INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SHRI K.N.CHARY, JUDICIAL MEMBER

ITA No. 937 & 938/Del/2012
(Assessment Year: 2004-05 and 2005-06)

Shri Janak Goel, S-151, Ground Floor, Uppals Southend, Sohna Road, Gurgaon PAN: AGDPG6295Q	Vs.	DCIT, Central Circle-4, New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri S. S. Mangla, CA
Revenue by:	Shri S. S Rana, CIT DR
Date of Hearing	20/02/2019
Date of pronouncement	13/05/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

ITA number 937/del/2012 for assessment year 2004 – 05

1. This is an appeal filed by the assessee against the order of the LD CIT (A)-XXXIII, New Delhi dated 26.01.2011 for the Assessment Year 2004-05. Wherein the learned assessing officer made an addition u/s 68 of the income tax act with respect to the amount of cash deposited the savings bank account maintained with the state bank of India by the assessee is partly confirmed.

2. The assessee has raised the following grounds of appeal:-

"1. Whether as per provisions of section 143(2), notice can only be served after Assessing Officer has examined return filed by assessee.

2. Whether, since, in instant case notice had been issued prior to filing of return, it was not a valid notice and, therefore, assessment Completed on basis of it was also invalid.

3. Whether Commissioner (Appeals) was justified in not considering the new ground.

4. Whether, since, in instant case, the assessing authority is justified in assuming jurisdiction to frame the impugned Assessment Order and to make impugned addition and disallowance. More so, the same have

been made in absence of any adverse material having been found and seized during the course of search.

5. *Commissioner (Appeal) has not considered the additional evidences on which the assessing authority has not made any enquiry.*
6. *The commissioner (Appeal) has not considered the ground no. 9 regarding objection of jurisdiction of the appellant."*

3. During the course of hearing of the appeal, The assessee filed the additional ground of appeal as under:-

> "That having regard to the facts and circumstances of the case, the learned CIT – A, has erred in confirming the addition amounting to INR 512000/– on account of unexplained bank deposit under section 68.

4. The assessee submitted that appellant has submitted the main ground of appeal, thorough oversight this ground could not be raised. He stated that subject matter of the additional ground has already been taken up in the assessment proceedings and the first appellate proceedings. The facts of additional grounds of appeal are already there in the other grounds of appeal, therefore no fresh investigation of facts is required for adjudication of additional ground of appeal, and therefore it may be admitted.
5. The learned departmental representative vehemently objected to the additional ground of appeal and stated that same does not arise from the order of the Ld assessing officer or the learned CIT – A and therefore the same is not been raised before the lower authorities. It can also not be raised before tribunal.
6. We have carefully considered the rival contention and perused the orders of the lower authorities. We also applied our mind to the application for additional evidences filed by the assessee. We find that the assessee would like to challenge the addition made by the learned assessing officer under section 68 of the income tax act on the legal grounds. The legal ground can be raised at any time of the disposal of the appeal. Further, no additional facts are required to be brought on record and therefore, the additional ground raised by the assessee is admitted.
7. The brief facts of the case show that the search u/s 132 of the income tax at 1961 was conducted at the residential premises of the assessee on 22/9/2005. The notice under section 153A of the act was issued on

15/5/2006 directing the assessee to file the return of income within 16 days of the receipt of notice. No return of income was filed by the assessee and therefore, notice under section 142 (1) was issued on 21/8/2007. Detailed questionnaire along with the further notice under section 142 (1) of the act was also issued on 9/10/2007. The learned assessing officer further issued notice under section 143 (2) on 6/12/2007, which was duly served. Suddenly assessee filed its return of income on 7/12/2007 declaring total income of Rs. 77130/–. However, the same was not accompanied by any of the documents.

