

आयकर अपीलिय अधिकरण
मुंबई पीठ "एस एम सी"
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI
श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER
आअसं. 1183/मुं/2019 (नि.व.2014-15)
ITA NO. 1183/MUM/2019 (A.Y.2014-15)

Dineshkumar Verma,
102, Sai Aashram Apartment,
2nd Floor, Tejumal Chaki Road,
Nr. Sadhubela School, Ulhasnagar,
Tahane 421 001
PAN : ACMPV 7468B

: अपीलार्थी/ **Appellant**

बनाम/ Vs.

ITO, Ward -2(1),
2nd Floor, Mohan Plaza, Wayale Nagar,
Near Khadakpada Circle,
Kalyan (W) 421 301.

: प्रत्यर्थी/ Respondent

Assessee by : Shri Tanmay Phadke
Revenue by : Ms. Smita Verma

सुनवाई की तारीख/
Date of Hearing : 04/11/2020
घोषणा की तारीख /
Date of Pronouncement : 28 /12/2020

आदेश/ ORDER

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-3, Thane (in short 'the CIT(A)') dated 18/09/2018 for the assessment year 2014-15.

2. Shri Tanmay Phadke, appearing on behalf of the assessee submitted that the assessee an individual is a contractor of wood, tiles and marble works. The gross receipts of the assessee from contract work during the period relevant to the assessment year under appeal is Rs.16,00,000/-. The assessee filed his return of income under section 44AD and hence, did not maintain books of account. In scrutiny assessment proceedings the Assessing Officer on the basis of AIR report observed that there were cash deposits amounting to Rs.11,20,000/- in the bank account of assessee maintained with Bank of India. The Assessing Officer issued show cause notice to explain the deposits. The assessee vide letter dated 13/05/2016 explained that the deposits were made from savings of earlier years from wood/tiles contract work and supply of building material. Explaining the reason for deposit of cash in bank account the assessee submitted that the assessee had purchased land at Dehu Road for Rs.12,00,000/-. Since payment for purchase of land was to be made urgently, the assessee deposited cash in his bank account. During assessment proceedings statement of assessee was recorded on oath, wherein the assessee had explained the circumstances under which cash was deposited in the bank and also the fact that the deposits were made out of past savings made in last three to four years. The Id. Authorized Representative of the assessee further submitted that the assessee had furnished cash flow statement for the financial year 2013-14. However, the Assessing Officer did not considered the same.

2.1. The Id. Authorized Representative of the assessee submitted that the Assessing Officer has erred in invoking the provisions of section 68 of the Income Tax Act, 1961 (in short 'the Act') in the absence of books of account. As the assessee filed return of income U/s 44AD of the Act i.e. under

presumptive tax scheme, the assessee was not maintaining books of account. No addition can be made u/s 68 of the Act in absence of any credit entry in the books. The Id. Authorised representative of the assessee contended that bank passbook/statement does not constitute books of account. To support of his submissions, he placed reliance on the following decisions:

- (1) CIT vs. Bhaichand N. Gandhi 141 ITR 67 (Bom.)
- (2) Madhu Raitani vs. ACIT, 10 taxmann.com 206 (Guwahati)(TM)
- (3) Manasi Mahendra Pitkar vs. ITO 160 ITD 605 (Mumbai – Trib.)
- (4) Kokarre Prabhakara vs. ITO, ITA 1239/Bang/2019 DoD 11/09/2020

2.2. The Id. Authorized Representative of the assessee asserted that although the provisions of section 68 does not apply where the return has been filed on presumptive basis under section 44AD of the Act, where the assessee is not maintaining books of account, notwithstanding, the assessee has fully explained source of cash deposits in the bank.

3. Per contract, Ms. Smita Verma, representing the Department vehemently defended the impugned order and prayed for dismissing the appeal of assessee. The Id. Departmental Representative strongly opposing the ground raised by the assessee in appeal pointed that these grounds were never raised before the CIT(A). The assessee has changed its stand before the Tribunal.

4. The Id. Authorized Representative of the assessee rebutting the arguments raised on behalf of the Department submitted that the grounds raised by the assessee in appeal are purely legal in nature and hence, can be raised at any stage. The Id. Authorized Representative of the assessee pointed that in the case of Manasi Mahendra Pitkar vs. ITO (supra) similar grounds

were raised at second appellate stage and the same were admitted by the Tribunal being legal in nature.

5. Both sides heard. Orders of authorities below and the decisions on which reliance has been placed by the Id. Authorized Representative of the assessee examined. The addition of Rs.11,20,000/- under section 68 of the Act has been made in the instant case on the basis of unexplained cash deposits in the bank account of assessee. The contention of the assessee is that the cash deposits in bank are from his past savings from business income. To buttress his contentions the assessee purportedly furnished Fund Flow Statement for the impugned assessment year before the Assessing Officer. However, the same was not considered by the authorities below. The assessee has not maintained books and has filed return of income u/s.44AD of the Act.

6. The assessee in appeal before the Tribunal has raised a fresh issue i.e. whether the provisions of section 68 of the Act are attracted where the assessee has not maintained books of account and has filed return of income on the basis of presumptive income under section 44AD of the Act? The Id. DR has opposed admission of new ground at second appellate stage.

