



**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES, DELHI**

**BEFORE HON'BLE VICE PRESIDENT, SHRI. SAKTIJIT DEY
[THIRD MEMBER]**

ITA No.1428/DEL/2021
Assessment Year:2017-18

JMK Exports, Shop No. 103A, Building No. 2117-2118, Bank Street, Karol Bagh, New Delhi 110005	v.	The ACIT, Central Circle-1, Delhi
TAN/PAN:AAKFJ 3011 G		
(Appellant)		(Respondent)

Appellant by:	Shri Gautam Jain, Adv. Shri Lalit Mohan, CA Shri Parth Singhal, Adv.
Respondent by:	Shri Puneet Rai, Standing Counsel Shri Ashvini Kumar, Junior Standing Counsel
Date of hearing:	17 01 2024
Date of pronouncement:	26 03 2024

ORDER

As a result of difference in opinion between learned Members constituting the bench which heard the appeal, the Hon'ble President, ITAT has referred the following questions of difference proposed by the learned Members for the decision of the Third Member.

2. The questions referred by the Id. Accountant Member, are as under:

1. *Whether on the facts and circumstances of the case the Id. CIT(A) erred in confirming the addition made by the Assessing Officer on account of alleged bogus sales.*

2. *Whether on the facts and in the circumstances of the case the Id. CIT(A) has failed to appreciate that once sales are duly recorded in the books of account and have been made out of stock available in the books of account, then both logically and legally, such sales could not be separately assessed to tax as bogus sales and unexplained cash credit u/s 68 of the Act.*

3. Whereas the questions proposed by the Id. Judicial Member, are as under:

1) *Whether on facts and circumstances of the case and in law, the Ld. CIT(A) has justified in confirming the addition on account of bogus sales, when assessee through his partners admitted on oath that there is no movement of goods and it was introduction of unaccounted amount to the Assessee's bank account?*

2) *Whether on the facts by circumstances of case and in law, the Assessee has introduced his unaccounted money into his bank account without proving of the holding such stocks before the 'Sales' more so the partners of the Assessee firm have categorically admitted that there is no movement of goods and it was introduction of unaccounted amount to the Assessee's bank account, can the assessee claim the such 'sales' as 'Genuine one'?*

3) *Whether on facts by circumstances of case and in law, the lower authorities were justified in holding that the transactions of sales are not genuine, making addition based on the finding that the Assessee has not satisfactorily proved the existence of such stock before sales and delivering of goods after such 'Sales'?*

4) *On facts by circumstances of case and law and in view of the specific admissions of the partners of the Assessee that there is no movement of goods and it was introduction of unaccounted amount to the Assessee's bank account, whether the lower authorities were justified in holding that provisions u/s 68 of the Act is applicable with regard such claimed 'sales' as bogus sales', wherein the genuineness of sale transactions are not explained satisfactorily and same is to be taxes u/s 68 or alternatively u/s 69 of the Act?.*

4. As could be seen from the question proposed, basically, there are two issues arising for consideration. Firstly, whether, the ingredients of section 68 of the Act are satisfied to sustain the disputed additions. Secondly, the additions in dispute can alternatively made u/s. 69 of the Act. Before, I proceed to deal with the aforesaid issues, I propose to discuss relevant facts briefly. The

assessee is a resident partnership firm stated to be engaged in the business of trading in bullion, jewellery etc. For the assessment year under dispute, assessee filed its return of income on 28.10.2017 declaring income of Rs.17,10,646/-.

5. As could be seen from the facts on record, a search and seizure operation u/s 132 of the Act was carried out in case of Shri Kapil Kumar and Shri Ashwini Singla, the partners of the assessee firm. Consequent to such search and seizure operation, survey was conducted at the business premises of the assessee and some other entities. Based on information/material found during the search and seizure/survey operations the Departmental Authorities observed that large amount of cash was deposited in various bank accounts of different entities including M/s. Ringing Bells Pvt. Ltd., (RBPL), which, after layering were transferred to the assessee. Based on the enquiry conducted by the Investigation Wing of the Department the Assessing Officer noticed that in the year under consideration, as per the books of accounts maintained by the assessee, M/s. RBPL had purchased huge amount of bullion from the assessee and there is cash deposit of Rs. 32,81,90,000/- in the bank account of RBPL. He also noticed that in course of search and seizure operation carried out in the case of Shri Mohit Goel, an erstwhile director of M/s. RBPL, a statement was recorded u/s. 132(4) of the Act. Wherein, he stated that the cash deposited in the bank account of M/s. RBPL was given to him by Shri Rajesh Chawla owner of M/s. DL Heera Bhai Jewellery Arcade P. Ltd. for depositing in the account of M/s. RBPL and subsequent transfer of the fund to specific bank accounts on commission basis.

6. He further found that as per the investigation carried out by the Investigation Wing, the assessee had purportedly sold gold and bullions to 44 entities controlled and managed by an entry operator, namely, Shri Sonu Punjabi, which are sham transactions. He also found that such transactions were carried out during the demonetization period. It is alleged by the Assessing Officer, that though notices u/s. 133(6) of the Act as well as summons u/s. 131 of the Act were issued, the concerned entities, who supposedly purchased gold and bullion from the assessee, however, no information came from such entities as most of the summons returned back un-served. He also observed that, as per the information available, those 44 entities had never done any purchases from the assessee except during the period of demonetization. He also referred to the statement recorded from Shri Kapil Kumar and Shri Ashwini Singla the partners of the assessee firm wherein they not only admitted that the document containing list of credit and debit entries found from the e-mail id of Shri Deepak Jain, the accountant of the partners, belong to the assessee, but they further stated that they were approached by Shri Sonu Punjabi, Nitin and Jeetu to introduce cash into various fake concerns/firm/proprietorship concern on commission basis.

7. Based on the information available on record the Assessing Officer finally concluded that sales of gold/bullion amounting to Rs. 49,19,43,623/- to 44 entities allegedly controlled by Shri Sonu Punjabi, are bogus sales and made for the purpose of introducing own money routed through bogus firms to its accounts. Thus, he treated the amount of Rs. 49,19,43,623/- credited to the books of accounts as receipts from sale of gold/bullion, as unexplained cash credit u/s. 68 r.w.s 115BBE of the Act. Proceeding further, he

observed that, in the year under consideration the assessee has recorded sales of gold/bullion worth Rs. 20,87,02,972/- to M/s. RBPL. He observed, in course of search and seizure operation conducted in case of Shri Mohit Goel of M/s. RBPL statement u/s. 132(4) was recorded wherein Shri Mohit Goel allegedly stated that cash amounting to Rs. 32,81,90,000/- given to him by Shri Rajesh Chawla owner of M/s. DL Heera Bhai Jewellery Arcade P Ltd., was deposited in the bank account of M/s. RBPL, for the purpose of transferring the fund to specific accounts on commission basis. He observed that M/s. RBPL was the largest purchaser of gold/bullion from the assessee during the year. Whereas, the said entity is in the business of mobile phone, power bank etc. and had no creditworthiness to purchase such huge amount of gold/bullion. He further alleged that the assessee failed to prove genuineness of sale transactions with M/s. RBPL. Based on the aforesaid analysis of facts the Assessing Officer ultimately concluded that the purported sales of gold/bullion to M/s. RBPL is bogus. Accordingly, he treated the receipt of Rs. 20,87,02,970/- from sale of gold/bullion to M/s. RBPL as unexplained cash credit u/s. 68 r.w.s. 115BBE of the Act and added back to the income of the assessee.

8. Further, he observed that, in the year under consideration the assessee had recorded sales of Rs. 19,30,000/- to M/s. Olivia Tradelinks India P. Ltd., towards sale of gold/bullion. He observed that, in course of survey conducted in the case of M/s. Olivia Tradelinks India P. Ltd., it was found that the said company was incorporated in January 2015 and in AY 2015-16 it has filed the return of income offering NIL income without any turnover. Whereas, huge amount of cash was found to have been deposited in the bank account of M/s. Olivia Tradelinks India P. Ltd., which

suggested that the entity is an entry provider. He found that in the year under consideration M/s. Olivia Tradelinks India P. Ltd., had transferred an amount of Rs. 90,30,000/- to the assessee. He further found that as per the bank statement of the said entity an amount of Rs. 90,30,000/- was deposited in cash on 24.11.2016 and on the same day cash of Rs. 90,30,000/- was transferred to the account of the assessee. From the aforesaid facts, he concluded that the purported sale of gold and bullion amounting to Rs. 90,30,000/- to M/s. Olivia Tradelinks India P. Ltd., is bogus. Accordingly, he treated the amount in dispute as unexplained cash credit u/s. 68 r.w.s 115BBE of the Act and added back to the income of the assessee. Similarly, he treated receipts of Rs. 1,19,20,793/- from M/s. S.S Overseas as bogus sales and held it as unexplained cash credit u/s. 68 r.w.s. 115BBE of the Act. Thus, in aggregate, the Assessing Officer added back an amount of Rs. 72,15,97,386/- u/s. 68 of the Act, while completing the assessment.

9. Against the assessment order so passed, assessee preferred in appeal before Id. Commissioner (Appeals). In course of hearing of appeal before Id. First Appellate Authority, the assessee furnished further documentary evidences to prove the identity of the purchasers; their creditworthiness as also the genuineness of the transaction. However, Id. Commissioner (Appeals) did not find merit in the submissions of the assessee, hence, confirmed the addition. Dispute travelled to Tribunal. While deciding the issue, learned Accountant Member, having found that the assessee was able to establish the identity and creditworthiness of the entities purchasing gold/bullion from the assessee as well as the genuineness of the transactions, held that not only the sales are genuine but none of the conditions of section 68 are applicable to

the subject transactions. Accordingly, he deleted the entire addition. Whereas, learned Judicial Member did not agree with the view expressed by learned Accountant Member. He was of the view that not only the sales are bogus but the amount representing bogus sales are required to be added to the business income by treating them as unexplained investment u/s. 69 of the Act. Thus, in sum and substance learned Judicial Member directed the Assessing Officer to convert the disputed addition from section 68 to section 69 of the Act.

10. Before me, learned Counsel appearing for the assessee made exhaustive submissions both orally and in writing. He submitted that not only the assessee maintains regular books of accounts but its books of accounts are subjected to statutory audit. He submitted, on the date of survey no discrepancy whatsoever was found either in the physical stock or stock entered in the books of account. He submitted, no un-unaccounted cash was also found. He submitted, in course of assessment proceeding the assessee has furnished not only the audited books of accounts but all other relevant and necessary documents for examination of the Assessing Officer. He submitted, no discrepancy or deficiency was found in the books of accounts maintained by the assessee. He submitted, the Assessing Officer has not drawn any adverse inference either with regard to the maintenance of books of accounts or the entries made therein. He submitted, to prove the identity and creditworthiness of the purchaser entities the assessee has furnished various documentary evidences including VAT returns and VAT assessment orders. He submitted, the assessee has also furnished the details of suppliers from whom it had purchased gold/bullion. He submitted, in response to inquiry conducted u/s. 133(6) of the Act all suppliers

have confirmed the transaction with the assessee. He submitted, merely because some of the purchases, who have purchased gold/bullion from the assessee, did not respond to notice issued u/s. 133(6) of the Act, or summons u/s. 131 of the Act, the sales cannot be treated as bogus. As regards the statement recorded from partners of the assessee firm, ld. Counsel submitted, they are not at all relevant for the disputed addition nor the Assessing Officer himself, has relied upon them while making the addition. Without prejudice, he submitted, under no circumstances the addition can be made u/s. 69 of the Act, as has been done by learned Judicial Member, as it was never the case of the Assessing Officer or learned Commissioner (Appeals). Thus, he submitted, at this stage a new dimension cannot be given to the issue in dispute by converting the addition from section 68 to section 69 as the conditions of both the sections are totally different. Thus, he submitted, since the view taken by learned Accountant Member is the correct view, it should be accepted. In support, he relied on the following decision.

11. Per contra, learned Standing Counsel appearing for the Revenue strongly relied upon the observations of the Assessing Officer and learned First Appellant Authority. Drawing our attention to the observations made in the Assessment Order and First Appellate Order, learned counsel submitted that the assessee has miserably failed to prove the genuineness of the sales claimed to have been made to the concerned entities. He submitted, in course of search and seizure operation conducted in case of the partners of the assessee and other third parties, sufficient material was found indicating that huge cash deposits were made during the demonetization period through circuitous route and sham transactions. He submitted, even assessee's partners admitted of

having indulged in accommodation entry transaction carried out by an entry operator Shri Sonu Punjabi on commission basis. Thus, he submitted, the facts on record clearly demonstrate that certain sale transactions recorded in the books of accounts of the assessee are not genuine. He submitted, these facts got further fortified because of non response of the alleged purchasers of gold/bullion to the notices and summons issued u/s. 133(6) and u/s.131 of the Act respectively. Thus, he submitted, in the given circumstances the sales effected by the assessee remained unproved. Hence, the credit entries appearing in the books of the assessee corresponding to such sales have to be treated as unexplained cash credit u/s. 68 of the Act. Though, he fairly submitted that the provision of section 69 of the Act may not be strictly applicable as it is not a case where the entries are not recorded in the books of account. However, he submitted the addition made u/s. 68 of the Act has to be sustained.

12. I have carefully considered rival submissions in the light of judicial precedents cited before me and perused materials on record. As discussed earlier, the core issue arising for consideration is whether the disputed addition made u/s. 68 of the Act representing alleged bogus sales can be sustained. Alternatively, whether such addition can be made u/s. 69 of the Act as against section 68 of the Act. Undisputedly, in the year under consideration, the assessee has declared total sales turnover of Rs. 163.98 crores. Out of which, as alleged by the Department, sales worth Rs. 109.07 crores were made during the month of November 2016, after declaration of demonetization of Rs. 1000/- and Rs. 500/- currency notes. It is interesting to note, out of the total sales made of Rs. 163.98 crores the Departmental Authority have disputed/doubted sales worth Rs. 72,15,97,386/-.Even, sales worth Rs. 37 crores made during the

demonetization period have been accepted by the Departmental Authorities. The Assessing Officer has identified and made additions in the following four categories of alleged sham transactions:

(i) sales to 44 entities purportedly belonging to Shri Sonu Punjabi - Rs. 49,19,43,623/-

(ii) sales to M/s. Ringing Bells Pvt. Ltd., - Rs. 20,87,02,970/-

(iii) sales to M/s. Olivia Tradelinks India P. Ltd., - Rs. 19,30,000/-

(iv) sales to M/s. S.S Overseas - Rs. 1,19,20,793/-

13. The reasons based on which the Assessing Officer has treated the sales as bogus and added them u/s. 68 of the Act by treating them as unexplained cash credit have been discussed in detail earlier. Therefore, it needs to be examined whether the assessee has been able to satisfy the three ingredients of section 68 of the Act i.e, identity, creditworthiness and genuineness of the transaction. As far as the sales of Rs. 49,19,43,623/- alleged to have been made to bogus entities controlled by entry operator Shri Sonu Punjabi, it is observed that in course of assessment proceeding as well as before the First Appellate Authority the assessee has furnished various documentary evidences, such as, party wise details of purchase and sale for the entire year, VAT returns and VAT assessment orders, item wise stock register and purchase invoices, confirmation from the suppliers, audited books of accounts, quantitative tally of purchase and sale etc. It is also a fact that the suppliers from whom the assessee purchases gold/bullion confirmed the transactions in response to notices issued u/s. 133(6) of the Act. Pertinently, no deficiency or discrepancy was found either in the books of accounts

maintained by the assessee or the documentary evidences furnished. This is so because, neither the Assessing Officer nor the First Appellate Authority have returned any adverse inference, either in relation to the books of accounts maintained by the assessee or the documentary evidences furnished. Merely, because the notices issued u/s. 133(6) and summons issued u/s. 131 returned unserved or remained unanswered, cannot lead to the conclusion that sales are bogus, when there are overwhelming documentary evidences brought on record in the form of audited books of accounts, stock register, item wise purchase and sales, VAT return, VAT assessment order accepting the sale transactions to demonstrate that the assessee indeed has effected the sales.

14. Similarly, in respect of sales made to M/s. RBPL the addition in my view was made purely on conjectures and surmises. The Assessing Officer has attempted to treat the sales made by the assessee as non genuine only because of statement recorded on oath from Shri Mohit Goel stating that cash amounting to Rs. 32 crores was given to him by M/s. DL Heera Bhai Jewellers for depositing in the bank account of M/s. RBPL. I fail to understand how the purported cash deposit in the bank account of M/s. RBPL, even assuming it to be correct, can prove that the sales effected by the assessee to M/s. RBPL is non genuine. On the contrary, it proves availability of fund with M/s. RBPL to effect the purchases from the assessee. Even in respect of the sales made to M/s. RBPL the assessee has furnished all documentary evidences including audited books of accounts, item wise purchase and sales, VAT return, VAT assessment orders, stock register etc. to prove the genuineness of sales. Admittedly, the Assessing Officer has not found any discrepancy or deficiency in the books of accounts and

stock register maintained by the assessee. Thus, when the assessee has maintained item wise purchase and sale details as well as stock register and, moreover neither in course of survey any stock discrepancy was found nor any unaccounted cash was found, certain sales cannot be treated as bogus. More so, when one of the directors of RBPL has stated before the Assessing Officer that he had taken delivery of gold/bullion purchased from assessee.

15. Similar is the factual position qua the sales effected to M/s. Olivia Tradelinks India P. Ltd., and M/s. S.S Overseas, as, the assessee has furnished all documentary evidences to prove the identity, creditworthiness and genuineness of transaction. Thus, the assessee has sufficiently discharged the initial burden cast upon it to prove the credit entries appearing in the books of account. In fact, learned First Appellate Authority has accepted the fact that the assessee has discharged the initial burden cast upon it. Once it is established that the initial burden cast upon the assessee has been discharged, the burden shifts to the Assessing Officer to conclusively prove that the credit entries appearing in the books of accounts are unexplained in terms with section 68 of the Act. In the facts of the present appeal, I am of the view, the Assessing Officer has failed to do so. Therefore, the amount in dispute cannot be treated as unexplained cash credit under section 68 of the Act.

16. As rightly observed by learned Accountant Member, since the Assessing Officer has started the computation of income with the returned income of the assessee, it goes to prove that the entire trading account shown in the financial statement filed with the return of income has been accepted by the Assessing Officer. I also agree with learned Accountant Member that once the sales made by

the assessee are supported by stock register, sale bills, payments through banking channel and sales have not only been disclosed in VAT returns but stand duly verified and accepted by VAT Department, such sales cannot be treated as bogus, so as to enable the Assessing Officer to invoke the provisions of section 68 of the Act. Thus, in my view, the addition made u/s. 68 of the Act was rightly deleted.

17. Now coming to the difference of opinion between learned Accountant Member and learned Judicial Member, as discussed earlier, as against the addition made u/s. 68 of the Act by Departmental Authorities, learned Judicial Member has held that the addition has to be made u/s. 69 of the Act. At the very outset, it is necessary to look into the provisions of section 69 of the Act, which reads as under:-

Unexplained investments.

69. Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year.

18. On a plain reading of the aforesaid provision it becomes clear that the provision gets attracted subject to fulfillment of the following conditions:

- (i) there must be an investment by the assessee in the financial year relevant to assessment year for which assessment is being made;
- (ii) such investment has not been recorded in the books of accounts, if any, maintained by the assessee;
- (iii) the assessee offers no explanation about the nature and source of investment or the explanation offered is not acceptable.

19. In the facts of the present appeal, it is an admitted factual position that the disputed transactions are duly recorded in the books of accounts of the assessee. Therefore, at the very threshold the provisions of section 69 will not get attracted. In fact, learned Standing Counsel appearing for the Revenue fairly accepted aforesaid factual and legal position. In any case of the matter, both the Assessing Officer and learned First Appellate Authority have proceeded on the premise that the credit entries appearing in the books of account are unexplained cash credit u/s. 68 of the Act. It is quite patent and obvious that provisions contained u/s. 68 and 69 of the Act operate in different situations and conditions therein are also different. Therefore, when it was never the case of the Department that the disputed addition has to be treated as unexplained investment u/s. 69 of the Act, at the second appellate stage, a new dimension cannot be given to the disputed issue by converting the addition from section 68 to section 69, that too, without providing an opportunity of being heard to the assessee. More so, when applicability of section 69 was never within the purview of the Tribunal and not even the case of the Department. I don't intend to deal further on the issue as to whether the Tribunal

has powers to change the provision under which the addition has been made by the Departmental Authorities as it is academic in the present case considering the fact that the conditions of section 69 are not satisfied.

20. At this stage, I must observe that in course of hearing learned Standing Counsel appearing for the Revenue, though, had fairly agreed that provisions of section 69 cannot get attracted, however, he urged and pleaded that the addition made u/s. 68 of the Act should be sustained. In my view, aforesaid contention of learned Standing Counsel is unacceptable considering the fact that the mandate given to me as Third Member is very limited in its scope and I have to agree with the view expressed by one of the Members. In the facts of the present appeal, learned Accountant Member has given a clear cut finding that no addition u/s 68 of the Act can be made. Whereas, learned Judicial Member has returned a finding that the addition has to be made u/s. 69 of the Act. In other words, learned Judicial Member impliedly agrees that the addition could not have been made u/s. 68 of the Act. Thus, in my view, there is no disagreement between the learned Members with regard to applicability of section 68 of the Act to the disputed addition. Since, it is a purely factual issue, there is no need to dwell in detail on various judicial precedents cited before me. However, I am of the view that the ratio laid down in the decisions referred to by learned Accountant Members clinches the issue in favour of the assessee. Thus, after considering the totality of facts and circumstances of the case, I hold that, the additions made u/s. 68 of the Act are unsustainable. Accordingly, I agree with the view expressed by learned Accountant Member.

21. In the light of the above, the matter may now be placed before the regular bench for passing confirmatory order as per majority view, in accordance with law.

Sd/-
SAKTIJIT DEY
VICE PRESIDENT

DATED: 26.03.2024

NV:

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR