आयकर अपीलीय अधिकरण,सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT
श्री सी.एम.गर्ग, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्य के समक्ष
BEFORE SHRI C.M.GARG, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A No.338/AHD/2014/SRT
निर्धारण वर्ष/Assessment Year : 2009-10

The Income Tax Officer, Ward-5(4), Surat.	**Vs.**	Snehalkumar J.Shah, Flat No.201, 2nd Floor, Shantinath Apartment, Limbacha Falia, katagam, Surat – 395 008. **[PAN: AZXPS 1006 Q]**
अपीलार्थी Appellant		**प्रत्यर्थी/Respondent**

C.O. No.130/AHD/2014/SRT
निर्धारण वर्ष/Assessment Year : 2009-10

Snehalkumar J.Shah, Flat No.201, 2nd Floor, Shantinath Apartment, Limbacha Falia, katagam, Surat – 395 008. **[PAN: AZXPS 1006 Q]**	**Vs.**	The Assistant Commissioner of Income Tax, Circle – 5, Surat.
अपीलार्थी Appellant		**प्रत्यर्थी/Respondent**

निर्धारिती की ओर से **/Assessee by**	Shri Tushar P. Hemani - Adv.
राजस्व की ओर से **/Revenue by**	Shri J.K.Chandnani - Sr.DR

सुनवाई की तारीख/ Date of hearing:	12.07.2018
उद्घोषणा की तारीख/Pronouncement on	05.09.2018

आदेश /O R D E R

PER O. P. MEENA, ACCOUTANT MEMBER:

1. This appeal by the Revenue and Cross Objection by the Assessee are directed against the order of learned Commissioner of Income tax (Appeals)-I, Surat(in short "the CIT (A)") dated 20.11.2013 pertaining to Assessment Year 2009-10, which in turn has arisen from the order passed by the Assistant Commissioner of Income Tax, Circle-5, Surat (in short "the AO") dated 30.12.2011 under section 143(3) of Income Tax Act, 1961 (in short 'the Act').

ITA No.338/Ahd/2014/SRT for A.Y 2009-10 (by Revenue)

2. Ground No.1 states that the ld.CIT(A) has erred in deleting the addition of Rs.58,70,431/- on account of disallowance of notional loss made by the AO.

3. Briefly stated facts of the case are that the AO has disallowed the foreign exchange loss of Rs.58,70,431/- by holding that the assessee has made purchases from M/s.Wamastar (SK) Pvt. Ltd., Hong Kong and sold goods to M/s.Padmavathi Exports with preplanned arrangements to get both credits and debits outstanding throughout the year thereby taking advantage of fluctuation of dollar for creation of artificial and notional loss. This finding of the AO has discussed at para 45 and 45.1 and by CIT(A) in para 6.3. It was submitted before the AO that profit

arising from conversion of monetary assets has to be offered for tax while loss arising from the same has to be allowed as a n expenses by relying in the case of Woodward Governer India Pvt. Ltd., Civil Appeal no.2214/2009. However, the AO opined that the assessee has rightly quoted the judgment of Supreme Court, but the Hon'ble Supreme Court has laid down certain conditions which has to be fulfilled before claiming such loss. According to AO, one of the conditions is that such loss should not be claimed with an intention to reduce the expenditure of taxation. In view of this, the AO made disallowance of notional loss of Rs.58,70,431/-.

4. Being aggrieved, the assessee filed appeal before the ld.CIT(A), wherein it was contended that credit balances have been paid and amount has been received from the debtor in the next assessment year i.e. 2010-11. The appellant has also filed ledger accounts of the assessment year 2010-11 and 2011-12 reflecting the payment and receipts of outstanding amounts and regular transaction with M/s.Padmavathi Exports. It was submitted that appellant made purchases from M/s.Wamastar (SK) Pvt. Ltd., Hong Kong to the extent of Rs.3.07 crores while the sales to M/s.Padmavathi Exports were to the extent of Rs.3.68 crores. It was further submitted that similar transactions have done in the