7. The new ground raised by the assessee challenging action of the Assessing Officer in invoking provisions of section 68 of the Act in absence of books of account goes to the root of validity of addition made u/s 68. The new ground raised by the assessee is legal in nature and hence, can be very well raised even at second appellate stage. The facts and documents to decide the ground are already available on record and no new documents are required to be adduced to decide this legal issue. The coordinate Bench in the case of

Manasi Mahendra Pitkar vs. ITO (supra) under similar set of facts admitted the additional ground challenging the addition made by Assessing Officer u/s 68 of the Act merely on the basis of cash deposits in the bank account. The objection raised by the Id. DR is rejected. The new ground raised by the assessee before the Tribunal being legal in nature is admitted for adjudication on merits in the light of decision rendered by Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. vs. CIT reported as 229 ITR 383.

8. Before proceeding further to decide this issue it would be imperative to refer to the relevant provisions of section 68 of the Act. The same are reproduced herein under:

“68 Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year:”

A bare perusal of section 68 of the Act makes explicitly clear that the addition can be made under the section if, any sum is found credited in the books maintained by the assessee. That is the books should be that of the assessee.

9. The “books or books of account” have been defined in section 2(12A) of the Act. The same reads as under:-

“2(12A) books or books of account” includes ledgers, day-books, cash books, account-books and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device;”

The definition of books under the Act is inclusive. A perusal of the definition shows that the same does not include bank passbook or bank statement. A conjoint reading of above provisions would thus lead to the

conclusion that the addition u/s 68 can be made only where any amount is found credit in the books as defined u/s 2(12A) of the Act maintained by the assessee.

10. The Hon'ble Bombay High Court in the case of CIT vs. Bhaichand N. Gandhi (supra) upholding the decision of Tribunal concluded that bank passbook does not constitute books as envisaged under u/s 68 of the Act. The relevant extract of the judgement reads as under:

“..... 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.”

11. Under the provisions of section 44AD of the Act, where the assessee is engaged in eligible business and has total turnover or gross receipts in the previous year not exceeding Rs.60,00,000/-, the assessee is eligible to file return of income on the basis of presumptive income @ 8% of total turnover or gross receipts. In the present case undisputedly the assessee has not maintained books and has offered his business income to tax on presumptive basis u/s 44AD of the Act. The same has been accepted by the Assessing Officer except for addition u/s.68 of the Act. It is not mandatory for the assessee to maintain books, if the return of income is filed under section 44AD of the Act.

12. 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 maintains 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.

13. The Hon'ble High Court of Gauhati in the case of Anand Ram Raitani vs. CIT reported as 223 ITR 544 has held that existence of books of account is a condition precedent for invoking the provisions of section 68 by the Assessing Officer. The relevant extract of the judgement is as under:

*"We have gone through section 68 of the Act. **The Assessing Officer before invoking the power under section 68 of the Act must be satisfied that there are books of account maintained by the assessee and the cash credit is recorded in the said books of account and if the assessee fails to satisfy the Assessing Officer, the said sum so credited has to be charged to income-tax as the income of the assessee of that previous year. The existence of books of account is a condition precedent for invoking of the power. Discharging of burden is a subsequent condition. If the first point is not fulfilled the question of burden of proof does not arise. The Assessing Officer made the assessment by making addition of the amount for which disallowance was claimed Mr. Bhuyan very candidly admits that addition was made in exercise of the power under-section 68 of the Act, therefore, the first condition necessary for invocation of the power is the existence of the books of account."***

[Emphasised]

14. The Tribunal in the case of Madhu Raitani vs. ACIT (supra) following the decision rendered in the case of CIT vs. Bhaichand N. Gandhi (supra) and Anand Ram Raitani (supra) held that if books of account are not maintained by the assessee, the provisions of section 68 cannot be invoked. The Tribunal further held that bank passbook cannot be considered as books of account.

Similar view has been taken by the coordinate Bench in the case of Manasi Mahendra Pitkar (supra).

15. The Co-ordinate Bench of the Tribunal in the case of Shri Kokarre Prabhakara vs. ITO(supra), in a similar situation where the assessee had declared income under section 44AD of the Act without maintaining books and the Assessing Officer had invoked the provisions of section 68 of the Act, the Tribunal deleted the addition by placing reliance of various decisions of the Tribunal holding that where the returns are filed on the basis of income declared under section 44A of the Act, there cannot be any application of section 68 of the Act.

16. Thus, in the back drop of the facts, relevant provisions of the Act and case laws discussed above, no addition under section 68 can be made in the instant case. We find merit in ground no.1 raised by the assessee in appeal.

17. In ground no.2 of the appeal, the assessee has impugned addition u/s.68 of the Act on merits. Since, the legal ground raised by assessee against invoking of Sec. 68 has been accepted, the ground no.2 has become academic and hence, not deliberated upon.

18. In the result, impugned order is set-aside and the appeal of assessee is allowed.

Order pronounced in the open Court on Monday the 28th day of December, 2020.

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated: 28/12/2020
Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai