

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC" NEW DELHI**

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

आ.अ.सं./I.T.A No.410/Del/2022

निर्धारणवर्ष/Assessment Year: 2010-11

Mehar Singh, WZ-34, Nangli Jalib, B1, Janakpuri, Delhi.	बनाम Vs.	ITO Ward 67(4) Delhi.
PAN No. AALPS2143K		
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारितकीओरसे /Assessee by	Shri Suresh Kumar Gupta, CA
राजस्वकीओरसे /Revenue by	Shri Om Prakash, Sr. DR

सुनवाईकीतारीख/ Date of hearing:	17.10.2022
उद्घोषणाकीतारीख/Pronouncement on	11.01.2023

आदेश /O R D E R

This appeal is filed by the assessee against the order of Id. Commissioner of Income Tax (Appeals)-21, New Delhi dated 29.07.2019 for the assessment year 2010-11 with a delay of 883 days and the assessee has filed petition for condonation of delay alongwith affidavit explaining the reasons for delay as under: -

Affidavit

"I, Mehar Singh S/o Late Sh. Chhajju Ram R/o WZ-34, Nangli Jalib, B1, Janakpuri, New Delhi-110058 do hereby declare under solemn affirmation as under:

- 1. That I am assessed to Income Tax Vide PAN: AALPS2143K (hereinafter referred to as "Appellant")*
- 2. That the present appeal is against the order passed u/s 250 of IT Act by Ld CIT(A)-21, New Delhi vide order dt: 29.07.2019. The present appeal based on the above*

order, is required to be filed on or before 28.09.2019. But the same is filed today and there is delay of 883 days in filling the present appeal.

3. *That the income tax matters of the appellant including the assessment/appeal had been handled by our late counsel Sh Ajay Kumar Sharma, CA who had before the authorities below which is evident from the assessment order and the Ld CIT(A) order.*
4. *That the order of Ld CIT (A) had been served upon the above counsel who had expired on 30.12.2021 and the appellant was not aware of the passing of the above order by Ld.CIT(A).*
5. *That now, the department has served a show cause notice dt: 16.02.2022 for imposition of penalty u/s 271(1)(c) of IT Act. On receiving above notice, a new counsel namely Sh Suresh K Gupta, CA was approached who on accessing the Income Tax E-Proceeding portal found that the order dt: 29.07.2019 has been passed in appellant's case;*
6. *That the present appeal is immediately filed after downloading the order from the e-proceeding portal.*
7. *That a separate application for condonation of delay is being submitted to the registrar ITAT, New Delhi based on above grounds.*

*Sd/-
Deponent*

Verification

I, the above deponent do hereby verify that my above declaration is true to the best of my knowledge and belief.

*Sd/-
Deponent"*

2. The Ld. Counsel for the assessee explained the reason for the delay in filing the appeal stating as under:

Note on the condonation of delay in filing the present appeal:

"The delay in filing the present appeal is of 883 days and the reason for delay is explained in the separate application dt:

25.02.2022 filed with the Form 36 duly supported with the Affidavit of the appellant.

The reason for delay had been that the assessee appellant had been aware of the passing of the impugned order dt: 29.07.2019 as the same had not been served on the appellant personally by the Department. The appellant came to be aware of the passing of the impugned order by Ld. CIT(A) when a Show Cause Notice dt: 16.02.2022 was issued u/s 271 (1)(c) of the IT Act. The appellant did not have the services of legal counsel for the reason that his old counsel Shri Ajay Kumar Sharma, CA, had expired on 30.12.2021. Copy of the death certificate is already submitted with condonation application. The assessee feels that the order of Ld. CIT(A) must have been collected by his deceased counsel for the reason that this order has not been served upon him.

The appellant on receipt of Show Cause Notice dt: 16.02.2022 immediately approached new counsel CA Suresh K Gupta for legal assistance in the matter who advised him to file the present appeal before Hon'ble ITAT, against the order Ld. CIT(A) when he found from e-proceedings portal of the department that CIT(A) dt: 29.07.2019 had been uploaded on the above portal.

During the present appeal proceedings, on the direction of the Hon'ble Bench on 29.06.2022, to the Ld. Sr. DR to verify the reason for condonation, the Ld. Sr. DR on 23.08.2022 submitted letter dt: 18.08.2022 from the office of CIT(A) that the impugned order was duly dispatched vide speed post on 07.08.2019 on the address of the appellant. To support the above fact portion of the dispatch register is enclosed therewith. From perusal of the entries in the dispatch register, the contention of the assessee that the order has not been served upon him gets strengthened. The reason is that the dispatch register shows dispatch of the CIT(A) order on incorrect address. While dispatching the appeal order, the PIN Code of the assessee is mentioned as 110007 instead of the correct PIN Code No. 110058, the PIN Code No. appearing on assessment order, demand notice and also the impugned CIT(A) Order. It is because of the PIN Code not correctly mentioned, the service could not take place at the address of the appellant. The department has not filed any other evidence to show that the speed post has been sent on the correct PIN Code and the evidence in the form of dispatch register does not prove that the order has been dispatched to the correct address of the appellant.

Having regard to forgoing facts, it is prayed that the delay in filing the present appeal is because of the sufficient cause beyond control of the appellant and therefore the delay involved be kindly condoned u/s 253(5) of the IT Act.”

3. On careful examination of the facts as narrated by the assessee, it is observed that the show-cause notice for levy of penalty u/s 271(1)(c) of the Act was issued on 11.02.2022 which was said to have been served upon the assessee on 16.02.2022. Assessee also furnished death certificate of his erstwhile Counsel who expired on 30.12.2021 and these evidences goes to show that the assessee was prevented with reasonable cause in delay in filing the appeal before the Tribunal. In the interest of justice, the delay is condoned and the appeal is admitted.

4. On merits, the only issue in the appeal of the assessee is against the addition made u/s 68 of the Act in respect of money deposited in bank account. The assessee in his appeal raised the following grounds: -

1. *“The impugned assessment is invalid and without jurisdiction as the said assessment is completed without complying with legal requirements of the provisions of section 147/148/151 of the Income Tax Act therefore such assessment is void ab initio and liable to be quashed.*
2. *The Ld. CIT(A) has erred both in law and in facts of the case in upholding the addition of Rs.14,05,820/- u/s 68 of the IT Act ignoring the fact that the appellant is an individual and not required to maintain books of account and, therefore, under such circumstances no addition can be made u/s 68 of the IT Act.*
3. *The Ld. CIT(A) has erred both in law and in facts of the case in upholding the addition of Rs.14,05,820/- u/s 68 of the Act ignoring the fact that the appellant has duly explained the source of cash deposits. Therefore, the addition made u/s 68 need to be deleted.”*

5. The Ld. Counsel for the assessee, at the outset, submits that ground no. 1 of grounds of appeal is not pressed. In view of the submissions of the ld. Counsel, ground no. 1 is dismissed as not pressed.

6. Coming to ground no. 2, the ld. Counsel for the assessee submits that the assessee was employed with Oriental Bank of Commerce and was deriving income from salary and other sources during the previous year relevant to the assessment year under consideration. The Ld. Counsel submits that the assessee was having a meager income of Rs.6,110/- under the head "Income from other sources" apart from salary income and, therefore, since assessee had no income assessable as business income, was not required to maintain books of account. The Ld. Counsel submits that in the absence of any books of account being maintained and being not required under the provisions of Section 44AA of the Act the Assessing Officer was not correct in making addition u/s 68 of the Act treating the sale realization of shares as credits appearing in books of account. Ld. Counsel submits that the Assessing Officer erred in invoking the provisions of Section 68 of the Act in the absence of books of account. The Ld. Counsel contends that the assessee was not maintaining books of account and in the absence of any credit entry in the books the bank passbook/statement does not constitute books of account and, therefore, no addition can be made u/s 68 of the Act in the absence of any credit entry in the books.

7. The Ld. Counsel further submits that the definition of “books or books of account” has been defined in Section 2(12A) of the Act and the definition of the books under the Act is inclusive. The Ld. Counsel submits that a perusal of the definition shows that the same does not include bank pass book or bank statement. Therefore, the Ld. Counsel submits that a conjoint reading of provisions would lead to the conclusion that the addition u/s 68 of the Act can be made only where any amount is found credited in the books as defined u/s 2(12A) of the Act maintained by the assessee. Reliance was placed on the following decisions in support of the above proposition: -

- (1) *“CIT vs. Bhaichand N. Gandhi 141 ITR 67 (Bom.)*
- (2) *Anand Ram Raitani vs CIT 223 ITR 544 (Gau);*
- (3) *Madhu Raitani vs. ACIT, 10 taxmann.com 206 (Guwahati) (TM)*
- (4) *Manasi Mahendra Pitkar vs. ITO 160 ITD 605 (Mumbai - Trib.)*
- (5) *Kokarre Prabhakara vs. ITO, ITA 1239/Bang/2019 DoD 11 11/09/2020*
- (6) *Dinesh Kumar Verma vs ITO ITA No.1183/Mum/2019 dt: 28.12.2020*
- (7) *Smt Babbal Bhatia vs ITO ITA No.5430/Del/2011 dt: 08.06.2018”*

8. Ld. DR strongly placed reliance on the orders of the authorities below. Ld. DR also placed reliance on the decision of Delhi Bench in the case of Shri Janak Goyal vs. DCIT in ITA No. 937 & 938/Del/2012 dated

13.05.2019 wherein it has been held that bank passbook constitute books of account under section 2(12A) of the Act.