assessment year 2010-11 and 2011-12 as well which established the genuineness of the purchases, sales made by the appellant. It was also brought to the knowledge of CIT(A) that as per information M/s.Padmavathi Exports has confirmed the transaction in response to notice u/s.133(6) issued by the AO. The CIT(A) observed that if the trading account of the appellant is examined, there is a loss. The net loss as per the P & L Account is Rs.18,48,029/- while the gross loss from trading operation is Rs.17,72,952/- (excluding other income sales / administrative expenses and financial charges). If the foreign exchange fluctuation loss is excluded we get gross profit of Rs.40,97,499/- which comes to 7.6 % of sales against this Gross Profit of M/s.Padmavathi Exports is 4.6% as per audit report in that case. The profit rate is after considering foreign exchange fluctuation gain of Rs.33,99,918/- in that case. This means that foreign exchange fluctuation gain in the case to M/s.Padmavathi Exports is comparable to the foreign exchange fluctuation loss in the case of the appellant. The CIT(A) observed that with the above facts, if we examine the statement of the appellant (though restricted in the submission before AO) it is noticed that AO has taken the exercise to eligible conclusion if the statement is believed to be true. The appellant is only a concern

of M/s.Padmavathi Enterprises in that case there cannot be any addition or income in the hand of the appellant in respect of trading operations shows by the appellant and the purchase of the appellant are to be taken as purchase of M/s.Padmavathi Enterprises. As there cannot be any assessment of corresponding income in the hands of the appellant.

5. On the contrary, if the statement is not to be believed, the foreign exchange fluctuation loss is to be allowed as it is a trading loss and has been worked out by taking the balance of both the creditors and debtors. In either case, the addition made cannot be sustained. The ld.CIT(A) without prejudice to the above further observed that if the statement is believed true, it will only lead to shifting of purchases from the trading account of the appellant to the trading account of M/s.Padmavathi Enterprises from the appellant. Without considering the foreign exchange fluctuation loss/gain it will increase the Gross Profit Margin of M/s.Padmavathi Enterprises. However, the same exercise in respect of foreign exchange fluctuation gain/loss will have a reverse affect of any loss in the hands of the appellant in respect of debit balance in the name of M/s.Padmavathi Enterprises results in corresponding gain in the hands of the M/s.Padmavathi Enterprises.

6. In view of these facts, it was noted that the clubbing will reduce the foreign exchange fluctuation gain in the hands of M/s.Padmavathi Enterprises, therefore, the basic logic of disallowance by the AO is faulted, and accordingly this ground was allowed in favour of the assessee.

7. Being aggrieved, the Revenue filed appeal before this Tribunal. The ld.AR vehemently supported the order of the AO.

8. On the other hand, the ld.AR of the assessee submitted that the CIT(A) has elaborately dealt with the issue and find that the logic of disallowance adopted by the AO is faulty, therefore called no interference. Further, the accounts of the assessee have been prepared as per AS-11 which says that of the monetary items are to be reported at closing rate of the foreign exchange and resultant gain and loss is to be charged as income /expenses in the Profit and Loss Account. Even, as per rule 115 if Income Tax Rules, 1962. The ld.AR submitted that for conversion into rupees of income expressed in foreign currency is to be reported at the end of the year at the closing reduction of the foreign exchange. Thus, the accounting method adopted by the assessee is in the line with the Income Tax Rules. Further it is the settled law that the foreign exchange fluctuation loss is allowable u/s.37 of the Act as held by

the Hon'ble Apex Court in the case of CIT Vs. Woodward Governer India Pvt. Ltd. 312 ITR 254 (SC).

