

आयकरअपीलीयअधिकरण, सुरतन्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT
BEFORE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A No.1212/AHD/2015

निर्धारणवर्ष/Assessment Year: 2010-11

Ms. Shilpa Mayank Parikh, A-2, Atithi Bungalow, Revaba Town Ship, Bharuch-392001 [PAN: AESPP 7558 L]	Vs.	Income Tax Officer, Ward-1, Bharuch
अपीलार्थी / Appellant		प्रत्यर्थी/Respondent

निर्धारितीकीओरसे /Assessee by	Shri Shailesh J. Shah, CA
राजस्वकीओरसे /Revenue by	Smt. Anupama Singhla, Sr. DR

सुनवाईकीतारीख/ Date of hearing:	05.12.2019
उद्घोषणाकीतारीख/Pronouncement on:	06.12.2019

आदेश /O R D E R

PER O.P.MEENA, AM:

1. This appeal filed by the Assessee is directed against the order of Ld. Commissioner of Income Tax (Appeals)-3, Bharuch [in short "CIT(A)"] dated 04-03-2015 for the assessment year 2010-11.
2. Ground no. 1 & 2 states that the ld. CIT(A) has erred both in law and on the facts of the case in confirming an addition of Rs.4,96,500/- holding it as unexplained credits u/s. 69 of the Act, whereas the addition made by the AO was u/s.68 which is contrary to the facts and circumstances of the case.
3. Ground No. 3 & 4 are without prejudice to above ground which states that the assessee is explained with documentary evidence that the

ingredients of section 69 of the Act, hence the addition made of Rs.4,96,500/- by the AO u/s.68 as confirmed by the CIT(A) u/s.69 requires to be deleted holding that it is genuine bonafide and supported by documentary evidence.

4. Since, the above 3 to 5 grounds are inter-connected, hence same are being considered together.

5. Brief facts are that the assessee is an individual deriving income from House Property, Capital Gain and income from other sources. The assessee filed her return of income on 02-11-2010 declaring total income of Rs.6,29,275/-. The AO found that the assessee has taken loan from seven parties amounting to Rs.4,96,500/-. The reason for making addition of Rs.4,96,500/- u/s. 68 of the Act have been discussed in detail in the Para 3 to 10 of the assessment order. There was deposit of cash in an equal amount in the account of lender before giving deposit to the assessee. This fact raises a doubt about the genuineness of the transactions, therefore the assessee was asked to produce them for examination. However, the assessee could produce only three parties, out of these three parties two parties have admitted in their statement before the AO, that the father of the assessee, had given them cash for depositing in the account before the issue of cheque. The third party could not explain the source of the cash deposit and thus its creditworthiness could not be established. From the evidence submitted by the appellant, creditworthiness of remaining four lenders could not be

proved to the satisfaction of the AO. Accordingly, the AO added the amount of Rs.4,96,500/- u/s.68 of the Act.

6. Being aggrieved, the assessee carried the matter before the Id. CIT(A). Wherein, detail explanation was furnished which has been reproduced by the CIT(A) in his order from Para 4.1 of the appellate order. However, the CIT(A) observed that the deposit of Rs.49,000/- each which is taken from Ms. Seema A. Patel and Harshad D. Patel, is sustained as they have admitted in their statements before the AO that cash for deposit in the bank account was given by the husband of the assessee Shri Mayankbhai Parikh. Further, deposit of Rs.49,000/- was taken from Smt. Jyoti B. Gandhi was also confirmed as she could not explain the source of cash deposit in her bank account. So far remaining four lenders i.e. Shri Ashiwin Patel (Rs.1,00,000), Shri Indrajit P. Gohel (Rs.1,00,000), Shri Kamlesh R. Baxi (Rs.49,500) and Mitesh B. Patel (Rs.1,00,000), also there was cash deposit of equal amount immediately before the issue of deposit cheque to the assessee. Therefore, the CIT(A) was the opinion that creditworthiness of these persons has not been established. Therefore, addition of deposits amounting Rs.4,96,500/- was confirmed u/s.69 of the Act because amounts have been deposited in the bank account of the appellant and the appellant is not maintaining any books of account. Thus, the contention of the appellant in respect of addition being made u/s.68 of the Act was accepted. Accordingly, these grounds of appeal were partly allowed.

7. Being aggrieved, the assessee filed this appeal before this Tribunal. At the outset, the ld. counsel referred the finding recorded by the CIT(A) that the ld. CIT(A) has accepted the contentions of the assessee that addition u/s.68 could not be made as the assessee is not maintaining books of account and accordingly change to the section 69 and confirmed the addition accordingly. The ld. counsel contended that if the case falls u/s.68 of the Act, the onus on the assessee to adduce evidence that the credit in the accounts which genuine. Whereas, in the case addition u/s.69, the onus is on the revenue to show that the payments had been made outside books of account as held by the Tribunal in the case of Bafakyh Export House v. ITO (1995) 53 TTJ 293 (Cochin Trib.). Since, the onus has not been discharged by the revenue, therefore addition sustained u/s.69 of the Act needs to be deleted. Further, for invoking of section 69 of the Act, the AO or CIT(A) first come to the finding that the assessee has made investment which is not recorded in the books of account and thereafter called for explanation from the assessee about the nature and source of investment and if he find that no such explanation is furnished by the assessee or the explanation is not satisfactory, he can treat the value of investment as the income of the assessee. However, in the present case the ld. CIT(A) has not established that the assessee has made investment which are not recorded in the books of account. Since, the assessee has taken loan from the parties which cannot be treated as investment made by the assessee, therefore invocation of the Section 69 of the Act is not in

accordance with the law. The ld. counsel supported this view by placing reliance in the case of Aurobindo Sanitary Stores v. CIT [ITA No. 13 of 2002] dated 31-01-2005 of Orissa High Court. The ld. counsel further place reliance in the case of ABT Limited v. ACIT [2013] 56 SOT 42 (Chennai Trib.), wherein it was held that:

"The assessee was able to produce documents and the details of re-payment made through cheque. Even the bank confirmations were filed by the assessee before the CIT(A) showing that the cheques issued by the assessee were encashed by the respective parties. The assessee had also furnished identity of persons with complete details of addresses and the FD applications showing details. After satisfying himself with the documents, the CIT(A) has allowed the ground of appeal of the assessee. The DR could not controvert the findings of the CIT(A) on this issue. We, therefore, do not see any reason to interfere with the findings of the CIT(A) on this issue. No other issue has been raised in this appeal of the Revenue. Since both the issues are decided against the Revenue, the appeal of the Revenue for the assessment year 2008-09 is dismissed being devoid of merit".

8. The ld. counsel further submitted that the CIT(A) that the AO was made addition u/s.68 as unexplained cash credit, further the CIT(A) modified the order and uphold the addition u/s.69 of the Act. Therefore, it was incumbent upon the CIT(A) who should give proper notice and verification to the assessee regarding the intention to modify this section under which the addition was proposed. Reliance was place on the decision of the case of Liayakat Ibrahim Shaikh v. ITO [2018], TaxPub(DT) 1469 (Mum-Trib.). The ld. counsel further place reliance on the decision of Hon'ble Supreme Court in the case of Andaman Timber Industries [2015] 281 CTR 241 (SC) to contend that the assessee was not allowed to cross-examination of the lenders, hence the addition made by the AO is not sustainable. The ld. counsel further filed a chart giving details which was also filed before the lower authorities in which the aforesaid loans

have been repaid to the concern debtors by cheque from the bank account of the assessee. Therefore, when the assessee has repaid the loans to the debtors the addition sustained u/s.69 of the Act is not tenable, as held by the Co-ordinate Bench of Tribunal in the case of ABT Limited v. ACIT in Para 16 as under:-

"The second ground of appeal of the Revenue is with regard to addition made under section 68 of the Act on account of unexplained cash credit. A perusal of para 13 of the order of the CIT(A) shows that during the course of appellate proceedings, the assessee was able to produce documents and the details of repayment made through cheque. Even the bank confirmations were filed by the assessee before the CIT(A) showing that the cheques issued by the assessee were encashed by the respective parties. The assessee had also furnished identity of persons with complete details of addresses and the FD applications showing details. After satisfying himself with the documents, the CIT(A) has allowed the ground of appeal of the assessee. The DR could not controvert the findings of the CIT(A) on this issue. We, therefore, do not see any reason to interfere with the findings of the CIT(A) on this issue. No other issue has been raised in this appeal of the Revenue. Since both the issues are decided against the Revenue, the appeal of the Revenue for the assessment year 2008-09 is dismissed being devoid of merit."

9. The ld. counsel further placing reliance on the decision in Rohini Builders v. DCIT [2002] 76 TTJ 521 [in ITA No. 3860/AHD/1992 A.Y. 1989-90], wherein it was held that the confirmations of bank accounts /PAN No. filed by the assessee before the AO. The assessee has discharged the initial onus which lays one in terms of section 68 by providing the identity of the creditors by giving their complete addressees, GIR Numbers/Permanent Account Numbers which can be made to the assessment order, whereas rightly follow the order of AO is not sustainable.

10. *Per contra*, the ld. Sr. Departmental Representative (DR) relying on the order of lower authorities and submitted that the assessee was not

able to produce the four parties and the two persons admitted in their statements that cash was given by the husband of the assessee to them for depositing of cash cheques. However, the Id. Sr. DR could not controvert the argument that how the section 69 is applicable in the case of the assessee.

11. We have heard the rival submissions and perused the relevant material available on record. We find that the AO has made addition u/s.68 of the Act, whereas held that the addition u/s.68 cannot be made, and therefore contention of the assessee is correct. However, the CIT(A) has changed the addition to section 69 of the Act, but without giving a finding that the assessee has made any investments. The onus lies on the Revenue to establish that the assessee has made investment which has not been recorded in the books of account as held by Hon'ble Orissa High Court in the case of Aurobindo Sanitary Stores v. CIT (supra). We, further, find that the CIT(A) has modified the order as uphold the addition u/s.69A of the Act without giving proper opportunity of being heard to the assessee. However, it was incumbent upon the CIT(A) who should give proper notice and opportunity to the assessee regarding the intention to modify the section under which the addition was proposed, therefore having not done so, the decision of Id. CIT(A) for invoking of section 69 is not sustainable in law. We find that the onus was on the revenue to establish that payments had been made outside the books of account. This view is supported by the decision of Cochin Tribunal in the case of Bafakyh Export House (supra). Further, the Id. counsel has placed

reliance on the decision of Hon'ble Supreme Court in the case of Andaman Timber Industries v. CCE [2015] 281 CTR 42, wherein it was held that not allowing the assessee to cross-examination witnesses by taxing authority, though subsequent of those statements were made basis of the impugned order amounts to a serious flaw which makes impugned order nullity in as much as it amounted to violation of principles of natural justice. Though the CIT(A) by not allowing opportunity to the assessee cross-examination as violated the principles of natural justice. We further observe that the addition is not sustainable u/s.69 of the Act. We further observed that the assessee has repaid all the loans to the lenders in the subsequent year through cheque which has been appeared in their bank account also therefore when the assessee has repaid the loans by cheques which has in cash to the respective parties, and the assessee has furnished complete details and address, and thus the assessee has discharged the onus u/s.68 of the Act, hence addition is not sustainable in law. In support of this view, the reliance is placed on the decision of Co-ordinate Bench of Chennai Tribunal in the case of ABT Limited v. ACIT [2013] 56 SOT 42 (Chennai. Trib), wherein para 16 in the Tribunal held as under:-

"The second ground of appeal of the Revenue is with regard to addition made under section 68 of the Act on account of unexplained cash credit. A perusal of para 13 of the order of the CIT(A) shows that during the course of appellate proceedings, the assessee was able to produce documents and the details of repayment made through cheque. Even the bank confirmations were filed by the assessee before the CIT(A) showing that the cheques issued by the assessee were encashed by the respective parties. The assessee had also furnished identity of persons with complete details of addresses and the FD applications showing details. After satisfying himself with the documents, the CIT(A) has allowed the ground of appeal of the assessee. The DR could not controvert the

findings of the CIT(A) on this issue. We, therefore, do not see any reason to interfere with the findings of the CIT(A) on this issue. No other issue has been raised in this appeal of the Revenue. Since both the issues are decided against the Revenue, the appeal of the Revenue for the assessment year 2008-09 is dismissed being devoid of merit."

12. In the light of above discussion, the addition sustained by the ld. CIT(A), by u/s.69 is not found sustainable in the law. Accordingly, the same is directed to be deleted. Accordingly, these grounds of appeals are allowed.

13. In the result, the appeal of the assessee is allowed.

14. Order pronounced in the open court on 06.12.2019.

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Sd/-
(O.P.MEENA)
ACCOUNTANT MEMBER

सुरत/ Surat, दिनांक Dated: 6th December, 2019/S. Samanta, PS
Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

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By order
Assistant Registrar, Surat