IN THE INCOME TAX APPELLATE TRIBUNAL
AMNRITSAR BENCH, AMRITSAR
BEFORE SHRI N.K. CHOUDHRY, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A No.195/ASR/2018
निर्धारणवर्ष/A.Y.:2011-12

Dr. Harprit Singh, C/o M/s. Orthonova Hospital, Near Nari Niketan, Nakoddar Road, Jalandhar(PB) PAN: ACMPS 7237 F	Vs.	Deputy Commissioner of Income-Tax, Central Circle -II, Jalandhar (PB)
अपीलार्थीAppellant		प्रत्यर्थी/Respondent

निर्धारितीकीओरसे /Assessee by	Shri Surinder Mahajan, CA
राजस्वकीओरसे /Revenue by	Shri Alok Kumar, CIT (D.R.)

सुनवाईकीतारीख/ Date of hearing:	16.12.2019
उद्घोषणाकीतारीख/Pronouncement on:	19.12.2019

आदेश /O R D E R

PER O. P. MEENA, ACCOUTANT MEMBER:

1. This appeal by the Assessee is directed against the order of learned Commissioner of Income tax (Appeals)-1, Jalandhar (in short “the CIT (A)”) dated 31.01.2018 pertaining to Assessment Year 2011-12, which in turn has arisen from the assessment order passed under section 143 (3)/147 dtd. 13.01.2016 of Income Tax Act,1961 (in short ‘the Act’) by the Deputy Commissioner of Income-Tax, Central Circle-II, Jalandhar (in short “the AO”).

2. **Grounds 1 to 4 are against the confirmation of addition of Rs.33,71,720 made on account of cash deposits in saving bank account and Rs. 12,528 being interest inspite of the facts to the AO**

has framed assessment by applying different possibilities and there is no specific charge against the assessee. The addition was made under section 68 of the Act. However, same was sustained by the CIT (A) under section 69 of the Act on the ground that investment are not recorded in books of accounts. Since the change of section, amounts to enhancement without giving opportunity of being heard the assessee, hence, no sustainable in law.

3. Since above grounds of appeal related to addition of Rs. 33,71,720 being cash deposits in saving bank account and interest thereon of Rs.12,528 , hence, same are being considered together.

4. Succinctly, facts as culled out from the orders of lower authorities are that the assessee has filed return of income on 29.03.2012 declaring total income of Rs. 46,57,850. The assessment was reopened u/s.147 and notice under section 148 of the Act was issued and served on 31.03.2015 on the ground that the assessee could not explain the cash deposits in his saving bank account with Axis Bank in reply to notice under section 133(6) issued to him. The said bank account was opened on 03.02.2011 in which cash of Rs.33,71,720 was deposited during the period from 03.02.2011 to 15.03.2011. The assessee has also earned interest of Rs.12,528 on the said amount. The assessee vide letter dated 05.10.2015 explained that bank account is recorded in the books of accounts of M/s. Orthonovo Joint & Trauma Hospital Pvt. Ltd. It was submitted that cash has been

deposited out of cash in hand of the company M/s. Orthonovo Joint & Trauma Hospital Pvt. Ltd.a company in which the assessee and his wife Smt. Jasleen Kaur are majority shares holder. The said company had regular current account with Capital Local Area Bank, which was duly reflected in its balance sheet. The AO has observed that the perusal of cashbook of the company showed regular cash in hand because of cash receipts and itis deposited in the current account every second or third day. Therefore, the assessee was asked to show cause as to why cash deposits in his personal bank account should not be treated as unexplained. The assessee has explained thathe was advised by his Astrologer to insert his name in the bank account of the company. He approached his banker but they refused. Therefore, he opened the bank account in his own name to deposit cash in said bank account. The assessee is also stated that the saving bank account was incorporated in the books of the company and the cash was withdrawn in the month of March. However, the AO observed that the balance sheet of the company does not reflect this bank account as on 31. 03. 2011. The interest earned on the cash deposits was Rs.12,528 has also not been reflected in the return of income either of the assessee or in the company. Therefore, the AO observed that the explanation of the assessee is cooked up and he is unable to explain as to why the account claim to belonging to the company has not been reflected in its books of accounts. In view of these facts, the AO treated the said

amount as unexplained cash credit under section 68 of the Act. Without prejudice to the above, the AO further observed that if at any stage in the appellate proceedings, the higher judicial authorities, hold that the cash deposits as explained, and cash is actually belongs to the company, then the payment to be examined in the light of provisions of section 2(22)(e) of the Act as deemed dividend in the hands of the assessee. The AO further observed that the assessee is a director and shareholder with the substantial shareholding in the company at 50%. Therefore, the money has been given for the benefit to the assessee for his individual benefit. There is no business purpose. In view of such advance clearly falls within the purview of provisions of section 2(22)(e) of the Act. In view of these facts, the AO also taxed the same amount as deemed dividend in the hands of the assessee.

5. Being, aggrieved, the assessee filed an appeal before the Ld. CIT (A). The assessee has reiterated the same submissions as made before the AO. It was argued that said account was reopened due to astrological reasons. The addition made under section 68was challenged on the ground that section 68 is not attracted as saving bank account Paper Book is not books of accounts of the assessee but are books of the bank. It was further submitted that and is made on presumption and assumption. It was further submitted that it was not the case of the AO that company was not having cash in hand to

justify the deposit made in the saving bank account of the assessee. However, the Ld. CIT(A) has upheld the observation of the AO has the plea of the assessee that the bank account was opened on the basis of astrological advice is highly illogical and cannot be accepted. Further, the said saving bank account of the assessee was neither incorporated in the balance sheet of the company nor the same were declared by the assessee while filing return of income in his individual case. The AO has invoked section 68 by making addition on account of undisclosed cash deposit made into bank account of the assessee. Since the passbook maintained by the bank is not a books of accounts of the assessee. Therefore, the Ld. CIT(A) observed that the cash deposit in the bank account is upheld under section 69 of the Act. It was further submitted by the assessee that after having made an addition of Rs.33, 71, 720 as cash credit under section 68 of the Act. The AO without prejudice to the assessment made by him propounded alternating theories considering the possibilities of higher judicial authorities. Such as an exercise by the AO is of no consequence. Nor it is within his powers to pre-empt the decision of the higher judicial authorities. Therefore, the CIT (A) has dismissed such observation made by the AO regarding possibility of invoking provisions of section 2(22)(e) or section 269SS or 271D and 271E.

6. Being, aggrieved the assessee filed this appeal before the Tribunal. Learned counsel submits that the addition is made on

presumption and assumption. It was not the case of the AO that company was not having cash in hand to justify the deposit made in the saving bank account of the assessee. Further, the CIT (A) has changed the addition to section 69 of the Act without giving show-cause notice to the assessee. The CIT (A) has though not accepted the plea of the assessee that the bank account was opened on the basis of astrological advice, but has accepted that the passbook maintained by the bank is not a book of account of the assessee. Therefore, the Ld. CIT(A) confirmed the addition under section 69 of the Act without giving due opportunity of being heard to the assessee. This act of the ld. CIT(A) amounts enhancement of income, without giving any opportunity of hearing, which made the addition, confirmed as illegal and bad in law. Further, section 68 and section 69 are operates in different fields. Therefore, the addition confirmed is illegal. The assessment is made by applying different possibilities and there is no specific charge against the assessee.The learned counsel for the assessee submitted that section 68 could not be attracted in the case of the assessee in the light of decision of ITAT Amritsar in the case of Sanjeev Kumar v. ITO Ward 6(3) Pathankot [I.T.A.No. 445 to 449/ASR/2015-dated 17.06.2016, copy placed on record. The learned counsel for the assessee further, relied in the case of PCIT V. Bhaichand H Gandhi [1983] 141 ITR 67 (Bombay) in support of contention that no addition under section 68 can be made when no

books of accounts are maintained. The learned counsel for the assessee contended that the AO has observed that when the company was having regular current account then why the assessee has opened saving bank account in his name to make deposit out of cash in hand of company. The learned counsel for the assessee relying on the decision CIT v. Dalmia Cement (Bharat) Ltd. [2002] 254 ITR 377 (Delhi) submitted that the AO cannot guide as to how the business should be conducted by the assessee. The assessee has opened a bank account in which cash deposits were made out of cash in hand with the company. The AO has not pointed out that cash deposits are not out of cash in hand of the company, no discrepancies have been pointed out by the AO.The learned counsel for the assessee placed reliance in the case of Girish Bansal & Anr v. UOI [2016] 384 ITR 161 (Delhi) wherein it was held when the cash deposits are taxed under section 68 it cannot be taxed under section 69 of the Act nor can be brought to tax as deemed dividend u/s. 2(22)(e) of the Act.In the light of above submission, the learned Counsel submitted, the CIT (A) was not justified in sustaining the addition, when the AO was not certain under which head the addition should be made. Therefore, same may be quashed.