8. The learned AO noted that during the year the assessee derived income from consultancy work and on perusal of the bank account maintained with state bank of India, it is found that assessee has deposited cash of INR 636000/–. The assessee was required to explain the source of the cash deposit. The assessee submitted that cash deposit of INR 60,000 on 17/5/2003 is out of the loans of the various parties. However, the balance of INR 6000 no explanation was provided. The assessee also did not file any confirmation in respect of the above loans received Further, the loans were also given in cash. No books of accounts have been maintained are produced before the assessing officer. Therefore, the learned AO treated the above sum of INR 60,000 as unexplained income and added the same under section 68 of the income tax act. The next cash deposit of INR 55,000 on 21/8/2003. The assessee's counse submitted that it is out of cash of INR 18,000 received from three gentlemen. The three persons were the same persons who are also discussed in the cash deposit of INR 60,000/– on 17/5/2003. Therefore, the learned assessing officer rejected the explanation of the assessee, treated the sum of INR 55,000 /– as income from undisclosed sources, and added under section 68 of the income tax act. A further sum of Rs. 90,000/- was deposited on 18/9/2003. The assessee explained the source out of the cash withdrawal on 9/9/2003 of INR 50,000 and INR 12,000, 18,000 and 18,000 received back from 3 different persons. The learned assessing officer accepted the deposit of INR 50,000 out of the cash withdrawal of 9/9/2003. However, with respect to the other explanation he disbelieved and made an addition of INR 48,000/– as unexplained income under section 68 of the income tax act. Further, the sum of INR 125000/–

and INR 181000 on 11/11/2003 and 11/3/2004 , which was stated to be received by the assessee from one company, however the assessee did not furnish any information or confirmation from that particular company. Further, the learned assessing officer treated the sum of INR 316000/– as unexplained income and made the addition u/s 68 of the income tax act. Further the case of INR 135,000 deposited in the bank account on 27/11/2003, assessee submitted the same out of cash of INR 18,000/- received from 7 persons, however, no further explanation was provided and therefore the addition of INR 135,000/– was made by the learned assessing officer. The learned AO also noted that the assessee has made huge investment in various advances as well as property during the year. Therefore, the deposit of cash in the bank account is for payment by cheque for the purchase of those assets. The learned AO noted that the assessee is trying to create an explanation which is not supported by evidences and Therefore, the order under section 153A (b) of the act was passed on 20/12/2007 determining the total income of the assessee of INR 7 29393/– against the returned income of INR 1 15393/–, wherein, the addition of INR 6 14000/– was made under section 68 of the income tax act.

9. The assessee aggrieved with the order of the Ld. assessing officer preferred an appeal before the learned CIT – A, who after considering the argument of the assessee confirmed the addition of INR 512000/– and deleted the balance amount. The assessee aggrieved with the order of the learned CIT – A has preferred this appeal before us.

10. The 1st ground of appeal of the assessee challenges the issue of the notice under section 143 (2) of the income tax act submitting that it can only be served after the assessing officer examined the return filed by the assessee. As per ground number 2, assessee challenged that instant case, the notice had been issued prior to the filing of return of income and therefore it was not a valid notice and therefore assessment completed based on it was invalid. The main argument of the assessee is that the appellant submitted its return of income on 7/12/2007. However the learned assessing officer issued notice under section 143 (2), on 6/12/2007. Therefore this notice is not a valid one as per the provisions of section 143 (2), which makes it clear that the notice can only be served after the learned

assessing officer examined the return of income filed by the appellant. For this proposition, he relied upon the decision of the honourable Delhi High Court in 323 ITR 249 in DIT vs Society for worldwide interbank financial telecommunication.

11. The learned departmental representative vehemently submitted that there is no requirement of issue of notice under section 143 (2) of the income tax act in case of a search, assessment. He relied upon the decision of the honorable Delhi High Court in case of shri Ashok Chaddha wherein it has been held that where the returns has been filed under section 153A of the income tax act, there is no requirement of the issue of notice under section 143 (2) of the income tax act. Even otherwise, he submitted that the assessee has filed the return of income not in response to the notice under section 153A of the income tax act, which was required to be filed within 16 days from the date of the issue of the notice, where assessee has filed it only on 7/12/2007. Therefore, it was submitted that it cannot be said that it is a return filed in response to notice under section 153A of the income tax Act. In view of this, he submitted that there is no fault on the part of the assessing officer in not issuing the notice under section 143 (2) of the income tax act. He otherwise submitted that the assessing officer issued the notice under section 142 (1) to the assessee on several occasions along with the questionnaire and therefore the assessee was aware that the return of income filed by him would be taken up for the scrutiny for that assessment year. Even otherwise, he stated that this there is no requirement for stringent rule that the learned assessing officer cannot issue the notice under section 143 (2) of the income tax act on the date on which the return of income is filed by the assessee, when assessee has not filed a valid return and even return filed also did not accompany with any documents. He otherwise submitted that there is no infirmity in the procedural aspects of the issue of notice as well as the foundational aspects of the assessment. He further relied upon the provisions of section 292B of the income tax act.

12. We have carefully considered the rival contention and find that the assessing officer has issued notice under section 153A of the income tax act on 15/05/2006 granting the 16 days time to the assessee to file a return of income. However, the assessee did not file the return of income at all.

Consequently, the assessment was getting time barred on 31/12/2007. At the fag end of the time barring assessment, assessee filed his return of income on 7/12/2007, which was also not accompanied by any of the documents. Therefore, it cannot be stated that there is a valid return filed by the assessee in response to notice u/s 153A of the Act. When the assessee chooses to file his return of income at his sweet will without caring for the time limits prescribed by the assessing officer, he cannot later on take shelter under such technicalities, Even otherwise the return filed by the assessee could not be considered to be a return filed in response to notice under section 153A of the income tax act. Further, in case of search assessments u/s 153A of the act there is no requirement of issue of notice u/s 143(2) of the act. This issue is squarely covered against the assessee by decision of the honorable Delhi High Court in case of CIT vs Ashok Chadha [2012] 20 taxmann.com 387 (Delhi)/[2011] 337 ITR 399 (Delhi) wherein it has been held that There is no specific provision in the Act requiring the assessment made under section 153A to be after issue of notice under section 143(2). The words 'so far as may be' in clause (*a*) of sub-section (1) of section 153A cannot be interpreted that the issue of notice under section 143(2) is mandatory in case of assessment under section 153A. The use of the words 'so far as may be' cannot be stretched to the extent of mandatory issue of notice under section 143(2). A specific notice is required to be issued under clause (*a*) of sub-section (1) of section 153A calling upon the persons searched or requisit oned to file return. That being so, no further notices under section 143(2) can be contemp ated for assessment under section 153A. In view of this, we do not find any infirmity in the order of the learned assessing officer in issuing notice under section 143 (2), on 6/12/2007 as there is no requirement prescribed under the law for issue of notice under that section where the assessment is taken under section 153A of the income tax. In view of this ground number, one, and two of the appeal of the assessee are dismissed.

13. The ground number 3 – 6 are on the merits of the addition where the learned assessing officer has made the addition u/s 68 of the income tax act, amounting to INR 6 14000/– on account of unexplained cash deposits in the bank account, which has been restricted by the learned CIT – A, to the extent of INR 512000/–.

14. On the merits of the addition, the learned authorized representative vehemently submitted that assessee has submitted the evidences before the learned Commissioner of income tax appeals, which have not been considered. He further stated that only the undisclosed income detected in

the course of search and seizure can be made the subject matter of addition under section 153A of the income tax act. He submitted that in the present case, the learned assessing officer has made the addition with respect to the cash deposits made in the bank account of the assessee. He further stated that the assessee has submitted the affidavit of all 14 persons, which have been rejected by the lower authorities. He further relied upon the decision of the coordinate bench in case of 87 ITD 119 as well as the decision of the honourable Punjab and Arianna High Court in 12 taxmann.com 414 with respect to the evidences not considered by the lower authorities.

15. The learned departmental representative vehemently objected to the various grounds of appeal and stated that the assessee has not contested the quantum of additions made by the learned assessing officer. He further stated that the assessee has only submitted the general arguments with respect to the additions and has not made any case that why this addition has been incorrectly made by the learned assessing officer. He therefore submitted that on the merits of the case, the addition is required to be sustained as assessee has filed to prove the creditworthiness and genuineness of the transactions of loans/ cash deposits. He further stated that no evidence was submitted by the assessee to prove the identity, creditworthiness and the genuineness of the source of cash deposits in the bank account. He further stated that deposits are not exceeding INR 18,000/– which a so creates the doubt with respect to the genuineness of the loans obtained by the assessee. He further stated that the no proofs of repayment of these loans have been provided by the assessee and therefore the provisions of section 68 are correctly applied by the lower authorities. He extensively referred to the orders of the lower authorities.

16. We have carefully considered the rival contention and perused the orders of the lower authorities. In the present case the assessee has deposited cash in his bank account and the source of the cash deposited in this bank accounts have been shown by the assessee as loan from various parties. In support of which the assessee could submit only the affidavits. There are no evidences submitted by the assessee about the repayment of these loans. Affidavits submitted by the assessee are also self-serving evidences, which does not disclose any source of income in the hands of those depositors. It

is very interesting to read the remand report submitted by the learned assessing officer dated 9/9/2009, wherein, he noted that there are 17 persons from whom the assessee has obtained a loan of INR 18,000 amounting in all to INR 292000/–. With respect to the balance addition of INR 451,000/– assessee could not submit any credible evidences. Therefore the total addition of INR 6 36000/– was made by the AO, Which has been reduced by the learned CIT – A. The learned assessing officer granted several opportunities to the assessee to produce those persons. On 30/6/2009, 10/7/2009 and on 20/7/2009 to 27/7/2009 such opportunities were granted. However, assessee could not produce any persons. Further, finally the assessee could produce on 3/8/2009, only five persons and on 6/8/2009 the 6th one. The learned assessing officer recorded the statement and none of the above persons could produce their bank passbook or books of accounts, though all of them confirmed the transaction with the dates of the loan. However, none of them was aware about the various important dates in their life. Therefore, the learned assessing officer noted that they are tutored. Further, all the transactions were allegedly made in cash and no documentary evidences were either maintained with respect to the other persons. The assessee stated that other persons are unable o come before the assessing officer. It is also apparent that all the alleged transactions have been made in cash irrespective of the fact that the numbers of these persons were having bank accounts. Further assessee has also taken care that none of the alleged loans exceeds the amount of INR 20,000. There is no documentary evidences produced before the lower authorities with respect to creditworthiness and genuineness of transactions of loan. Assessee had various opportunities to adduce evidence at the time of assessment. However, the assessee did not the used them and during the course of remand proceedings could produce only six persons who also lacks credibility. None of the persons produced also submitted their bank passbook to show the source of the funds. The learned assessing officer further noted an interesting fact that all the persons who are the lender to the assessee are also employed with the same company in which the assessee is a managing director. This it shows the genuineness of the

transaction in serious doubt as the managing director of the company is taking loan of INR 18,000 from the various employees from his company. In view of this, we do not find any infirmity in the order of the learned CIT – A, in confirming the addition u/s 68 of the income tax act of the amount deposited in the bank account of the assessee. Accordingly, ground numbers 3 – 6 of the appeal are dismissed.

17. In the additional ground the assessee contented that the learned CIT – A, has erred in confirming the addition amounting to INR 512000/– on account of unexplained bank deposit under section 68 of the income tax act. The argument of the assessee is that provisions of section 68 of the income tax at act apply only when the amount is credited in the books of accounts. In the present case the assessee does not maintain any books of accounts and therefore the amount deposited in the bank account of the assessee cannot be considered to be the amount credited in the books of accounts of the assessee and hence, the addition u/s 68 made by the learned assessing officer and confirmed by the learned CIT – A, is invalid.

18. The learned departmental representative vehemently supported the order of the learned assessing officer/CIT – capital and submitted that the amount has been deposited in the bank account of the assessee and therefore the addition is rightly been made under section 68 of the income tax act.

19. We have carefully considered the rival contention and perused the orders of the lower authorities. In the present case, admittedly, assessee has deposited money in bank account for which the source could not be explained properly and therefore lower authorities have made addition u/s 68 of the income tax act. The contention of the assessee is that he is not maintaining any books of accounts and therefore deposit made in the bank account of the assessee cannot be considered as an amount deposited in the books of accounts of the assessee and hence, the addition made u/s 68 of the income tax act stands vitiated and therefore it should be deleted. The first judicial precedent in this controversy is the decision of the honourable Bombay High Court in 141 ITR 67, wherein it has been held that that when monies are deposited in bank account, relationship that is constituted between the bank and the customer is of creditor and not the trustee and beneficiary. Therefore, it is not as if the bank passbook is maintained by the

