repayment on behalf of others, rather than facilitating repayment to them? Is this the normal practice? In fact, the amount having been repaid soon after, why did he misguide the customers into booking plots on a site embroiled in litigation, which is stated as a reason for repayment? This becomes particularly relevant as it is not shown, or even stated, that the other credits, that is, by way of earnest money, stood similarly repaid, or the bulk of it, inasmuch as the normal tendency of the depositor would be to stay clear of any disputed property. How could then it be said that the transaction/s and, resultantly, the deposits represent a genuine transaction/s? The ld. CIT(A) has considered none of these aspects arising in the facts and circumstances of the case. It is, it may be appreciated, the genuineness of a transaction that is determinative and, in any case, guides the determination of the matter. The identity and capacity, though listed as separate parameters, that is, apart from genuineness, are, it may be appreciated, elements that go to establish the genuineness of the transaction or contribute thereto. Could, for example, where

the identity and/or the capacity of the creditor is not proved, be considered as genuine?

4.4 We, next, consider the assessee's argument that section 68 is not applicable to a trade credit. As afore-discussed, that the impugned credits represent trade credits is not proved. That the amount represents a trade credit is itself an explanation as to the nature of the credit, which the provision (s.68) obliges an assessee to furnish to the satisfaction of the AO. Further still, we do not find any such ratio emanating from the cited decisions, which we have carefully perused. In each decision, the verdict turned on the facts and circumstances the case, with the ld. third Member in *ITO v. Lachhman Das Makhija* (supra) clarifying that where there is a cash credit, creditworthiness of the creditor, genuineness of the transaction, the identity of the creditor, the source of money, is required to be examined and proved (para 12 of the order). The only decision that can, if at all, be said to be issuing a statement of law is *CIT v. Pancham Dass Jain* (supra) in-as-much as the Hon'ble Court states that section 68 is not applicable to a purchase transaction. *Purchase of goods/services, it may be appreciated, cannot be equated with receipt of money, which obtains in the present case, for the said decision to be said to be applicable in the present case*. Further, when the genuineness of the purchase – a matter of fact, is not in doubt or stands established, as it indeed was in that case, how could, one wonders, the corresponding credit to the supplier's account be doubted? Genuineness of a purchase would imply that goods/services in the specified quantity/quality stand acquired/availed, at the specified rate, at a specific time and place, from the specified source/supplier. It is in this context, as a reading of the entire decision would clarify, that the Hon'ble Court states that s. 68 is not applicable to a purchase transaction. The purchase (of goods/services), it may be noted, is again a description of the nature of the credit. There is, strictly

speaking, nothing in the language of the section *per se*, which speaks of any sum found credited in the assessee's books of account, but the surrounding facts and circumstances of the case that prompted the Hon'ble Court to state so. Not so reading the section would be to do violence to its clear language, which has to be given full play and effect where there is no ambiguity therein following the golden rule of interpretation of statute (refer: *CIT v. Calcutta Knitwears* [2014] 362 ITR 673 (SC); *Ajmera Housing Corporation v. CIT* [2010] 326 ITR 642 (SC)). Again, not so reading may subject the provision to misuse. One assessee may introduce his own money in the name of a name lender, and use the money to purchase goods for his business. The two transactions being distinct, s.68 would become applicable to the former transaction of receipt of money. Another may, instead, buy goods from his unaccounted money, attributing the purchase to a name lender. Now, if the section receives the interpretation as sought to placed thereon, the credit *qua* purchase would be regarded as outside the ambit of s.68, defeating the law. That is, the second assessee would circumvent the law, defeating its intent and purpose. As held by the hon'ble apex court in *CBI vs. Keshub Mahindra & Others* [in Curative Petition Nos. 39-42 of 2010 in Criminal Appeal Nos. 1672-1675 of 1996], no court, itself included, could accord an interpretation to a statute that defeats its very purpose. This, it may be appreciated, is also one of the established rules of interpretation of statutes. Sec. 68, as well as other sections of Chapter VI, viz. ss. 69, 69A to 69D, are, apart from constituting substantive law inasmuch as they deem an unexplained receipt (besides others, being an asset, expenditure, etc, representing a manifestation of the income), as the assessee's undisclosed income, are also rules of evidence, incorporating the principles of common law jurisprudence and, therefore, stood applied by the courts of law even when the said provisions were not on the statute book, as a reading of some of the decisions referred to earlier, rendered under the 1922 Act, shall show. Reference in this