9. We have considered the rival submissions and perused the material on record. We find that the AO has illogically worked out the loss whereas the accounts of the assessee are prepared in accordance with AS-11 as per rule 115 of the Income Tax Rules. We find that the CIT(A) has elaborately dealt with the issue and came to the conclusion that the method adopted by the AO for working out the notional disallowance on account of foreign exchange loss is faulty. We further find that the issue is squarely covered by the decision of Hon'ble Supreme Court in the case of CIT vs. Woodward Governer India Pvt. Ltd. 312 ITR 254 (SC) wherein it is held that foreign exchange fluctuation loss is allowable expenses u/s.37 of the Act. In view of these facts, we find no reason to interfere by the findings recorded with the CIT(A), accordingly this ground of appeal of the Revenue is therefore dismissed.

10. Ground No's.2 to 4 relates to deletion of addition of Rs.17,71,500/- u/s.68 of the Act.

11. Briefly stated facts of the case are that the AO made addition of Rs.17,71,500/- in respect of contra entries appearing in the

bank accounts of the assessee partly on the basis of the statement of the assessee, wherein assessee has stated that he has no knowledge of the names appearing in the cash book and also has no knowledge of cash withdrawals. The brake-up of the same is contra entries is as follows :

Sr.No	*Name of the Bank*	*Amount (in Rs)*
1	*Punjab National Bank*	*1,61,500*
2	*Punjab national Bank*	*3,10,000*
3	*HDFC a/c*	*2,50,000*
4	*HDFC a/c*	*5,50,000*
	Total	*17,71,500*

12. The above amounts were claimed to be cash withdrawals from the bank account and reflected in the cash book. It was claimed that these amounts are out of realisation of debtors outstanding, to whom sales were made and realisation out of loans outstanding from earlier years. However, the AO was of the view that the assessee's statement of oath recorded on 19.12.2011 wherein it is admitted and stated that he has not done any business of trading of diamonds himself and he has done those work for M/s.Padmavathi Exports. Therefore, the AO concluded that since the assessee has not done any business himself, the realisation from debtors and loans pertaining to said business for which cheques have been deposited in the bank account and cash withdrawals have been made from the same cannot be accepted

as genuine and consequently the AO made addition of Rs.17,71,500/-

13. Being aggrieved, the assessee went into appeal before the ld.CIT(A), wherein the CIT(A) has observed that if the statement of the appellant is believed to be true, then there cannot be any addition of this amount in the hands of the appellant. On the other hand, if it is not believed to be true, then these are genuine repayments received from debtors, borrowers and therefore even then these amount cannot be added. In any case these repayments are realisation from debtors or borrowers of earlier years. The source of entry is from debtors / borrowers. Therefore, irrespective of whether the statement is believed to be true or not, no addition cannot be made in respect of these amounts in the hands of the appellant. Consequently, addition made by the AO was deleted.

14. Being aggrieved, the Revenue has filed appeal before this Tribunal. The ld.Departmental Representative (DR) submitted that the CIT(A) has failed to furnish the fact that a statement on oath was recorded on 19.12.2011 by the AO wherein reply to question no.11, the assessee has categorically stated that he has no knowledge of cash withdrawals made from the branch. In view

of the statement of the assessee, it is clear that withdrawals made from the bank remained as unexplained. Therefore, the CIT(A) ought to have upheld the addition made on account of unexplained credits which are in the nature of income of the assessee as noticed for the books of accounts under the guise of unexplained creditor whose identity itself are not proved.

15. *Per contra*, the ld.AR referred page no.65 and submitted that an amount of Rs.4,71,335/- in respect of Punjab National Bank has been received through cheque from Shri Hash Pagdhar of Rs.2,06,553/- vide cheque no.640522 dated 04.06.2008 and Rs.1,03,277/- from Shri Raju Pagdhar vide cheque no.311340 dated 04.06.2008 and amount of Rs.1,61,505/- from B.K.Joshi through bank transfer on 12.01.2009. The assessee had given loan to the above persons in earlier years and they have returned same entry during the year under consideration. Out of such funds, the assessee has withdrawn cash of Rs.1,61,500/- and Rs.3,10,000/-. Since the withdrawals are out of funds received from persons to whom assessee has advanced funds in past, no addition cannot be made u/s.68 in respect of such withdrawals. With regard to entries in HDFC bank of Rs.13 lakhs, it was submitted that the assessee has sold goods to M/s.Padmavathi Exports and the above

funds are towards amount receivable on account of sales. In support of this, the assessee has also filed copy of ledger accounts PB-91, balance sheet of Padmavathi Exports PB-92 bank statement of Padmavathi Exports PB-93 to 113 and also filed extract of relevant entries in HDFC placed at paper books page no.63 and 64. As regards, AO's contention that the assessee has no knowledge of the names appearing in cash book and also has no knowledge of cash withdrawals, it was submitted that such statement was given under pressure and is far from truth. The above documents amply clarify such position. The AO ought not to have taken cognizance of such statement. Alternatively, it was submitted that if the assessee is working for someone else than appropriate action must be taken in the hands of such third party and not on the assessee.

16. We have heard the rival submissions, considered the facts and perused the available material on record. We find that the assessee has successfully explained the entries of cash withdrawals from Punjab National Bank amounting of Rs.4,71,500/- which were withdrawals out of funds received from the persons namely K.Paghdar, R. pagdhar and Bhavesh Joshi representing repayment of advances given in earlier years. Similarly, the entries in respect of HDFC amount to Rs.13,00,000/- are on account of exports from

M/s.Padmavathi Exports. The CIT(A) has duly considered these facts and find that the statement recorded on oath by the AO of the assessee is not true as the facts are contrary to the facts on record and evidences. We may also note that the CIT(A) also noted that if the statement is taken as true, even then no addition can be made as the amount represented the repayment of advances/outstandings of the assessee of the earlier period. Considering these facts on record, in our humble understanding, we find that the CIT(A) has clearly justified in deleting this addition, therefore no interference is called for, accordingly ground no.2 to 4 of the Revenue are therefore dismissed.

C.O.No.130/Ahd/2014 for A.Y. 2009-10 (BY Assessee)

17. Ground No.1 relates to confirming addition of Rs.2,51,000/- made u/s.68 of the Act in respect of gift received by the appellant.

18. The AO noted that the assessee has received a gift of Rs.2,51,000/- from his brother Nirav J.bhai Shah. Since the summons issued to the donor and return of income showed very meager income which indicated that he had no capacity to gift such a huge amount of Rs.2,51,000/-. Further the assessee did not offer any satisfactory explanation about the nature and source

thereof. The AO made the addition of Rs.2,51,000/- to the income of the assessee u/s.68 of the Act.

19. In appeal, the CIT(A) observed that the assessee's brother does not have sufficient income or capital to justify the gift given in cash. The total receipts in the Profit and Loss Account of the donor was of Rs.1,53,462/- and the total capital account was at Rs.5,25,620/- out of the same the cash gift of Rs.2,51,000/- had been made which comes to almost 50% of the capital. Further, the donor is having bank account in Bank of India in which the balance of Rs.1,003/-. Considering these facts, the CIT(A) confirmed the addition.

20. The ld.AR of the assessee submitted that the CIT(A) has not appreciated the facts that the assessee filed a gift deed on stamp paper, acknowledgment of income tax return, Profit and Loss Account and Capital balance of the donor. Further, the gift is covered by provision of section 56(1)(vii) and by virtue of said provision, gift received from brother is exempt. In this case, the gift has been received from brother which is evident from the gift deed, hence provisions of section 56 of the Act are applicable, hence no addition can be made. The ld.AR also placed in the case of Chandrakanth S.Shah [2010] 124 ITD 177 (Mum).

21. On the other hand, the ld.DR submitted that credit worthiness is not called by section 56 of the Act, hence the provision of section 68 are independent which applicable to the present circumstances of the case. Since the summons issued to the donor return unserved. Therefore, identity, genuineness and credit worthiness and genuineness of transactions of the Act is not satisfied.

22. We have heard rival submissions we find that the in order to verify the genuineness of the gift the AO had issued a summon to the donor Shri Nirav J.bhai Shah, but the same returned back with the remarks 'left'. Therefore, the assessee was asked to produce the Shri Nirav J.bhai Shah, but the assessee failed to produce him. Further, it was seen that the return of income of Shri Nirav J.Shah was very meagre which indicated that he had no capacity to give such a huge amount of Rs.2,51,000/- in cash to the assessee. We, further note that the assessee was having a bank account with balance of Rs.1,003/- only. Therefore, the contention of the assessee that the gift received out of balance of past savings is also not justified. The CIT(A) has also observed that so-called gift deed has been exhibited on a stamp paper of Rs.50, but the same has not been notarized. The donor has shown profit in his Profit

and Loss Account at Rs.1.53 lakhs only, whereas capital account is showing the balance at Rs.5.25 lakhs, thus, almost 50% of the amount is claimed to be as gift. It is not understood as to why the appellant's brother was keeping his entire capital in cash with him, despite having a bank account and why the gift was not made through bank channels. Therefore, we are of the view that credit worthiness and genuineness of the transaction of the gift is not justified. The provisions of section 56(2)(vii) could come into picture only when the genuineness of the transaction is established beyond doubt. Therefore, the decision relied by the ld.AR in the case of Shri Chandrakanth H. Shah (supra) is not applicable to the present facts of the case, accordingly the findings of the ld.CIT(A) are upheld which does not called any interference from our side.

23. Ground No.2 relates to confirmation of addition of Rs.1,87,000/- u/s.68 of the Act.

24. The AO noticed that the assessee has claimed to have received loan amount of Rs.1,87,000/- from 10 persons for which confirmations and PAN of lender were also filed. However, the AO noted the assessee himself in his statement on oath has conveyed total ignorance in respect of identity of such names. Therefore, the additions were made by the AO u/s.68 of the Act.

25. In appeal, the CIT(A) noted that the assessee in his statement on oath dated 19.12.2011 in response to question no.11 stated that he does not know anything about the persons in whose names the money has been credited in the cash book he stated that he did not even know those persons. Since, the appellant has conveyed his ignorance on oath in respect of identity of such name, therefore, the addition to the expenditure of Rs.1,87,000/- was confirmed.

26. Being aggrieved, the assessee has filed this Cross Objection before this Tribunal. The ld.AR of the assessee submitted that the documentary evidences in the form of bank, PAN and addresses acknowledgment of ITR were submitted to the AO. Therefore, the identity, genuineness of transaction and credit worthiness is established, hence all the ingredients prescribed u/s.68 are proved, therefore no addition can be made.

27. On the other hand, the ld.DR submitted that the assessee has received the amount of Rs.1,87,000/- in cash loan for which CIT(A) has correctly upheld the addition as the assessee himself has expressed his inability and ignorance in respect of these receipts from the persons.

28. We have heard the rival submissions and considered the facts and circumstances of the case. We find that the assessee himself in his statement on oath dated 19.12.2011 has admitted that he had no knowledge regarding the cash loans received by these persons, therefore, CIT(A) was justified in confirming the said addition. In view of these facts, we do not find any reason to interfere with the findings recorded by the Lower Authorities, accordingly same is upheld.

29. Ground No.3 and 4 relating to interest u/s.234ABC and initiation of penalty u/s.271(1)(c) which are consequential in nature, hence not being adjudicated.

30. In the result, the Cross Objection of the assessee is dismissed.

31. To sum up, appeal of the Revenue and Cross Objection of the assessee are dismissed.

32. The order pronounced in the open Court on 05-09-2018.

Sd/-	**Sd/-**
(सी.एम.गर्ग /C.M. GARG)	**(ओ.पी.मीना/O.P.MEENA)**
न्यायिकसदस्यतथा/JUDICIAL MEMBER	**लेखासदस्यकेसमक्ष /ACCOUNTANT MEMBER**

सुरत/ **Surat,** दिनांक **Dated:** 5th Sep, 2018/ *S.Gangadhara Rao, Sr.PS*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

/ / **TRUE COPY** / /

Assistant Registrar, Surat