

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "B": DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA.No.489/Del./2014
Assessment Year 2009-2010

The Income Tax Officer Ward-34(3), Room No.D-5, Block-D, Vikas Bhawari, I.P. Estate, New Delhi - 02.	vs.,	Shri Devi Dass, V-15, Bhagwati Gali No.1, Arvind Nagar, Ghonda, Delhi - 110 053. PAN AGGPD5562J
(Appellant)		(Respondent)

For Revenue :	Shri Anshu Prakash, Sr. D.R.
For Assessee :	-None-

Date of Hearing :	05.10.2017
Date of Pronouncement :	11.10.2017

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by Revenue has been directed against the order of the Ld. CIT(A)-XXVII, New Delhi, dated 29.11.2013 for the A.Y. 2009-2010, challenging the deletion of addition of Rs.59,98,975 under section 68 of the I.T. Act, 1961.

2. Briefly the facts of the case are that assessee filed return of income declaring total income of Rs.1,45,350. The case was

selected on account of AIR information received against the assessee. The A.O. issued various statutory notices. However, despite service of notice, none attended the proceedings before the A.O. Some proceedings were attended, but it was adjourned on the request of the assessee. The A.O. issued notice for completing the best judgment assessment under section 144 of the I.T. Act, 1961. The assessee was required to explain source of the cash deposited amounting to Rs.66,78,128 as per AIR information in S.B. Account maintained with ICICI Bank Ltd., Preet Vihar, New Delhi during assessment year under appeal along with documentary evidences. The notice was also served by affixture. However, none appeared before A.O. The A.O. in the absence of any evidence and material on record and in the absence of any co-operation from the side of the assessee, made the addition of Rs.66,78,128 on account of undisclosed/unexplained cash deposit under section 68 of the I.T. Act. The assessee challenged the addition before Ld. CIT(A). The Ld. CIT(A), however, applying the concept of peak credit, deleted the addition of Rs.59,98,974. The findings of the Ld. CIT(A) in paras 6 and 7 of the order are reproduced as under :

6. “ Ground No. 3 is against the addition of Rs.66,78,128/- u/s 68 of the IT Act being the cash deposited in appellant’s saving banks accounts. As per the appellant’s AR, the appellant had SB Account No. 3393 with ICICI Bank, Preet Vihar, Delhi up-to 06.01.2009 and subsequently on 20.01.2009 he opened another Account No. 3441 in the same bank. The total cash deposited in Account No. 3393 was Rs.45,15,038/- and in Account No. 3441 was Rs.21,63,090/- as per AIR information available in the assessment records. As per the appellant’s AR, the appellant had one more bank account with State Bank of India, Seelampur Branch, Delhi. The appellant had gross receipts of Rs.33,17,000/- from his business and he had withdrawn Rs.17,00,000/- approx. from Account No. 3393 and Rs.16,00,000/- approx. from Account No. 3441. According to the appellant’s AR, the deposit of Rs.66,78,128/- was from his gross receipts from business and cash withdrawals from bank account. Therefore, during the appellate hearing on 22.11.2013, the appellant’s AR was asked as to why the peak credit in his bank account should not be treated as income from undisclosed sources u/s 68 of

the I. T Act. In the written submissions filed on 29.11.2013, the appellant's AR had requested that the peak negative cash balance as on 02.07.2008 of Rs.1,56,225/- based on the date wise cash flow statement now submitted should be treated as appellant's income from undisclosed sources u/s 68 of the I T Act instead of Rs.66,78,128/- added by the A.O. The appellant admits that he maintains no books of account and therefore cash flow statement now submitted is a cooked up document and therefore can be considered only as an afterthought. The fact that even that shows negative cash balance indicates that the appellant is unable to properly explain the cash deposited in his saving banks accounts.

- 7. The appellant's AR in the written submissions filed on 29.11.2013 had also stated that in ICICI Bank, Preet Vihar Branch a new saving banks account was opened by the appellant on 20.01.2009 and the earlier saving banks account of the appellant was in-operative from 06.01.2009. Therefore, it was requested that the two accounts should be considered as one for considering the peak credit of the appellant.*

According to the appellant's AR, the peak credit was Rs.6,79,154/- on 29.06.2009 as he had balance of Rs.6,78,142/- in ICICI Bank Account No. 3393 and Rs.1012/- in his bank account with State bank of India, Seelampur Branch. Therefore, based on the above evidence the peak credit of the appellant is taken at Rs.6,79,154/- and this is treated as appellant's undisclosed income u/s 68 of the I T Act against the addition of Rs.66,78,128/- made by the A.O. Thus, the appellant gets a relief of Rs.59,98,974/- (6678128 - 679154) and the addition of Rs.6,79,154/- only is sustained. Therefore, the ground no. 3 is partly allowed."

3. We have heard the Ld. D.R. and perused the findings of the authorities below. However, none appeared on behalf of the assessee despite service of notice. The Ld. D.R. contended that the A.O. passed the ex-parte order. Therefore, whatever contention was raised by the assessee before Ld. CIT(A) should have been confronted to the A.O. Therefore, the order passed by the Ld. CIT(A) without giving an opportunity to the A.O. is bad in law and matter may be

remitted to the file of the Ld. CIT(A). The Ld. D.R. submitted that the theory of peak is not applicable to the facts of the case.

4. We have considered the submissions of the Ld. D.R. and are in agreement with the contention of the Ld. D.R. that the matter requires reconsideration at the level of the Ld. CIT(A). It is an admitted fact that assessee did not attend at many assessment proceedings despite service of notices. However, some proceedings were attended, but adjournment was sought. No explanation was filed with any documentary evidence to explain the cash deposited by assessee in his bank account maintained with ICICI Bank Ltd., The A.O. therefore, passed ex-parte order under section 144 of the I.T. Act. It is, therefore, the duty of the Ld. CIT(A) before granting relief to the assessee that whatever contention was raised by the assessee before him should be confronted to the A.O. The A.O. should have been given an opportunity of being heard at the appellate stage in such circumstances, before passing the appellate order. Therefore, the order passed without giving opportunity to A.O. to rebut the claim of assessee, the order cannot be sustained in law. Hon'ble Allahabad

High Court in the case of Bhaiyalal Sham Behari vs. CIT (2005) 276 ITR 38 held as under :

“In order to adjudicate upon the plea of peak credit the factual foundation has to be laid by the assessee. He has to own all cash credit entries in the books of account and only thereafter can the question of peak credit be raised.

Held, that as the amount of cash credits stood in the names of different persons which all along the assessee had been claiming to be genuine deposits, withdrawals/payments to different persons during the previous years, the assessee was not entitled to claim the benefit of peak credit”.

4.1. However, in the present case, the assessee did not raise any such plea of peak credit before A.O. and no factual foundation have been laid out for claiming benefit of peak credit either before A.O. or before Ld. CIT(A). The assessee admitted before Ld. CIT(A) that cash flow statement is cooked-up document. In view of the above, we find that the matter requires re-consideration at the level of the Ld. CIT(A). In view of the above discussion, we set aside the impugned order of the Ld. CIT(A) and restore the appeal of the

assessee to the file of Ld. CIT(A) with a direction to re-decide the appeal of assessee in accordance with law, by giving reasonable, sufficient opportunity of being heard to the assessee as well as A.O.

5. In the result, appeal of Revenue is allowed for statistical purposes.

Order pronounced in the open Court.

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Delhi, Dated 11th October, 2017

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT "B" Bench
6.	Guard File

//By Order//

ASST. REGISTRAR : ITAT :
DELHI BENCHES : DELHI.