context may also be made to some of the recent decisions by the Amritsar Bench of the tribunal, as in the case of *Abdul Hafiz v. Dy. CIT* (in ITA No. 465/Asr/2017, dated19/3/2018; *Harmanpreet Kaur v. ITO* (in ITA No. 15/Asr/2017, dtd. 29/6/2018). It is principally for these reasons that a decision *qua* these provisions, as found by us in the context of the decisions cited supra by the assessee, turns on its facts. Why, the apex court in *Vijay Kumar Talwar* (supra) did not find the assessee's claim, made vehemently, that the sum of money was received from a trade debtor, as proved, so that the application of section 68 was, in the facts and circumstances case, upheld. If a credit from (or attributed to) a trade debtor is not excluded from the purview of s.68, how could that from a trade creditor be? That is, *per se*. Where the credit is in respect of money received, the account, be it of a trade creditor or trade debtor, is, essentially, only of a person – the stated source of the credit, which is to be established on facts. Reference in this context may be with profit made to the decision in *CIT v. Varinder Rawlley* [2014] 366 ITR 232 (P&H). No doubt, the Hon'ble High Courts in *V.I.S.P. (P.) Ltd. vs. CIT* [2004] 265 ITR 202 (MP) (referred to by the Bench during hearing); *Indian Woollen Carpet Factory vs. Income-tax Appellate Tribunal* [2003] 260 ITR 658 (Raj), clarified that sec. 68 would apply to a credit transaction of purchase as well, even as, as afore-noted, the present case is not of a purchase (of goods/services).

4.5 In view of the foregoing, in our clear view, section 68 stands rightly invoked by the AO in the facts and circumstances the case. The impugned order is accordingly set aside on this ground, and the impugned addition upheld.

5. The second ground is in respect of addition of Rs. 15 lacs on account of unexplained investment toward purchase of agricultural land, purchased during the year for Rs. 22 lacs. The assessee explained the same as sourced from agricultural

income – disclosed at Rs. 9 lacs, and the balance from withdrawals from his AOP. Of the stated income of Rs. 9 lacs, the AO considered that Rs.2 lacs would go toward household withdrawals, so that only the balance Rs. 7 lacs was admitted from the said source, leaving a balance of Rs. 15 lacs, which was added in the absence of any evidence of the withdrawals from the AOP, doubting its very existence. In appeal, the assessee furnished various details of the AOP as well as its accounts for the relevant year. The same were admitted by the ld. CIT(A), calling for a remand report. The assessee was allowed relief by him on the basis of such evidence. The Revenue's case before us was that the entire story of the withdrawals from AOP has been discredited by the AO in his remand report; the entire evidence having been made up later. The assessee would, on the other hand, rely on the impugned order, stating of having been allowed relief by the first appellate authority for cogent reasons.

6. We have heard the parties, and perused the material on record.

Without doubt, no evidence was produced by the assessee in the assessment proceedings toward the withdrawals from the AOP. The assessee, however, has furnished substantial material toward the same in the appellate proceedings. The same was objected to by the AO. Without doubt, questions arise in the matter. Why, for example, were the details of the AOP and its books of account, exhibiting the source from where the funds are stated to have been withdrawn, not produced before the AO, settling the matter; the onus of which is on the assessee. Rather, this, despite being specifically called for by the AO, as vide order sheet entry dated 8.12.2009, which though remained unavailed, with the assessee seeking further time, also granted. Why, the assessee's account with AOP, as produced, *shows a withdrawal of Rs.22.30 lacs for the purchase of agricultural land during the relevant year* (PB pg.159). If that was so, where was, one may ask, the need for the

assessee to state of Rs.9 lacs as sourced from agricultural income, as he does in the assessment proceedings. The said accounts, produced at the first appellate stage, were clearly not existent at the time of assessment, so that the question of their production, even as observed by the Bench during hearing, did not arise. In fact, we observe that the ld. CIT(A) applied his mind to the matter, and rejected the assessee's application for admission of additional evidence u/r. 46A upon considering the facts of the case as well as the judicial precedents, including by the by the Hon'ble jurisdictional High Court in *S. Uttam Kaur Educational Society v. CIT* [2008] 173 Taxman 229 (P&H), holding that none of the conditions of sub-rule (a) to (d) of rule 46A(1) were met (page 77 of the impugned order (IO)).

So however, to enable him to dispose the appeal or for a substantial cause, including enhancement of income, he, in exercise of his powers u/s. 250(4), admitted some of the evidences listed in the assessee's application u/r. 46A(1). The credit to the assessee's account in the books of the AOP, as submitted, was Rs.50.18 lacs. If the AOP's income was below Rs.50.69 lacs, as disclosed (PB pgs. 185-186), the excess credit would need to be added in the assessee's hands as unexplained credit. The matter was accordingly examined by him in light of the admitted material, and the AO issued directions for further examination (pgs.101-102 of the IO). After considering the AO's report as well as the assessee's reply thereto, he concluded that an AOP was in existence since the year 2004, which had carried out agricultural operations on 178 acres of land during the relevant year, earning as much as Rs. 50 lacs. There was accordingly no case to doubt the receipt of funds attributed by the assessee to the AOP. The addition of Rs.15 lacs was therefore deleted (pg. 116 of the IO). The finding stands issued upon an exhaustive analysis by the ld. CIT(A). No contrary material, or otherwise any infirmity therein, stands shown to us during hearing. Rather, we compliment the first appellate authority for the painstaking effort made by him to ascertain the facts.

We find no reason for interference and, accordingly, decline to. The assessee succeeds.

7. The third and final ground is *qua* agricultural income, disclosed, as afore-stated, at Rs.9 lacs. The assessee has 9 acres of land, stated to be drip irrigated, yielding an annual return of Rs.57,500 per acre, apart from 19 acres purchased during the year, which was therefore cultivated only for a part of the year, besides being admittedly not drip irrigated, stated to have fetched Rs. 20,000 per acre. No evidence toward the land purchased during the year being put to agricultural use, much less the period for which it is, or of that already owned being drip irrigated, being produced, the AO estimated the assessee's income from agriculture at Rs. 6.50 lacs, making an addition for Rs.2.50 lacs. The ld. CIT(A) regarded the assessee's estimate as reasonable, and deleted the addition. We find the assessee's case as wholly unsubstantiated. The AO's estimate is, under the circumstances, in our view, only reasonable. We, therefore, decline interference therein, and the Revenue succeeds in result.

8. In the result, the Revenue's appeal is partly allowed.

Order pronounced in the open court on July 31, 2018

Sd/-	Sd/-
(N. K. Choudhry)	(Sanjay Arora)
Judicial Member	Accountant Member

Date: 31.07.2018
/GP/Sr. Ps.
Copy of the order forwarded to:

(1) The Appellant: Asstt. Commissioner of Income Tax, Hoshiarpur Circle Hoshiarpur
(2) The Respondent: Maninder Singh Cheema, H. No. 298, St. No. 20, Guru Nanak Nagar, Hoshiarpur
(3) The CIT(Appeals)-1, Ludhiana
(4) The CIT concerned
(5) The Sr. DR, I.T.A.T

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