7. *Per contra,* learned CIT(D.R.) submitted decision in Kalayan Kumar Ray v. CIT [1991] 191 ITR 634 (SC) was given in the context of quantification of tax and interest thereon. In said case, the AO had not quantified interest chargeable to tax and made part of assessment

order. Therefore, the Hon`ble Supreme Court held that has advised Department to incorporate such interest calculation in ITNS 65 form,Therefore, such decision is distinguishable on facts hence, not applicable to the assessee. It was further, submitted that as per section 292B of the Act the CIT (A) can rechristened the head of income. Therefore, substitution of section 69 in place of section 68 is well within the powers of the CIT (A). Further, the AO has rightly applied provisions of section 2(22) (e) of the Act.

8. In rejoinder to above, the learned counsel for the assessee submitted that referring para 5.6 and 5.7 of assessment order that it is not the case of the AOcash deposits does not relate to company or and there was no cash in hand of the company. The learned counsel for the assessee further relied on the decision of Co-ordinate Bench of Delhi Tribunal in the case of Vinesh Maheswari v. ITO Ward 61(3) New Delhi [I.T.A.No. 7210/Del/2018 dated 01.03.2019 in applying the ratio of various decision of Hon`ble High Court and Hon`ble Supreme Court it was held that change in section 68 to 69 was held to be sans and addition sustained by the CIT (A) was held to be incorrect and reversed.

9. We have heard the rival submissions and perused the relevant material on record. We find that it is not the case of the AO that cash deposits in saving bank account with Axis Bank has been not made out of cash in hand balance available with M/s. Orthonovo Joint & Trauma

Hospital Pvt. Ltd. in which the assessee was director. We find that the cash book of the company is reflecting day to day cash receipts, out of said cash balance, the cash deposits were made in the impugned bank account. This view is also supported by the facts that the AO has without prejudice, also observed that the addition should be considered u/s. 2(22)(e) of the Act as the assessee has received cash loan from the company in which he had substantial interest and shareholding.The learned counsel for the assessee placed reliance in the case of Girish Bansal &Anr v. UOI [2016] 384 ITR 161 (Delhi) wherein it was held as under:

> *"Examined in the light of the legal position explained in the above decisions, the Court is of the view that as far as the present case is concerned, the sum of Rs.20 lakhs received by the Assessee was in the context of the cancellation of the sale certificate and the sale deed executed in their favour in relation to an immovable property and neither the Assessee was dealing in immovable property as part of his business.While it could, if at all be said to be in the nature of capital receipt, what is relevant for the present case is that the Revenue has been unable to make out a case for treating the said receipt as of causal and non-recurring nature that could be brought to tax under Section 10 (3) read with section 56 of the Act.*
>
> *In the light of the clear enunciation of the law in the aforementioned decisions of the Court, it is plain that as far as the present case is concerned, the AO was in error in proceedings on the basis that a sum of Rs. 20 0, 00,000 received*

by the Assessee was in the nature of a casual and non-recurring receipt which can be brought tax under section 10 (3) of the Act. Having held that it could not in the nature of capital gain, it was not open to the Revenue to seek to bring it a tax under the revenue receipt. There can be no manner of doubt that what is in the nature of capital receipt, cannot be brought to tax by resorting to Section 10 (3) read with section 56 of the Act." Therefore, Learned Counsel argued that when the cash deposits are taxed under section 68 it cannot be taxed under section 69 of the Act nor can be brought to tax as deemed dividend u/s. 2(22)(e) of the Act.

10. In the light of ratio laid down in above decision we hold that the CIT (A) was not justified in sustaining the addition, when the AO was not certain under which head the addition should be made. This means to the AO was some what agreed that cash deposits in said bank account are out of cash in hand available with the said company. However, the AO did accept that the bank opened in pertained to M/s. Orthonovo Joint & Trauma Hospital Pvt. Ltd. On careful consideration of facts, we are of the view that cash deposits in bank account are out of cash in hand belonging to M/s. Orthonovo Joint & Trauma Hospital Pvt. Ltd. hence, source of cash deposits are duly explained and same pertained to the company as as the source of cash deposits are from cash in hand of the impugned company.in such circumstances, we are of the view that the AO was not justified in making addition without bringing on record to establish that there was no cash in hand balance

was available with said company. Therefore, having not done so the AO cannot added the sum belonging to company. Therefore, we hold that the addition made by the AO and sustained by the CIT (A) by invoking section 69 is not tenable in law, hence, same is deleted. Accordingly, appeal of the assessee is allowed.

11. In the result, the appeal of the assessee stands allowed.

12. The order pronounced in the open Court on 19.12.2019.

Sd/-	Sd/-
(N.K.CHOUDHRY)	**(O.P.MEENA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Amritsar: Dated: December 19, 2019/opm
Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/ Guard file of ITAT.

By order

Assistant Registrar