

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

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

**ITA No. 879/MUM/2018  
Assessment Year: 2009-10**

Deputy Commissioner of  
Income Tax, Circle  
Central-6(2), Room No.  
1903, 19<sup>th</sup> floor, Air India  
Building, Nariman Point,  
Mumbai-400021.

**Appellant**

Vs. Shri Sarvajit Patel,  
Flat No. 1101, Uttung  
CHS Ltd., D.L., Vaidya  
Road, Dadar (W),  
Mumbai-28.

**PAN No. ALBPP6642B  
Respondent**

**C.O. No. 106/MUM/2019  
(ITA No. 879/MUM/2018)  
Assessment Year: 2009-10**

Shri Sarvajit Patel,  
Flat No. 1101, Uttung CHS  
Ltd., D.L., Vaidya Road,  
Dadar (W), Mumbai-28.

**PAN No. ALBPP6642B  
Appellant**

Vs. DCIT Circle Central-6(2),  
Room No. 1903, 19<sup>th</sup>  
floor, Air India Building,  
Nariman Point, Mumbai-  
400021.

**Respondent**

Revenue by : Ms. Vidisha Kalra, CIT(DR)  
Assessee by : Mr. Malav P. Sheth, AR

Date of Hearing : 06/08/2019  
Date of pronouncement : 28/10/2019

ORDER

PER N.K. PRADHAN, AM

The appeal filed by the Revenue and the Cross Objection(C.O.) by the assessee are directed against the order passed by the Commissioner of Income Tax (Appeals)-54, Mumbai [in short 'CIT(A)'] and arise out of the assessment u/s 143(3) r.w.s. of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the revenue read as under:

1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.61,50,000/- made u/s 68 of the Income Tax Act.
2. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has failed to appreciate the fact that the addition was made on the basis of parallel books maintained by the assessee.
3. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in admitting additional evidence in contravention of Rule 46A.

3. Briefly stated, the facts are that the assessee filed his return of income for the assessment year (AY) 2009-10 on 25.07.2009 declaring total income of Rs.15,51,248/-. The return of income was processed u/s 143(1) of the Act. On receipt of information from the Deputy Director of Income Tax (Inv.)-5(4), Mumbai (in short 'DDIT'), the Assessing Officer (AO) recorded reasons for reopening the assessment (*Ref. page 1 to 5 of the assessment order*) and then issued and served notice u/s 148 to the assessee.

The AO received information from the DDIT that during the course of search and seizure action carried out by the department in Ahuja group

and their associate concerns on 25.06.2015, the statement of Shri Jagdish Bhagwandas Ahuja, Director and Promoter of M/s Ahuja group was recorded on 28.06.2015 and 07.07.2015. In the said statement Shri Ahuja had admitted the transactions which were found in loose papers and pen drives had not been entered in the regular books of accounts. As per the report of the DDIT, Shri Ahuja had transactions with Shri Sarvajit D. Patel (the assessee) and his father Shri Dilip Patel. The transactions are that Shri Dilip Patel received two cheques of Rs.10 lacs and Rs.25 lacs favouring Shri Sarvajit D. Patel on 05.07.2008 and 01.10.2008 respectively from Ahuja Group. Subsequently, on 24.11.2008, Rs.25 lacs has been paid back *vide* cheque by Shri Dilip Patel. Out of the amount of Rs.25 lacs, Rs.23.5 lacs was issued by Shri Dilip Patel (HUF) and Rs.1.50 lacs by Shri Sarvajit Patel. On the basis of the above information, the AO issued notice u/s 148 of the Act.

The following concluding para of the reasons recorded by the AO would address the present issue

“7. Accordingly, the transactions for FY 2008-09 in respect of Shri Sarvajit D. Patel maintained in the unaccounted parallel books in tally accounting software / package maintained by Directors and Promoters of M/s. Ahuja Group reveals On Money/cash sale, accommodation entries, cash loan receipts and miscellaneous cash receipts as under:-

Date	Dr / CR	Particulars	Narration	Debit	Credit
05.07.2008	Cr	Entry A/c.	Dilip bipin patel cheque for 10L issued fvg Sarvajit Patel from the account of ahuja properties and associates	1000000	

01.10.2008	Cr.	Entry A/c.	Dilip bipin patel cheque for 25L issued fug Sarvajit Patel from the account of ahuja properties and associates	2500000	
24.11.2008	Dr	Entry A/c	Dilip bipin patel cheque reed back fvg P&L 23.5L from Dilip Patel HUF, 1.5L from Sarvajeet D. Patel		2500000
			<b>Total</b>	<b>3500000</b>	<b>2500000</b>

8. Out of the above amount of Rs.2500000/-, Rs.150000/- is cash given to Shri Sarvajit D. Patel, which is received back in the form of accommodation entry in the Ahuja Group, and to protect the interest of revenue, this cash receipt should be added in the hands of Sarvajit D. Patel as unaccounted cash income in the relevant A.Y. 2009-10. Further, the amount of Rs.3500000/- in the form of cheques issued to Sarvajit Patel and cash is given to M/s. Ahuja Properties And Associates. The source of this cash component of Rs.35,00,000/- is not explained and is to be added as unaccounted income in the case of Shri Sarvajit D. Patel for the relevant period, over and above its regular source of income.

In view of the above I have reason to believe that an income of Rs.61,50,000/- has escaped assessment in the hands of Shri Sarvajit D. Patel." Hence I propose to reopen the assessment u/s 147 of the I.T. Act by issuing notice u/s 148 of the I.T. Act."

3.1 In response to the query raised by the AO during the reassessment proceedings, the assessee filed a reply dated 30.06.2016 stating (i) the notings mentioned that cash loan of Rs.4,600/- 4600, 4500 and Rs.5,308/- is received by the assessee and it does not refer to interest receipt, (ii) if loan is received by the assessee from that group, the source has to be explained by them and it does not become assessee's unaccounted income, (iii) in the statements recorded by that group, nowhere the Director of that group has ever referred to the name of the assessee in particular and has not referred to any direct nexus with him, (iv) the

presumption is drawn as if all the transactions recorded in the Tally data of that group refers to only the accommodation entries and the assessee is a part of it ; that merely on surmises and presumptions and without any direct nexus, the view is taken against the assessee, (v) there is no entry before the said noting indicating payment of cash loan by the assessee and in absence of cash loan being given by the assessee, question of receipt of loan interest is merely a presumption.

However, the AO was not convinced with the above explanation of the assessee for the reason that as per the statement given by Shri Jagdish Bhagwandas Ahuja, Director/Promoter of Ahuja group, cash was paid to the assessee against cheque which were recorded in the parallel books of accounts and the assessee had received cash of Rs.26,50,000/- and that assessee had made unexplained expenditure from the cash received from the Ahuja group which were not recorded in the books of accounts and simultaneously, the assessee latter paid Ahuja group in cash a sum of Rs.35,00,000/- in lieu of the cheque returned by the group.

With the above observations, the AO made an addition of Rs.61,50,000/- u/s 68 of the Act.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that *vide* order dated 20.11.2017, the Ld. CIT(A) observed that (i) as per the table mentioned in the reasons recorded by the AO, the assessee has received Rs.10 lacs on 05.07.2008 and Rs.25 lacs on 01.10.2008 by cheques ; according to the DDIT these are the entries found in the parallel books maintained by Ahuja group but nowhere it is mentioned that cash has changed hands, (ii) the assessee has repaid Rs.25 lacs out of the said amount

of Rs.35 lacs on 24.11.2008 and out of the said amount of Rs.25 lacs which has been repaid Rs.23.50 lacs was a cheque issued by Shri Dilip Patel (HUF) and Rs.1.50 lacs from Shri Sarvajit Patel ; again there is no mention of any cash, (iii) DDIT has presumed that out of the amount of Rs.25 lacs, Rs.1.50 lacs is the cash given by Shri Sarvajit Patel which is received back in the form of accommodation entry in the Ahuja Group ; there is absolutely no basis for making such a presumption, (iv) the assessee is showing repayment of Rs.25 lacs by cheques and the DDIT is saying that Rs.1.50 lacs is the cash given to Shri Sarvajit Patel which is received back in the form of accommodation entry; if that be the case, there would be cheque receipt of Rs.1.50 lacs in the Ahuja group but neither the DDIT nor the AO has brought out this fact, if it is true.

Observing as above the Ld. CIT(A) concluded that instead of investigating and trying to prove, the AO has completely distorted the facts and made an addition of Rs.61,50,000/- merely on the basis of presumptions and wrong assumptions. Relying on the judgement of the Hon'ble Supreme Court in the case of *Umacharan Shaw and Bros v. CIT* (1959) 37 ITR 271 (SC), wherein it is held that conclusion as a result of suspicion, surmises and conjectures cannot take place of proof, the Ld. CIT(A) deleted the addition of Rs.61,50,000/- made by the AO u/s 68 of the Act.

5. Before us, the Ld. Departmental Representative (DR) relies on the order of the AO, whereas the Ld. counsel for the assessee supports the order passed by the CIT(A).

6. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

We find that the Ld. CIT(A) has not admitted any additional evidence in contravention to rule 46A of the Income tax Rules, 1962.

It is well settled that in order to discharge the onus u/s 68 of the Act, the assessee must prove the following:

- (i) the identity of the creditor,
- (ii) the capacity of the creditor to advance money; and
- (iii) the genuineness of transaction.

After the assessee has adduced evidence to establish *prima facie* the aforesaid, the onus shifts to the Department as held in *Shankar Ind v. CIT* 114 ITR 689; *Prakash Textile v. CIT* 121 ITR 890; *CIT v. United* 187 ITR 596; *Rajshree v. CIT* 256 ITR 331; *Ashokpal v. CIT* 220 ITR 452, 454; *CIT v. Metachem* 245 ITR 160; *CIT v. Shree Gopal* 204 ITR 285; *MOD Creations P. Ltd. v. ITO* 354 ITR 282.

In the instant case, the AO has not done even preliminary inquiry to disprove the contentions of the assessee.

The AO has failed to disprove the contention of the assessee that (i) the loan taken from Ahuja Group and repaid are genuine and reflected in its books of accounts and there is no cash receipt or cash withdrawal, (ii) Shri Ahuja had nowhere in the statement admitted to having given any accommodation entry to the assessee, (iii) even if Shri Ahuja maintained parallel books, it is of no concern to the assessee who had reflected the loan transactions in his books of accounts, (iv) if it is presumed that Rs.35 lacs given to the assessee by Ahuja group is an accommodation entry and

out of this Rs.25 lacs has been repaid, there is no sense of making an addition of an entry amounting to Rs.61,50,000/-, which is Rs.1.50 lacs more than the amount of loan given and repaid.

Though the onus shifted to the AO, he failed to disprove the contentions of the assessee. Therefore, in view of the above factual scenario and position of law, we uphold the order of the Ld. CIT(A).

7. In the result, the appeal filed by the revenue is dismissed.

8. In the cross-objection filed by the assessee there is a delay of 20 days. Having considered the reasons for delay in filing the cross-objection, we condone the delay of 20 days.

In the cross-objection, the assessee has challenged the order of the Ld. CIT(A) affirming the action of the AO to reopen the case by issuing notice u/s 147 to be valid.

As mentioned earlier, the assessee filed his return of income for the AY 2009-10 on 25.07.2009 declaring total income of Rs.15,51,248/-. The said return was processed u/s 143(1) of the Act on 12.09.2010. Thereafter, the AO reopened the assessment by issuing notice u/s. 148 dated 30.03.2016.

In the case of *ACIT v. Rajesh Jhaveri Stock Brokers P. Ltd.* 291 ITR 500, it is held by the Hon'ble Supreme Court that intimation u/s 143(1)(a) is not an assessment and the notice u/s 148 of the Act was validly issued.

In view of the above position of law, the cross-objection filed by the assessee is dismissed.

9. To sum up, the appeal filed by the revenue and the cross-objection filed by the assessee are dismissed.

**Order pronounced in the open Court on 28.10.2019**

Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER

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

Mumbai;

Dated: 28/10/2019

*S. Samanta. P.S. (On tour)*

**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,

(Assistant Registrar)  
**ITAT, Mumbai**