

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "D" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 3675/MUM/2017  
Assessment Year: 2011-12**

Shri Rajesh Viswanathan, RH-11, Jimmy Tower CHS, Sector-4, Vashi, Navi Mumbai-400703.	Vs.	ACIT-35(2), Room No. 401, C-12, PratyakhKarBhavan, BKC Complex, Bandra (East), Mumbai- 400051.
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**PAN No. ADDPV5992Q**  
**Appellant**

**Respondent**

Assessee by : Mr. Vallabhadas D. Parmar, AR  
Revenue by : Mr. D.G. Pansari, DR

Date of Hearing : 04/07/2019  
Date of pronouncement : 30/08/2019

**ORDER**

**PER N.K. PRADHAN, AM**

This is an appeal filed by the assessee. The relevant assessment year is 2011-12. The appeal is directed against the order of the Commissioner of Income Tax-46, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. We consider below the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> ground of appeal together as they address a common issue. These grounds of appeal read as under :

1. On the facts and circumstances of the case and in law Ld. CIT(A) erred in confirming addition of Rs.69,02,000/- as cash credit u/s 68 of the IT Act.

2. On the facts and circumstances of the case and in law Ld. CIT(A) erred in not admitting the additional evidences filed before him under Rule 46A of IT Rules 1962 or u/s 250(5) of the IT Act, 1961.
3. On the facts and circumstances of the case and in law Ld. CIT(A) erred in confirming the addition of Rs.69,02,000/- as cash without appreciating the fact that part of deposits represents past savings etc. and part of deposits represents his business sales proceeds which appellant is doing as part time business so only profits of such turnover of Rs.4,30,756/- can be made u/s 44AD of the IT Act.
4. Without prejudice to the above, on the facts and circumstances of the case and in law Ld. CIT(A) erred in assuming withdrawals of Rs.10,55,700/- as expenditure towards personal expenses, medical expenses, education expenses travelling expenses etc. without brining on record any evidence, whereas the fact is that such withdrawals are used as redeposit in bank account in subsequent dates, in short the Ld. CIT(A) failed to give telescopic benefits of cash withdrawals of Rs.10,55,700/- against cash deposits in bank account without proper appreciation of facts of the case.

3. Briefly stated, the facts are that the assessee filed his return of income for the assessment year (AY) 2012-13 on 31.07.2012 declaring total income of Rs.26,67,452/-. As per the AIR/CIB information received, the Assessing Officer (AO) found that the assessee has made the following cash deposits in his bank accounts :

Sl. No.	Name of Bank	Total Cash deposit (Rs.)
1.	Abhyudaya Co-op Bank	44,44,000/-
2.	Bank of India	11,20,000/-
3.	HDFC Bank	13,38,000/-
	<b>Total</b>	<b>69,02,000/-</b>

During the course of assessment proceedings, the AO *vide* notice u/s 142(1) dated 20.01.2015, 13.02.2015, 02.03.2015 and 12.03.2015 and also *vide* order sheet noting dated 16.02.2015, 20.03.2015, 23.03.2015 and 24.03.2015 asked the assessee to explain why the above cash deposits should not be treated as unexplained cash credits u/s 68 of the Act. As the assessee failed to offer any explanation about the source and nature of the cash deposits, the AO made an addition of Rs.69,02,200/- u/s 68 of the Act. Further he held the cash withdrawals from the bank accounts to the extent of Rs.10,55,700/- as withdrawals towards household expenses, personal expenses, medical expenses, children education, travelling and other expenses for office tours for which reimbursements have been claimed.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). During the course of appellate proceedings, the authorized representative (AR) of the assessee submitted before the CIT(A) that the cash deposits were out of retail business carried out which was not offered as the assessee was not aware of accounting, law. It was submitted that income u/s 44AD was offered before the AO which was not accepted. In support of it the assessee filed documents like sales ledger, sale deed of office at 420 APMC in favour of his brother and cash book. Thereafter, the AR of the assessee filed details as per sales/cash book stating that (i) total sales is shown at Rs.53,84,450/-, (ii) as per cash book, opening cash at hand is Rs.16,92,948/- ; total debit Rs.74,87,045/-, (iii) total cash deposit of Rs.69,02,000/- is explained out of withdrawal of Rs.10,55,700/-, opening cash at hand is Rs.16,92,948/- and sales turnover of Rs.41,53,352/- and (iv) the cash book has no entries of any purchases made.

The Ld. CIT(A), after verifying the assessment records, found that there was no submission whatsoever made by the assessee to explain the

source of cash deposits even though the chart of deposits/withdrawals was filed. As the AO had given sufficient opportunity to the assessee and the assessee failed to comply to the said notices, the Ld. CIT(A) dismissed the application of the assessee to admit the additional evidence under Rule 46A of the Income Tax Rules, 1962 (in short 'the Rules').

Further, the Ld. CIT(A) relying on the judgment of the Hon'ble Supreme Court in the case of *Sumati Dayal v. CIT* 1995 AIR 2109 and *CIT v. Durga Prasad More* AIR 1971 SC 3439 confirmed the addition of Rs.69,02,200/- made by the AO u/s 68 of the Act. Also he rejected the claim of set off of cash deposits out of withdrawals.

5. Before us, the Ld. counsel for the assessee submits that the CIT(A) should have admitted the additional evidence and decided the appeal. In this regard, reliance is placed by him on the decision in *Smt. Prabhavati S. Shah v. CIT* (1998) 305 ITR 1 (Bom) and the order of the Tribunal in *Mr. Rajbahadur B. Yadav v. ITO* (ITA No. 4000/Mum/2016 for AY 2011-12). Also reliance is placed by him on the decision in *CIT v. Dr. Kodela Siva Prasad Rao* 212 Taxman 147 (AP).

The Ld. counsel further submits that documents viz. (i) sales register, (ii) sales ledger (iii) monthly cash summary (iv) cash book (v) cash deposits and withdrawals were filed before the CIT(A) requesting for admission of additional evidence. Also it is stated by him that medical papers/documents were filed before the CIT(A) justifying the reasons for not submitting the above documents before the AO.

6. On the other hand, the Ld. DR submits that as recorded by the AO at para 3.2 of the assessment order dated 26.03.2015, though several opportunities were provided to the assessee, he failed to appear before the

AO to file his explanation. Therefore, it is argued by him that the order of the Ld. CIT(A) which is based on facts of the case be affirmed.

7. We have heard the rival submissions and perused the relevant materials on record.

*In Smt. Prabhavati S. Shah* (supra), loans taken by the assessee were treated by the ITO as income from undisclosed sources because the summons could not be served on the creditors. Before the first appellate authority, the assessee wanted to prove the genuineness of the loan from one of the borrowers by relying upon the fact that the amount had been received by the assessee by cheque and repaid by cheque. For that purpose, the assessee wanted to produce photostat copies of the cheques, a certificate from the bank to show that the loan was received by the assessee by cheque and a copy of the account of the assessee with the bank. The first appellate authority refused to admit such additional evidence. The Hon'ble Bombay High Court held that the case of the assessee does fall under the exception as per clause (c) of Rule 46A(1). Such additional evidence should have been allowed to be produced by the assessee and the same was to be considered by the first appellate authority.

Having perused the relevant materials placed on record, we are of the considered view that the case of the assessee in the present appeal falls under the exception as per clause (c) of Rule 46A(1). It has been held in *CIT v. Shree Kangra Steel Pvt. Ltd.* (2010) 320 ITR 691 (HP) that Rule 46A(3) provides that no evidence produced under Rule 46A(1) shall be taken into account unless the AO has been given a reasonable opportunity of examining the evidence or documents produced or permitted to cross-examine the witnesses examined or permitted to produce any evidence or document in rebuttal to the additional evidence produced by the appellant.

In view of the above reasons, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make a *de novo* order after examining the evidence or document to be produced by the assessee. We direct the assessee to file the relevant documents/evidence before the AO. Needless to say, the AO would give reasonable opportunity of being heard to the assessee before finalizing the order.

8. During the course of hearing, the Ld. counsel submits that the assessee does not press the 5<sup>th</sup> ground of appeal which is regarding denial of HRA exemption of Rs.3,82,232/- u/s 10(13A) of the Act. Having considered the above submission, we dismiss the 5<sup>th</sup> ground of appeal as not pressed.

9. In the result, the appeal is partly allowed.

**Order pronounced in the open Court on 30/08/2019.**

Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER

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

Mumbai;

Dated: 30/08/2019

*Rahul Sharma, Sr. P.S.*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary)  
**ITAT, Mumbai**