bank as an agent of the customer, nor can it be said that the passbook is maintained by the bank under the instructions of the customers. In view of this, the bank passbook supplied by the bank to the assessee cannot be regarded as a books maintained by the assessee under instructions. Accordingly, it was held that cash credit for the previous year shown in the assessee's bank passbook issued to him by the bank, but not shown in the cashbook maintained by him for that year, does not fall within the ambit of section 68 of the income tax act. The facts in that case are that assessee did maintain the books of accounts , certain sums were found in the bank account of the assessee but were not found in the regular cashbook submitted by the assessee. In the circumstances, the honourable High Court stated so. Further, the assessment year involved in that case is 1962 – 63. Admittedly on that date definition of the 'books of accounts' as prescribed under section 2 (12A) was not there on statute, which is inserted by the finance act, 2001, with effect from 1/6/2001. Further, the honourable Bombay High Court in 85 taxmann.com 306, 250 taxman 362 and 399 ITR 256 (Bombay) in Arunkumar J Muchhala V CIT has considered an identical issue where the above decision of the honourable Bombay High Court in 141 ITR 67 was considered. The honourable Bombay High Court noted that in Sudhir Kumar Sharma (HUF) vs CIT, 46 taxmann.com 340, honourable High Court noted that when during the course of assessment proceedings, assessing officer noted that the assessee has deposited huge amount of cash in his bank account, the addition of the said amount in the income of the assessee, by invoking the provisions of section 68 of the income tax act is justified. It was further held that onus is on the assessee to explain the nature and source of the said cash deposits. Special leave petition was preferred challenging the above judgment before honourable Supreme court. However, the honourable Supreme Court has dismissed the same in 69 taxmann.com 219 [239 taxmann 264]. In view of this, even if the assessee does not maintain any books of accounts but the amount is deposited in the bank account of the assessee, which remains unexplained the addition could be correctly made u/s 68 of the act. Further looking at the definition of the 'books or books of accounts' it is apparent that passbook is a daybook which is kept in the return form or as a printout

of data stored in a floppy. Therefore, after the introduction of the definition of the books or books of account under section 2 (12A) of the act, the passbook can also be considered as books or books of account. There is no distinction who writes it, but it is record of the transactions entered into by the assessee with the bank. The provisions of section 68 of the income tax act also does not make any distinction about who maintains the books of account, the only requirement is that the books should be of an assessee. There is no requirement that the books of account should be maintained by the assessee himself. In view of this, we do not find any infirmity in the order of the learned CIT – A, in confirming an addition of INR 512000/– on account of unexplained bank deposits under section 68 of the income tax act. Accordingly, the additional ground raised by the assessee for assessment year 2004 – 05 is also dismissed.

20. Accordingly, appeal of the assessee for assessment year 2004 – 05 is dismissed.

ITA No 938/Del/2012 for AY 2005 - 06

21. Assessee has filed this appeal for assessment year 2005 – 06 against the order of THE COMMISSIONER OF INCOME TAX (APPEALS) –XXXIII, New Delhi dated 26/12/2011 wherein the addition of INR 343000/– on account of cash deposited in the bank account of the assessee out of the total addition made by the learned assessing officer of Rs. 451000/– is confirmed.

22. The assessee has raised the identical grounds of appeal and additional ground as it was raised in the appeal filed by the assessee for assessment year 2004 – 05. Both the parties confirmed that their arguments remain the same for this assessment year identical to the arguments advanced by them for assessment year 2004 – 05.

23. We have carefully considered the rival contention and found that the facts relating to the addition in this appeal are identical to the facts for assessment year 2004 – 05. During this year the assessee filed his return of income on 7/12/2007 in response to the notice under section 153A of the act issued on 15/05/2006. The similar notice under section 143 (2) was also issued by the learned assessing officer on 6/12/2007. The learned AO noted that assessee has deposited a sum of INR 475000/– in his bank account with state bank of India. After examining the source of deposits

explained by the assessee, learned assessing officer noted that assessee has accepted loan of INR 18,000 each from 12 different persons with respect to the deposit of sum of INR 225000/– on 24/3/2005 and further from 5 persons amounting to INR 76,000/-on 9/8/2004. With respect to deposit of INR 100,000 on 21/10/2004, assessee explained the source of the deposit as received from wife of the assessee. Assessee could not furnish any confirmation or the date when the same was received and repaid. Therefore, the same was added under section 68 of the income tax act. Further in para number 3.5 of the order he noted that assessee has made substantial investment in purchases of flat as well as other investment and therefore the above deposit in cash in the bank account is made in order to make payment by cheque for the purchase of these assets. Accordingly, the order under section 153A, was made making an addition of INR 451000/–. The assessee challenged the same before the learned CIT – A, who reduced it to INR 343000/–. The facts are similar to as decided by us in assessment year 2004 – 05 in appeal of the assessee where in we have confirmed the order of the LD CIT (A) We find no reason to deviate from the same. In the result all, the grounds of appeal raised in the appeal memo as well as the additional ground raised by the assessee are dismissed.

24. Accordingly, appeal of the assessee for assessment year 2005 – 06 in ITA number 938/Del/2012 is dismissed.

25. Accordingly, both the appeals filed by the assessee for assessment year 2004 – 05 and 2005 – 06 are dismissed.

Order pronounced in the open court on 13/05/2019.

-Sd/-	-Sd/-
(K.N.CHARY)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 13/05/2019
Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi