

THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD "B" BENCH  
(Conducted Through Virtual Court)  
**Before: Shri P.M. Jagtap, Vice President**  
**And Shri Siddhartha Nautiyal, Judicial Member**

**ITA No. 103/Ahd/2019**  
**Assessment Year 2015-16**

Narendra Chandubhai Rafaliya, H-2, Panchshilp Residency, Nr. Aditya Complex, Opp. Shreedhar Bungalows, Nikol, Ahmedabad-382350 PAN: AKVPR7628E (Appellant)	Vs	The ITO, Ward-3(3)(8), Ahmedabad (Respondent)
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**Assessee by: Shri ParimalSinh Parmar, A.R.**  
**Revenue by: Shri R.R. Makwana, Sr. D.R.**

Date of hearing : 16-03-2022  
Date of pronouncement : 15-06-2022

**आदेश/ORDER**

**PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-**

This is an appeal filed by the assessee against the order of the Id. Commissioner of Income Tax (Appeals)-3, Ahmedabad in Appeal no. CIT(A)-3/ITO, Ward-3(3)(8)/344/17-18 vide order dated 26/11/2018 passed for the assessment year 2015-16.

2. The assessee has taken the following grounds of appeal:

*“1. The learned CIT(A) has erred in law and on facts in confirming the addition made by the AO to the extent of Rs.47,35,070/- as unexplained cash credits u/s.68 of the Act.*

*2. The learned CIT(A) has erred in law and on facts in not appreciating that once profit element from job work income being Rs. 3, 33,630/- is accepted, the entire receipts of Rs.40,40,890/- are explained and liable to be deleted u/s.68 of the Act.*

*3. Alternatively and without prejudice, CIT(A) has erred in not granting benefit of telescoping or peak credit theory.*

*4. The learned CIT(A) has erred both in law and on the facts of the case in dismissing ground relating to initiation of penalty u/s. 271B of the Act as infructuous.*

*5. Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.*

*6. The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id. AO in levying interest u/s.234A/B/C of the Act.*

*7. The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id. AO in initiating penalty u/s.271(l)(c) of the Act.*

*8. The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.*

*Total tax effect* *Rs.14,20,521/-*

3. Further, the assessee has also taken their below additional grounds of appeal before us for the first time:

*“The appellant, through oversight, could not raise in the original appeal memo, the following legal ground of appeal and therefore, appellant now craves leave to raise this additional ground of appeal before this Hon'ble ITAT. This, being a legal ground, can be raised before this Hon'ble the ITAT as per decision of Hon'ble Supreme Court in the case of "National Thermal Power - 229 ITR 383".*

*1. Alternatively and without prejudice, both the lower authorities have erred in not allowing set off of loss from derivative transactions of Rs.24,79,180/-against the income declared by the assessee.*

*Appellant craves leave to add, amend, alter, change, delete and edit the above ground of appeal before or at the time of the hearing of the appeal.”*

**Grounds 1 to 3: additions under section 68 of the Act:**

4. The brief facts of the case are that the assessee is an individual engaged in the business of carrying out job of work of power coating. For the year under consideration, the assessee filed return of income under section 44AD of the Income Tax Act, 1961 (Act) on presumptive basis and declared net income of ₹ 3,33,630/-. The Ld. Assessing Officer noticed that the assessee had made cash deposits on various dates in his bank account held with “Bank of India” aggregating to ₹ 63,58,700/-and accordingly, the AO required the assessee to explain the same. The assessee submitted that

the above deposits made in bank account were duly explained and cash deposits were made out of cash withdrawal from his bank amounting to ₹ 12,90,000/-, ₹ 40,40,890/- was sourced out of receipts of job work in respect of which the assessee had filed return of income u/s 44AD on presumptive basis and ₹ 12,50,700/- was out of unsecured loans obtained from various parties. The assessee also submitted that he had filed return of income under section 44AD for previous two years as well and he is not required to maintain books of account of such business. The above plea of the assessee was rejected by the AO on the ground that the appellant has not proved that he is carrying out job work business with evidences and hence the submission of the assessee that cash deposits around of such job work income was not accepted by the AO. As regarding the submission of the assessee that he received loan of ₹ 12,50,700/- from various depositors (65 in number and all the deposits were less than ₹ 20,000/-) and for which he has filed confirmation letters and copies of identity proof, the Ld. Assessing Officer rejected the assessee's submission on the ground that the assessee has not submitted bank account, copy of return of the said depositors and held that these loans are bogus loans and creditworthiness of depositors along the genuineness of the transactions are not proved. The AO also rejected the claim of the assessee regarding use of cash withdrawal for subsequent cash deposit and made total addition under section 68 of the Act amounting to ₹ 63,58,700/- being the total amount of cash deposits made in the bank account held by the assessee.

5. In appeal, Ld. CIT(Appeals) give partial relief to the assessee and restricted addition under section 44AD of the Act to ₹ 37,07,260/- (₹

40,40,890/- less ₹ 3,33,630/- offered as income under section 44AD in the return of income) and also accepted the assessee's contention that cash withdrawals from bank for ₹ 12,90,000/- were used for making cash deposit. Accordingly, the Ld. CIT(Appeals) restricted the addition to ₹ 47,35,070/- (₹ 63,58,700 - ₹ 3,33,630 - ₹ 12,90,000/-).

6. Before us, the counsel for the assessee primarily reiterated the submissions made before the lower authorities. He submitted that the fact of business is being carried out by the assessee is not disputed. He submitted that the assessee has been declaring his return of income under presumptive basis under section 44 AD of the Act for the previous 2 years as well and during the year under consideration as is evident from page 3 of the assessment order that the total job work receipts amounted to ₹ 49,54,738/-. Out of the above receipts of ₹ 49,54,738/-, a sum of ₹ 9,13,848/- was received by way of cheque (which was duly accepted by the Department) and a sum of ₹ 40,40,890/- was received in cash (and the same is disputed by the Department). The counsel for the assessee submitted that following the principles of consistency, AO was not justified in taking contrary stand for "job work receipts in cash" during the year under consideration. The counsel placed reliance on various decisions on the principles of consistency in tax proceedings. Regarding the contention of the revenue that the assessee has not been able to establish that the receipts were from job work carried for various customers, the counsel for the assessee submitted that the assessee does not have any regular customers and this activity is carried on by the assessee akin to 'retail trading activity' where it is not possible to maintain record of various customers. The counsel further

submitted that once the total receipts have been offered for taxation u/s. 44AD of the Act on presumption basis, addition of such sum cannot be again made under section 68 of the Act as it would amount to double taxation. The counsel for the assessee further submitted that insofar as cash deposits of ₹ 12,57,700/- out of unsecured loans was concerned, the assessee has filed confirmations along with identity proof of lenders as is evident from page 4 of the assessment order. Therefore, source of cash deposits of ₹ 12,57,700/- stands duly substantiated. In response, the Ld. DR placed reliance on the observations made by the Ld. Assessing Officer and Ld. CIT(Appeals) in their respective orders.

7. We have heard the rival contentions and perused the material on record. We note that during the year under consideration, the assessee has declared job work receipts of ₹ 49,54,738/- and offered taxable income of ₹ 3,33,630/- on presumptive basis under section 44AD of the Act. The assessee has been consistently following the above practice in the previous two assessment years as well. During the course of assessment, we note that the Ld. Assessing Officer has not challenged the veracity of the above figures declared in the return of income and has not disturbed the above figure of total receipts declared by the assessee from job work activity while concluding the assessment. However, for the purpose of making addition under section 68 of the Act, the Ld. Assessing Officer has held that the assessee has not been able to prove that he is actually carrying out job work activity since details of persons to whom services are provided and other details etc. have not been satisfactorily explained.

7.1 In the case of **Dinesh kumar Verma v. ITO (ITA NO. 1183/MUM/2019 A.Y.2014-15)**, the Mumbai ITAT has held that the provisions of section 68 cannot be invoked where the assessee has filed return of income under the provisions of section 44AD of the Act without maintaining books of account. The ITAT made the following observations:

*As has been observed earlier that addition under section 68 can be made only if any sum is found credited in the books maintained by the assessee for any previous year and the assessee fails to offer valid explanation for credit of such sum in the books or explanation offered is rejected by the Assessing Officer. In other words maintenance of books by the assessee is sine-qua non for making addition u/s 68 of the Act. Since section 44AD does not obligates the assessee to maintain books, the provisions of section 68 cannot be invoked where the assessee has filed return of income under the provisions of section 44AD of the Act without maintaining books of account.*

7.2 In the case of **Smt. Madhu Raitani v. ACIT [2011] 10 taxmann.com 206 (Gauhati) (TM)**, it was held that existence of books of account maintained by assessee is a condition precedent for making addition under section 68 – The ITAT further held that where assessee had not maintained books of account, there was no legal scope to invoke provisions of section 68 and as such, addition made on such premise was to be deleted. In this case, the ITAT made the following observations:

*Admittedly, the assessee maintained no books of account and that was why the Assessing Officer in his assessment order had also written against the method of account as 'No A/cs'. It is an established position that existence of books of account maintained by the assessee is a condition precedent for addition under section 68. In the case of the assessee, no such books having been maintained, there was no legal scope to invoke provisions of section 68 and as such, the Judicial Member had rightly deleted the addition made on such premise.*

*It is pertinent to mention here that bank pass book, profit & loss account and balance sheet cannot be considered as books of account. The Bombay High Court in the case of **CIT v. Bhaichand H. Gandhi [1983] 141 ITR 67/[1982] 11 Taxman 59** has considered this issue, wherein it has been held that the pass book supplied by the bank to its constituent is only a copy of the constituent's account in the books maintained by the bank. It is not as if the pass book is maintained by the bank as the agent of the constituent nor can it be said that the pass book is maintained by the bank under the instructions of the constituent. It was in this context that the Bombay High Court held that the pass book supplied by the bank to the assessee cannot be regarded as the books of the assessee. [Para 16]*

7.3 In the case of **Mehul V. Vyas v. ITO [2017] 80 taxmann.com 311 (Mumbai - Trib.)**, ITAT held that where assessee was not maintaining any account books, bank statement could not be construed to be a books of

account maintained by her; merely on basis of information that assessee made a 'cash deposit' in her saving bank account, no addition could be made as unexplained cash credit.

7.4 The Co-ordinate Bench of the Tribunal in the case of **Shri Kokarre Prabhakara vs. ITO ITA 1239/Bang/2019**, held that where the returns are filed on the basis of income declared under section 44AD of the Act, there cannot be any application of section 68 of the Act.

7.5 The Cochin ITAT in the case of **Thomas Eapen v ITO [2020] 113 taxmann.com 268 (Cochin - Trib.)** held that where assessee, a small trader in medicine falling under section 44AD, offered income on presumptive taxation basis, provision of section 69A could not be applied to make addition in respect of undisclosed cash credits found in assessee's bank account.

7.6 The Chandigarh Tribunal in the case of **Nand Lal Popli v DCIT [2016] 71 taxmann.com 246 (Chandigarh - Trib.)**, held that where profit declared by assessee under presumptive taxation as provided under section 44AD was accepted, Assessing Officer could not make separate addition by invoking provisions of section 69C of the Act. The facts of this case were that assessee was a civil contractor. He had declared its profits under section 44AD at the rate of 8 per cent against the gross receipts. During assessment proceedings, the assessee explained that he had made payments from the bank account on various dates which were not reflected in the cash flow statement. Since no documentary evidence was filed to prove that those

payments were towards contract work, the Assessing Officer made addition of said amount to assessee's income under section 69C of the Act. The Commissioner (Appeals) confirmed said addition. While deciding the issue in favour of the assessee, the Tribunal held as below:

*Since the scheme of presumptive taxation has been formed in order to avoid the long drawn process of assessment in cases of small traders or in cases of those businesses where the incomes are almost of static quantum of all the businesses, the Assessing Officer could have made the addition under section 69C, once he had carved out the case out of the glitches of the provisions of section 44AD. No such exercise has been done by the Assessing Officer in this case.*

7.8 The High Court of Punjab and Haryana in the case of **CIT v Surinder Pal Anand**[ 2010] 192 Taxman 264 (Punjab & Haryana), held that once under special provision of section 44AD of the Act, exemption from maintenance of books of account has been provided and presumptive tax at rate of 8 per cent of gross receipt itself is basis for determining taxable income, assessee is not under any obligation to explain individual entry of cash deposit in bank unless such entry has no nexus with gross receipts.

7.9 Also, the Bombay High Court in the case of **CIT v Bhaichand N. Gandhi** [1982] 11 Taxman 59 (Bom.), has held that the pass book supplied by the bank to the assessee cannot be regarded as a book maintained by the assessee or under his instructions. Accordingly, the Tribunal is justified in holding that a cash credit for the previous year shown in the assessee's bank

pass book issued to him by the bank but not shown in the cash book maintained by him for that year, does not fall within the ambit of section 68 of the Act.

8. In view of the above rulings as applied to the assessee's set of facts, we are of the considered view that once the Ld. Assessing Officer has accepted the assessee's figure of receipts from job work declared in the return of income on the basis of which return has been filed by the assessee on presumptive basis under section 44AD of the Act, then the Ld. Assessing Officer is precluded from making separate additions u/s 68 of the Act to the returned income on the basis that the assessee has not been able to prove the fact of carrying out job work activity in absence of adequate supporting documents etc. without disturbing the figure declared by the assessee offered as job work receipts. Further, as regards cash deposits of ₹ 12,57,700/- the assessee has filed confirmations along with identity proofs of lenders and the same has not been disputed by the assessing officer (refer page 4 of the assessment order). Accordingly, considering the fact that deposits by each of the individual lenders were less than ₹ 20,000 coupled with the fact that the assessee has been able to establish their identity, we are of the view that source of cash deposits of ₹ 12,57,700/- also stands substantiated. Accordingly, ground number 1 to 3 of the assessee's appeal are allowed.

**9. Grounds for 4 to 8** of the assessee's appeal are general / consequential in nature and do not require any specific adjudication.

**Additional grounds of appeal:**

10. Additional ground of appeal filed by the assessee relates to set off of loss from derivative transactions of ₹ 24,79,180/- against income declared by the assessee in the return of income. The assessee has submitted that both the quantification and genuineness of the aforesaid loss from derivative transactions are not in dispute. However, the assessee, due to oversight could not claim the above loss either before the Ld. Assessing Officer or the Ld. CIT(Appeals) and has relied on various judicial precedents in support of his contention that “additional claim” can be raised at any stage before “appellate authorities”. We are in agreement with the contention of the assessee that a legally valid claim can be made by the assessee even before the appellate authorities. Therefore, in the interests of justice, we are restoring the matter to the file of the AO only in respect of the additional grounds of appeal in respect of claim of set off of loss incurred in “derivative transactions” against income declared in the return of income filed by the assessee, with a direction to verify the claim of the assessee in respect of this ground, since the revenue authorities did not have any opportunity to verify the aforesaid claim of the assessee at any prior stage. In the result, the additional ground of appeal of the assessee is allowed for statistical purposes.

11. In the combined result, the assessee’s appeal is allowed.

Order pronounced in the open court on 15-06-2022

**Sd/-**  
**(P.M. JAGTAP)**  
**VICE PRESIDENT**

**Sd/-**  
**(SIDDHARTHA NAUTIYAL)**  
**JUDICIAL MEMBER**

**Ahmedabad : Dated 15/06/2022**

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
अहमदाबाद