

IN THE INCOME TAX APPELLATE TRIBUNAL  
 DELHI BENCH "F", NEW DELHI  
 BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER  
 AND  
 SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA NO. 3519/DEL/2005	
A.Y. : 2001-02	
M/S SAMBHAV BUILDCON (P) LTD. C-13, D-1, MODEL TOWN, DELHI A-330, DERAWAL NAGAR, DELHI - 9 (PAN: AACCS2316Q)	Vs. ADDL, CIT-R-7, NEW DELHI
<b>(APPELLANT)</b>	<b>(RESPONDENT)</b>

ITA NO. 4805/DEL/2007	
A.Y. : 2001-02	
M/S SAMBHAV BUILDCON (P) LTD. C/o Rajeev Onkar Nath & Co. (CAS), 1107, Surya Kiran Building, KG Marg, New Delhi (PAN: AACCS2316Q)	Vs. ITO, WARD 7(2), NEW DELHI
<b>(APPELLANT)</b>	<b>(RESPONDENT)</b>

Assessee by : Sh. Vivek Bansal, Adv.  
 Department by : Sh. Surender Pal, Sr. DR.

**ORDER**

**PER H.S. SIDHU: JM**

These are the Appeals filed by the Assessee emanate out of separate Orders dated 18.7.2005 and 01.10.2007 passed by the Ld. Commissioner of Income Tax (Appeals)-X, New Delhi pertaining to quantum as well as penalty u/s. 271(1)© of the Act relevant for the Asstt. Year 2001-02. Since the issues involved in these appeals are inter-connected, hence, these are being disposed of by way of this common order. For the sake of convenience, we are dealing with Quantum Appeal

being ITA No. 3519/Del/2005 (A.Y. 2001-02) wherein, the following grounds have been raised:-

1. On the facts and in the circumstances of the case and in law the Ld. CIT(A) was incorrect and unjustified in confirming the addition of Rs. 21,26,190/- incorrectly and unjustifiably made by the AO.
2. On the facts and in the circumstances of the case and in law the Ld. CIT(A) was incorrect and unjustified in rejecting the explanation filed by the assessee regarding the expenditure of Rs. 21,26,190/-.
3. On the facts and in the circumstances of the case and in law the Ld. CIT(A) was incorrect and unjustified in applying the provision of section 292B.
4. On the facts and in the circumstances of the case and in law the Ld. CIT(A) was incorrect and unjustified in confirming the addition of Rs. 21,26,190/- made by the AO u/s. 68 of the Act, even though admittedly there was no books of accounts and hence section 68 would not be applicable.
5. On the facts and in the circumstances of the case and in law the authority below were incorrect and unjustified in making addition of Rs. 21,26,190/- u/s. 68 where as the provisions of section 68 are not applicable to the facts of the case.
6. On the facts and in the circumstances of the case the Ld. CIT(A) was incorrect and unjustified in not accepting the affidavit without recording the statement of the deponent and also without proving that the conduct of the affidavit were untrue.

2. The brief facts of the case are that the assessee filed its return of income of Rs. 15,993/- on 29.10.2001, after adjustment of brought forward loss of AY 1998-99, 1999-2000 and 2000-01 amounting to Rs. 4,190/-, Rs. 8,290/- and Rs. 23,513/- respectively. AO processed the return of the assessee u/s. 143(1) of the Income Tax Act, 1961 (In short "Act") at the returned income. Subsequently, the case of the assessee was selected for scrutiny and AO issued notice u/s. 143(2) of the I.T. Act dated 28.10.2012 and served upon the assessee company. Notices u/s. 143(2)/142(1) of the Act were issued to the assessee company. In

response to the same, the AR of the assessee appeared from time to time and filed the necessary evidences for substantiating the claim of the assessee. During the year under consideration, the assessee company was engaged in the business of construction of properties. The company was also doing sale and purchase of properties. From the perusal of the Profit and Loss Account for the year consideration, AO was of the view that Assessee has shown expenditure of Rs. 51,59,170/- on account of construction of expenses and in its balance sheet as shown Rs. 21,26,190/- as construction expenses payable. To verify the same, the AO has written a letter to 03 parties i.e. M/s Capricorn Marbles (P) Ltd.; M/s Kay Dee Enterprises and M/s Sanjay Building Material Suppliers. AO issued notices to these 03 parties u/s. 133(6) of the Act on 14.01.2004 requiring them to furnish the information as mentioned in the said letters on or before 21.01.2004. But these letters were received back unserved. AO again conducted enquiry through ITI from the Sales Tax Department in the case of M/s Kay Dee Enterprises which revealed that the name of M/s Sambhav Buildcon P. Ltd. did not appear in the list of sundry debtors/creditors, whereas the assessee company claimed that M/s Kay Dee Enterprises is its creditor, which is quite strange and surprising. These facts were confronted to the assessee and asked the assessee to explain why the sum of Rs. 27,26,190/- should not be added to its income as the onus lies on the assessee to prove the genuineness of the creditors and assessee is required to explain how the payments were made to these parties in the subsequent years and to file necessary evidences in support thereof. Assessee filed its written submissions before the AO with documentary evidences explaining the query of the AO by stating that assessee was not to be faulted by failure of M/s Kay Dee Enterprises for their commission to disclose sales to sale tax authorities, that the parties are no longer working at the places mentioned in their bills and after a lapse of more than 3 years it was difficult locating them that the amount of Rs. 21,26,190/- was paid in the next assessment year, that the books of accounts were lost and police report given and that the

entire building accounts are reflected in the bank statements. AO did not accept the contention of the assessee and in the absence of supported evidences, the AO proceeded to make the addition of Rs. 21,26,190/- u/s. 68 of the Act. No doubt that AO has made other additions, which are not before us, hence, the same are not discussed here for the sake of brevity. The AO completed the assessment at Rs. 78,89,493/- u/s. 144 of the Act vide order dated 19.3.2004. Aggrieved with the assessment order dated 18.7.2005, assessee appealed before the Ld. CIT(A), who vide his impugned order dated 18.7.2005 has partly allowed the appeal of the assessee wherein the Ld. CIT(A) has sustained the addition of Rs. 21,26,190/- u/s. 68 of the Act and also levied the penalty u/s. 271(1)(c) of the Act vide order dated 01.10.2007 on the addition in dispute and against the same the assessee is in appeal before the Tribunal, which depends upon the decision of the quantum appeal.

3. At the time of hearing Ld. Counsel for the assessee stated that assessee is a builder engaged in the business of construction and filed its return on 29-10-2001 declaring the income of Rs. 15,993/- after claiming brought forward losses in respect of A. Y. 1998-99 and 2000-01 amounting to Rs. 4,1901/-, Rs. 8,2901- Rs. 3,513/-. He further submitted that AO has completed the assessment u/s 144 of the Act vide order dated 19-03-2004. He further submitted that Assessee is required to explain about the current liabilities totaling to Rs. 21,26,190/- from the 03 companies for which the AO has issued notices to 03 parties mentioned in the facts of the case u/s. 133(6) of the Act and could not find response from those parties and in this manner the AO added the same amount as unexplained cash credit under the provisions of Section 68 of the I.T. Act. Ld. CIT(A) has also upheld the decision of the AO on the issue in dispute. For substantiating the claim of the assessee, Ld. Counsel for the assessee stated that the addition u/s. 68 of the Act could not be invoked to make the disallowance and for this propose the assessee also relied upon several decision referred to in order of Ld.

CIT(A) apart from contesting the addition on the ground that the same cannot be made u/s 68 of the Act. In support of his contention, he submitted that the said amount was paid to in the in the next assessment year and the same could not be paid during the year under consideration since the building was sold in the next assessment year. After receiving the payment of building sold, the payment was made and it was submitted that documentary proof is the books of the assessee which are audited and it shows that all these payments were made and the assessee also filed necessary evidence before the authorities below which was also accepted by the department in the next years for substantiating the claim of the assessee. Ld. Counsel for the assessee stated that the assessee has also filed the affidavit of Sh. Naresh Jain, Director of the assessee company. All these submissions of the assessee were forwarded to the AO for his comment. However, the AO adopted his earlier stand. Hence, he submitted that addition in dispute is not permissible u/s. 68 of the I.T. Act which should have been invoked u/s. 69C of the Act. He further submitted that applicability of section 69C of the Act in place of section 68 of the Act applied by the AO, enabling the provision of section 292B permits the authority to do so in view of the decision of the Hon'ble Delhi High Court in the case of Yadu Hari Dalmia vs. CIT (1980) 126 ITR 48 (Delhi). He further stated that unpaid purchase price could not be added to the income of the assessee as per the decision of the Hon'ble Delhi High Court in the case of CIT vs. Ritu Anurag Aggarwal (2010) 2 taxmann.com 134 (Delhi) and further submitted that when purchases were not doubted by the AO, therefore, the addition in dispute u/s. 68 of the Act is not permissible. As per the aforesaid decision, in the present case AO had not disallowed the purchases from those creditors and trading result were also not disturbed. In support of his contention, Ld. Counsel for the assessee also relied upon the case law of Pr. CIT vs. Kulwinder Singh (2017) 298 CTR 389 (Punjab & Haryana) wherein the Court has held that section 68 could not be invoked for the amount representing purchases made on credit. Lastly, Ld. Counsel for the

assessee stated that AO as well as Ld. CIT(A) has wrongly decided the issue in dispute against the assessee on the basis of the wrong facts and law. Therefore, the addition in dispute is liable to be cancelled and appeal filed by the Assessee should be accepted. As regard the levy of penalty, Ld. Counsel for the assessee stated that penalty is depending upon the decision of the quantum addition dealt in ITA No. 3519/Del/2005, if this Bench deleted the quantum addition in dispute by respectfully following the various Hon'ble High Courts, then the penalty in dispute may also be cancelled.

4. On the contrary, Ld. DR relied upon the orders of the authorities below and stated that the revenue authorities has passed a well reasoned order on the issue in dispute, because assessee could not produce any documentary evidence for substantiating the claim of the assessee. Therefore, the addition has rightly been upheld by the Ld. CIT(A, which does not need any interference and accordingly, request that the quantum appeal of the assessee may be dismissed.

5. We have heard both the parties and perused the records, especially the impugned order of the Ld. CIT(A) and the case laws cited before us. We find that assessee is a builder engaged in the business of construction and filed its return on 29-10-2001 declaring the income of Rs. 15,993/- after claiming brought forward losses in respect of A. Y. 1998-99 and 2000-01 amounting to Rs. 4,1901/- , Rs. 8,2901- Rs. 3,513/-. We further note that AO has completed the assessment u/s 144 of the Act vide order dated 19-03-2004. We further note that Assessee is required to explain about the current liabilities totaling to Rs. 21,26,190/- from the 03 companies for which the AO has issued notices to 03 parties mentioned in the facts of the case u/s. 133(6) of the Act and could not find response from those parties and in this manner the AO added the same amount as unexplained cash credit under the provisions of Section 68 of the I.T. Act. We note that Ld. CIT(A) has also upheld the decision of the AO on the issue in dispute. For substantiating the claim of the

assessee, we find considerable cogency in the contention of the Ld. Counsel for the assessee stated that the addition u/s. 68 of the Act could not be invoked to make the disallowance, because the said amount was paid to in the next assessment year and the same could not be paid during the year under consideration since the building was sold in the next assessment year. After receiving the payment of building sold, the payment was made and it was noted that the documentary proof is the books of the assessee which are audited and it shows that all these payments were made and the assessee also filed necessary evidence before the authorities below which was also accepted by the department in the next years for substantiating the claim of the assessee. We further note that the assessee has also filed the affidavit of Sh. Naresh Jain, Director of the assessee company. All these submissions of the assessee were forwarded to the AO for his comment. However, the AO adopted his earlier stand. Hence, the addition in dispute is not permissible u/s. 68 of the I.T. Act which should have been invoked u/s. 69C of the Act. We further note that the applicability of section 69C of the Act in place of section 68 of the Act applied by the AO, enabling the provision of section 292B permits the authority to do so in view of the decision of the Hon'ble Delhi High Court in the case of Yadu Hari Dalmia vs. CIT (1980) 126 ITR 48 (Delhi). The unpaid purchase price could not be added to the income of the assessee as per the decision of the Hon'ble Delhi High Court in the case of CIT vs. Ritu Anurag Aggarwal (2010) 2 taxmann.com 134 (Delhi). We are of the view that when purchases were not doubted by the AO, the addition in dispute u/s. 68 of the Act is not tenable. As per the aforesaid decision, in the present case AO had not disallowed the purchases from those creditors and trading result were also not disturbed. To support our aforesaid view, we draw support from the decision of the Hon'ble Punjab & Haryana High Court in the case of Pr. CIT vs. Kulwinder Singh (2017) 298 CTR 389 (Punjab & Haryana) wherein it has been held that section 68 of the Act could not be invoked for the amount representing purchases made on credit.

5.1 Keeping in view of the facts and circumstances of the case and respectfully following the precedents as aforesaid, we delete the addition sustained by the Ld. CIT(A) amounting to Rs. 21,26,190/- and allow the ground raised by the Assessee. In the result, this appeal is allowed.

**ITA No. 4805/Del/2007 (AY 2001-02)**

6. Since we have already allowed the issue in dispute raised in the quantum appeal, as aforesaid, therefore, the penalty levied by the AO and sustained by the Ld. CIT(A) on the quantum addition deserve to be deleted. Hence, the penalty in dispute is deleted. In the result, this appeal is also allowed.

7. In the result, both the Assessee's Appeals being ITA No. 3519/Del/2005 (AY 2001-02) and ITA No. 4805/Del/2007 (AY 2001-02) stand allowed.

Order pronounced on 15-10-2019.

**Sd/-**

**[O.P. KANT]  
ACCOUNTANT MEMBER**

*Date: 15/10/2019*

**"SRBHATNAGAR"  
Copy forwarded to: -**

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

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By Order,

Assistant Registrar, ITAT, Delhi Benches