9. Heard rival submissions, perused the orders of the authorities below and the decision relied upon. The issue to be decided with respect to ground no. 2 of grounds of appeal of the assessee is whether there can be any addition u/s 68 of the Act in the absence of books of account maintained by the assessee and not required to maintain under the provisions of the Act. Assessee is a bank employee deriving income from salary and income from other sources. Assessee made cash deposits of Rs.18,05,820/- in his savings bank account in Oriental Bank of Commerce. Assessee filed return of income on 28.07.2010 declaring income of Rs.3,67,670/-. Subsequently the assessment was reopened u/s 147 of the Act and the reassessment was completed on 26.12.2017 u/s 143(3) read with 147 of the Act determining the income of the assessee at Rs.17,73,490/-. The assessee was required to explain the cash deposits of Rs.18,05,820/- made in his bank account in the course of reassessment proceedings. The assessee explained that the source of cash deposits has been the withdrawals from the bank accounts and whenever the transaction of purchase of small pieces of land was not materialized the cash was re-deposited. The Assessing Officer treated transaction of Rs.4 lakhs which was withdrawn and deposited by the assessee as explained source out of Rs.18,05,820/- and the remaining Rs.14,05,820/- was brought to tax as an unexplained cash deposit. The question now to be

decided is as to whether there can be any addition u/s 68 of the Act in the absence of books of account maintained by the assessee under the provisions of the Act.

10. The coordinate bench of the Tribunal in the case of Smt. Babbal Bhatia vs. ITO in ITA No.5430 & 5432/2011 dated 08.06.2018 considering the decision of the Hon'ble Supreme Court in the case of Baladin Ram vs. CIT (1969) [7 ITR 427] and the decision of the Hon'ble Jurisdictional High Court of Delhi in the case of CIT vs. Ms. Mayawati [338 ITR 563] held that a credit in the bank account of the assessee cannot constitute as a credit in the books of the assessee for the reason that the bank account of the assessee cannot be held to be books of the assessee. It was, therefore, held that since no books of account are maintained in the ordinary course of business of the assessee no addition u/s 68 of the Act is tenable. The Tribunal while holding so observed as under: -

“17. In the case of Baladin Ram Vs. CIT [1969] 7 ITR 427, the Hon'ble Supreme Court has held as under:

“4. In Baladin Ram v. CIT [1969] 71 ITR 427, it has been held by the Supreme Court that it is now well settled that the only possible way in which income from an undisclosed source can be assessed or reassessed is to make the assessment on the basis that the previous year for such an income would be the ordinary financial year. Even under the provisions embodied in s. 68 of the said Act, it is only when any amount is found credited in the books of the amount so credited may be charged to tax as the income of that previous year, if the assessee offers no explanation or the explanation offered by him is not satisfactory.

5. As the Tribunal has pointed out, it is fairly well settled that when moneys are deposited in a bank, the

relationship that is constituted between the banker and the customer is one of debtor and creditor and not of trustee and beneficiary. Applying this principle, 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. In view of this, the Tribunal was, with respect, justified in holding that the pass book supplied by the bank to the assessee in the present case could not be regarded as a book of the assessee, that is, a book maintained by the assessee or under his instructions. In our view, the Tribunal was justified in the conclusions at which it arrived."

18. *The Hon'ble jurisdictional High Court of Delhi in the case of CIT Vs. Ms. Mayawati reported in 338 ITR 563 [DEL] has held as under:*

"As the ITAT has come to the conclusion that Section 68 has no applicability to the facts of the present case as the assessee is not maintaining any books of accounts. If that be so Section 68 does not apply in this case for the simple reason cheque received from Mr.Pankaj Jain has been deposited in her bank account in this regard. The ITAT was of the opinion that balance sheet/statement of the affairs cannot be equated to books of account because a pass book of the bank cannot be treated as a book of account of the assessee because this is proved by the banker, which is given to its customer and is only a copy of the customer's account in the books maintained by the bank. The bank does not act as an agent of the customer nor can it be said that the banker maintains the pass book under instructions of the customer (assessee) the relationship between the banker and customer is one of the debtor and creditor only. Therefore, a cash credit appearing in assessee's pass book relevant to a particular previous year, in a case where the assessee does not maintain books of account, does not attract the provisions of Section 68.

19. *All the aforementioned decisions reveal that an addition u/s 68 of the Act can only be made where any sum is credited in the books of the assessee maintained for any previous year.*

Thus, the very sine qua non for making of an addition u/s 68 of the Act presupposes a credit of the amount in the books of the assessee. We are not being oblivious of the settled position of law that the statutory provision has to be strictly construed and interpreted as per its plain literal interpretation and no word howsoever meaningful it may so appear can be allowed to be read into a statutory provision in the garb of giving effect to the underlying intent of the legislature. The scope and gamut of the aforesaid statutory provision is to be construed by according a plain meaning to the language used in section 68. We are of the considered view that a credit in the bank account of an assessee cannot be construed as a 'credit' in the books of the assessee for the very reason that the bank account of an assessee cannot be held to be 'books' of the assessee. The account of the assessee in the books of the bank is different from the books of the assessee.

20. *Our view is fortified by the judgment of the Hon'ble High Court of Bombay in the case of Bhaichand N Gandhi 141 ITR 67 wherein the Hon'ble High Court has held as under:*

"As the Tribunal has pointed out, it is fairly well settled that when moneys are deposited in a bank, the relationship that is constituted between the banker and the customer is one of debtor and creditor and not of trustee and beneficiary. Applying this principle, 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. In view of this, the Tribunal was, with respect, justified in holding that the pass book supplied by the bank to the assessee in the present case could not be regarded as a book of the assessee, that is, a book maintained by the assessee or under his instructions. In our view, the Tribunal was justified in the conclusions at which it arrived."

21. *In the case of Anandram Ratiani, the Hon'ble Guwahati High Court has also held that a perusal of section 68 of the Act shows that in relation to expression "books" the emphasis is on the word 'Assessee' meaning thereby that such books*

have to be books of the assessee himself and not of any other assessee.

22. It is correct that since no books of account are maintained in the ordinary course of business of the assessee, no such addition u/s 68 of the Act is tenable.

23. Coming to the decisions relied upon by the Id. DR, the first relates to the Special Bench of the Delhi Tribunal in the case of Manoj Aggarwal [supra] which was pronounced on 25.07.2008. As mentioned elsewhere, the judgment of the Hon'ble Delhi High Court in the case of Ms/ Mayawati [supra] is dated 03.08.2011 which means that the judgment of the Hon'ble jurisdictional High Court was not available before the Special Bench. Reliance was also placed on the judgment of the Hon'ble High Court of Bombay in the case of Arun Kumar J. Muchhala [supra], but we find that in that case the assessee took the plea for the first time before the Hon'ble court that he has not maintained books of account and, therefore, those amounts cannot be considered u/s 68 of the Act. Whereas in the case in hand, the undisputed fact is that the assessee had made it very clear in the returns of income that she is not maintaining books of account and yet the Assessing Officer proceeded to make assessment by invoking provisions of section 68 of the Act.

24. The Id. DR has also relied upon the decision of the coordinate bench in the case of Renu Aggarwal [supra] which has been affirmed by the Hon'ble High Court of Allahabad. But we find that the facts of this case are clearly distinguishable from the facts of the case in hand in as much as in that case the assessee was maintained books of account of her proprietorship concern and claimed to have received the gifts in her individual bank account and the bench was of the view that the deposits so made was utilized in the regular business of the assessee for which the assessee has maintained regular books of account.

25. As discussed hereinabove, there are decisions in favour of the assessee and there are decisions in favour of the Revenue. But, as mentioned elsewhere, the Hon'ble jurisdictional High Court of Delhi in the case of Ms. Mayawati [supra] has decided similar issue in favour of the assessee and we are governed by the Hon'ble jurisdictional High Court of Delhi. Accordingly, respectfully following the same, we allow the additional ground of appeal so raised by the assessee and direct the

Assessing Officer to delete the additions so made u/s 68 of the Act in the respective assessment years which are under appeal before us.

26. Since we have directed for deletion of addition on the point of law, we do not find it necessary to dwell into the merits of the additions. Appeals filed by the assessee are accordingly allowed.”

11. The decision relied on by the Ld. DR in the case of Shri Janak Goyal vs. DCIT (supra) is no more good law as it was overruled by the Jurisdictional High Court in the case of CIT vs. M/s Mayawati (supra) and, therefore, cannot be applied to the case on hand. The decision in the case of Smt. Babbal Bhatia vs. ITO is applicable to the case on hand. Respectfully following the decision of the Jurisdictional High Court in the case of CIT vs. Mayawati (supra). AO is directed to delete the addition made u/s 68 of the Act. Ground no. 2 of grounds of appeal is allowed. Since the appeal of the assessee is allowed on point of law and not going into the merits of the addition u/s 68 of the Act. As it is only an academic exercise at this stage.

12. In the result, appeal of the assessee is allowed as indicated above.

Order pronounced in the open court on 11/01/2023

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Dated: 11.01.2023

**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard
file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi