IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : G : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA Nos.6715 & 6716/Del/2016
Assessment Years: 2005-06 & 2006-07

Tarun Goyal, 13/34, WEA, Karol Bagh, New Delhi.	Vs	ACIT, Central Circle, Noida.

PAN: AAPPG1505R

(Appellant)		(Respondent)
Assessee by	:	Shri V.P. Gupta & Shri Anunav Kumar, Advocates
Revenue by	:	Shri S.S. Rana, CIT, DR
Date of Hearing	:	02.05.2019
Date of Pronouncement	:	22.05.2019

ORDER

PER BENCH:

The above two appeals filed by the assessee are directed against the separate orders dated 18.11.2016 of the CIT(A), Kanpur, relating to assessment years 2005-06 and 2006-07.

ITA No.6715/Del/2016 (A.Y. 2005-06)

2. Facts of the case, in brief, are that a search and seizure operation was conducted in the case of the assessee on 17th September, 2010. In response to notice u/s 153A of

the IT Act issued on 01.08.2011, the assessee filed his return of income on 12th August, 2011 declaring an income of Rs.1,29,871/-. During the course of assessment proceedings, the Assessing Officer observed that the assessee has disclosed income under the head 'Income from business and profession'. During the course of assessment proceedings, the statement of the assessee was recorded in which the assessee filed a chart of cash deposited by him in the banks and he admitted that he is providing accommodation entries. The Assessing Officer asked the assessee to explain the source of cash deposits, but, the assessee was unable to furnish a satisfactory reply. He submitted that the cash deposits in the account has been provided by the accommodation entry beneficiaries and deposited by him in his bank account and cheques were issued accordingly. He further submitted that commission @ 0.25% only of cash deposits has been received. The Assessing Officer noted that during assessment year 2004-05, the assessment order was passed u/s 153A wherein it has been established that the assessee failed to explain the cash deposits in the bank. Accordingly, the amount of Rs.50,84,400/- was treated as income of the assessee from undisclosed sources and was added u/s 68 of the IT Act. The ld.CIT(A) also confirmed the addition so made by the Assessing Officer since for the impugned assessment year an amount of Rs.18,99,300/- was the cash deposited in the bank. The Assessing Officer, invoking the provisions of section 68 and relying on various decisions made addition of Rs.18,99,300/- to the total income of the assessee.

3. In appeal, the ld.CIT(A) confirmed the action of the Assessing Officer. While doing so, he rejected the argument of the assessee that only commission income was required to be brought to tax. He noted that the conduct of the assessee goes to show that he has received no such commission income which is self evident from the returns of income filed firstly u/s 139 and, thereafter, u/s 153A of the Act. Had there been an iota of truth at least in the subsequent return filed u/s 153A for this year, then, the assessee would have offered such commission income. However, the assessee has not shown any commission income at all. He accordingly rejected all the arguments advanced before him.

4. Aggrieved with such order, the assessee is in appeal before the Tribunal raising the following grounds:-

> 1. The CIT(A) erred in upholding the order of A.O. making addition Rs.18,99,300/- on account of cash deposits in the bank account without appreciating that since admittedly the appellant has been carrying on the business of providing accommodation entries, amount of cash deposits was part of the business and, accordingly, same could not be added u/s 68 of the Act and only commission income thereon could be considered as income.
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> 2. That the CIT(A) also failed to appreciate that in case of other companies of the group managed by Mr. Tarun Goyal, only commission income was considered by the A.O. in respect of entries for deposits in the bank and accordingly adding the amount of cash deposits in the case of the appellant was contrary to the stand of the A.O. in other cases.
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> 3. That the CIT(A) also erred in referring to and following the order of CIT(A)-33, New Delhi, for A Y. 2004-05, dated 03.08.2012, which order has already been set aside by ITAT vide its order dated 18.10.2013 and, accordingly, the CIT(A) ought to have decided the appeal as per the directions of ITAT vide its order referred above.
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> 4. That the CIT(A) erred in not determining the commission income in respect of cash deposits in the bank account @ 0.25% taking into consideration precedents in this regard in other cases and also

statement of Mr. Tarun Goyal made during the course of search and also giving a holding that since the amount of commission at the above rate has already been offered by the appellant in A.Y. 2009- 10, no addition was called for in the year under appeal.

5. That the appellant crave leave to add, amend or modify any ground hereinafter."

4.1 The assessee has also filed the following additional ground:-

"That the Assessing Officer erred in making the addition in the case of the appellant on the basis of bank statement u/s 68 of the Act without appreciating that bank statement is not books of account of the appellant and therefore addition could not be made u/s 68 of the Act."

5. The ld. counsel for the assessee, referring to the additional ground, submitted that it is purely a legal ground and no fresh facts are required to be investigated, therefore, this ground should be admitted.

6. After hearing both the sides and considering the fact that the additional ground raised by the assessee is a legal one, therefore, following the decision of the Hon'ble Supreme Court in the case of NTPC Ltd., the additional ground raised by the assessee is admitted for adjudication.

6.1 The ld. counsel for the assessee submitted that the assessee has been carrying on the business of providing accommodation entries through a number of companies promoted by him. The addition has been made by the Assessing Officer on the basis of bank statement of the assessee. He submitted that the relevant entries were recorded by the assessee in the books of account. Referring to the provisions of section 68, he submitted that addition could be made only with reference to credit

entries in the books of account. Since the bank statement is not in the nature of books of account of the assessee, therefore, no addition could be made u/s 68 on the basis of bank statement. For the above proposition, he relied on the decision of the SMC Bench in the case of *Vinesh Maheshwari vs. ITO reported in 2019(3) TMI 1118-ITAT DELHI*. He accordingly submitted that the addition made by the Assessing Officer u/s 68 of the Act which has been upheld by the CIT(A) should be deleted since no addition can be made on the basis of bank statement.

6.2 So far as the merit of the case is concerned, the ld. counsel for the assessee, referring to the following decisions, submitted that addition cannot be made on account of cash deposits and only the commission income has to be assessed:-

i) Himanshu Verma vs. DCIT, 2019(3) TMI 896-ITAT DELHI.

ii) Amit Agarwal vs. DCIT, 2016(11) TMI 596-ITAT KOLKATA.

iii) Sanjay Kumar Garg vs. ACIT, 2011(1) TMI 696-ITAT DELHI.

iv) Prashant Aggarwal vs. ACIT, 2017(11) TMI 803-ITAT DELHI.

v) Shri Vijen Jhaveri vs. ITO, ITA No.740/Ahd/2013, order dated 07.02.2017.

vi) Pr. CIT vs. NDR Promoters Pvt. Ltd., (2019) 410 ITR 379.

7. Referring to the decision of the Tribunal in the case of group concerns of the assessee, vide consolidated order dated 26th April, 2019, he submitted that the Tribunal in the said decision has adopted the commission income @ 0.5% of the deposit after excluding the intra group entries in the bank account in order to calculate the commission income. Referring to another order of the group concern passed by the

Tribunal vide order dated 23rd January, 2019, he submitted that there also the Tribunal has directed the Assessing Officer to adopt 0.5% as the reasonable rate of profit/commission in such clandestine activities. He accordingly submitted that the addition cannot be made of the entire bank deposits and only commission @ 0.5% at best can be added.

8. The ld. DR, on the other hand, strongly supported the order of the CIT(A). He submitted that the assessee, in the instant case, is engaged in providing accommodation entries. Referring to the grounds raised by the assessee before the CIT(A), he drew the attention of the Bench to ground of appeal No.2, wherein the assessee has raised the following ground as reproduced by the CIT(A) in the body of the assessment order:-

> *"2. That the Assessing Officer erred in making addition of Rs.18,99,300/- being the cash deposited in the bank account of the appellant without appreciating that admittedly the appellant was carrying on the business of providing accommodation entries and the cash was deposited in the bank account of the appellant during the course of the above business for providing accommodation entries in respect of which commission income had also been offered by the appellant during the course of search and in his income tax return for AY 09-10 and the income has also been assessed by the Assessing Officer in AY 09-10 therefore, cash deposited could not be added under section 68 of the Income Tax Act."*

9. Referring to the above, he submitted that it is evident that the assessee was carrying on the business and the cash deposited constituted its business receipt. The amount was credited in the books of account of the assessee and he failed to discharge the onus cast upon him in terms of the provisions of section 68 of the Act. Therefore, the Assessing Officer was fully justified in making an addition u/s 68 of the Act.

Referring to the decision of the Hon'ble Supreme Court in the case of *PCIT vs. NRA Iron & Steel (P) Ltd. (2019) 103 taxmann.com 48 (SC)*, he submitted that the Hon'ble Supreme Court in the said decision has held that where there was a failure of the assessee to establish the credit worthiness of the investor company, the Assessing Officer is justified in passing the assessment order making additions u/s 68 of the Act of share capital/share premium received by the assessee company. Merely because the assessee company has filed all primary evidence, it cannot be said that the onus on the assessee to establish the credit worthiness of the investor companies stood discharged. Referring to the decision of the Hon'ble Delhi High Court in the case of *PCIT vs. NDR Promoters Pvt. Ltd. (2019) 410 ITR 379 (Del),* he submitted that the Hon'ble Delhi High Court has held that where the Assessing Officer has made additions to assessee's income u/s 68 of the Act in respect of cash received as share capital from several companies, in view of the fact that all of these companies are maintained by one person who was engaged in providing accommodation entries through paper companies and all such companies are located at same address, the addition was justified. Referring to the decision of the Hon'ble Supreme Court in the case of *Sudhir Kumar Sharma (HUF) vs. CIT (2016) 69 taxmann.com 219 (SC),* he submitted that the Hon'ble Supreme Court dismissed the SLP against High Court's ruling that where the assessee has failed to give the list of persons who advanced cash to him along with their confirmations in respect of huge amount of cash deposited in its bank account, the Assessing Officer was justified in adding the said amount to assessee's taxable income u/s 68 of the Act. Referring to the decision of the Hon'ble Delhi High

Court in the case of *CIT vs. D.K. Garg (2017) 84 taxmann.com 257 (Del),* he submitted that where assessee, an accommodation entry provider, was unable to explain all sources of deposits and corresponding payments, he would not be entitled to benefit of peak credit. He also relied on the following decisions:-

i) Govindarajulu Mudaliar vs. CIT (1958) 34 ITR 807 (SC);

ii) Kale Khan Mohammad Hanif vs. CIT (1963) 50 ITR 1 (SC); and

iii) Sreelekha Banerjee vs. CIT 49 ITR 112(SC).

10. So far as the decision of the Tribunal in the group cases is concerned, he submitted that the Tribunal in assessee's own case for the immediately preceding assessment year has restored the issue to the file of the Assessing Officer with certain directions.

11. We have considered the rival arguments made by both the sides and perused the material available on record. We find the assessee in the instant case, is engaged in the activity of providing accommodation entries. Since the assessee had made cash deposit of Rs.18,99,300/- and was unable to explain the source of the same, the Assessing Officer, following his order for assessment year 2004-05 and relying on various decisions, made addition of the same u/s 68 of the Act which has been upheld by the CIT(A). It is the first proposition of the ld. counsel for the assessee that addition cannot be made u/s 68 of the Act on the basis of the bank statement since the bank statement is not the books of account of the assessee and, therefore, addition could not be made u/s 68 of the Act. For the above proposition, the ld. counsel for the

assessee relied on the decision of the SMC Bench of the Tribunal in Vinesh Maheshwari vs. ITO (supra). It is the submission of the ld. DR that as per the ground raised by the assessee before the CIT(A), the assessee was carrying on the business of providing accommodation entries and the cash was deposited in the bank account of the assessee during the course of such business activity for providing accommodation entry. We, therefore, do not find any merit in the argument advanced by the ld counsel for the assessee that addition cannot be made u/s 68 of the IT Act on the basis of bank statement especially when the assessee is engaged in business as per ground of appeal before the CIT(A). So far as the decision relied on by the ld. counsel of the assessee in the case of Vinesh Maheshwari is concerned, a perusal of the facts of that case shows that the assessee was not engaged in the business activity and had derived income from long-term capital gain and was not maintaining any books of account. However, in the instant case, the assessee is engaged in the business activity. Therefore, the said decision is not applicable to the facts of the present case.

12. We find the Hon'ble Punjab & Haryana High court in the case of *Sudhir Kumar Sharma (HUF) vs CIT reported in (2014) 224 taxman 178 (P&H)* has held that where in respect of huge amount of cash deposited in bank, assessee failed to give list of persons who advanced cash to him along with their confirmations in respect of huge amount of cash deposited in its bank account, the Assessing Officer was justified in adding the said amount to assessee's taxable income u/s 68 of the Act. We find the

SLP filed by the assessee against the said order of the Hon'ble High court was dismissed by the Hon'ble Supreme Court as reported in 239 taxmann.com 64.

13. We find the Hon'ble Delhi High Court in the case of *CIT vs. D.K. Garg, reported in 404 ITR 757*, has held that where the assessee, an accommodation entry provider, was unable to explain all sources of deposits and corresponding payments, he would not be entitled to benefit of peak credit. In other words, the entire bank deposits added by the Assessing Officer were confirmed. Therefore, the additional ground raised by the assessee that addition cannot be made u/s 68 of the Act on the basis of the bank statement is rejected.

14. Now, coming to the argument of the ld. counsel for the assessee that only commission @ 0.5% should be added and not the entire deposits is concerned, we find the Assessing Officer, while making the addition has followed his order for assessment year 2004-05 in assessee's own case. The ld.CIT(A) has upheld the action of the Assessing Officer by following the order of his predecessor in assessee's own case. We find when the matter travelled to the Tribunal, the Tribunal, vide order in ITA No.4636 and 4637/Del/2012, order dated 18th October, 2013 for assessment years 2003-04 and 2004-05 respectively has restored the issue to the file of the Assessing Officer with certain directions. Respectfully following the decision of the Tribunal in assessee's own case for assessment years 2003-04 and 2004-05, we restore the issue to the file of the Assessing Officer for adjudication of the issue afresh in the light of the direction of the Tribunal and in accordance with law, after giving due opportunity of

being heard to the assessee. We hold and direct accordingly. The grounds raised by the assessee are accordingly partly allowed for statistical purposes.

ITA No.6716/Del/2016 (A.Y. 2006-07)

15. After hearing both the sides, we find the grounds as well as the additional ground raised by the assessee are identical to the grounds raised by the assessee in ITA No.6715/Del/2016. We have already decided the issue and the grounds raised by the assessee have been dismissed. Following similar reasoning, the additional ground is dismissed and the grounds on merit are allowed for statistical purposes.

16. In the result, both the appeals filed by the assessee are partly allowed for statistical purposes.

The decision was pronounced in the open court on 22.05.2019.

Sd/-	Sd/-
(SUCHITRA KAMBLE) JUDICIAL MEMBER	(R.K. PANDA) ACCOUNTANT MEMFBER

Dated: May, 2019

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Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi