

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "D", MUMBAI
BEFORE SHRI D. MANMOHAN (VICE-PRESIDENT)
&
SHRI RAJANDRA SINGH (ACCOUNTANT MEMBER)
I.T.A. No.2131/Mum/2009
(A.Y. :2005-06)**

Shri Dinesh Khemabhai Patel, A-104, Pluto Apartments, Ram Mandir Compound, SVP Rd., Borivli(W), Mumbai-400 092. PAN: AACPP6815A	Vs.	Income-tax Officer, Ward 25(3)(2), C-11 Bldg., 3 rd floor, Pratyakshakar Bhavan, Bandra Kurla Complex, Bandra(E), Mumbai-400 051.
Appellant		Respondent

Appellant by		Shri Kashyap Vaidya.
Respondent by		Shri Durgesh Sumrott.

ORDER

PER D. MANMOHAN, VICE-PRESIDENT:

This is an appeal filed by the assessee and it pertains to asst. year 2005-06.

2. At the time of hearing, Id. counsel appearing on behalf of the assessee submitted that only ground no. 2 is the material ground which reads as under :

"(2) The Learned CIT(Appeals) has erred in sustaining, partly, the disallowances made by the Assessing Officer on account of :

(a) A sum of Rs.17,29,508/- u/s.68 of the Income-tax Act, 1961 by way of treating loans taken as unexplained cash credits without considering the additional evidence filed before the Learned Commissioner of Income-tax (Appeals).

(b) A sum of Rs.19,090/- on account of difference between the amount of TDS certificates enclosed and the amount of labour charges received."

3. The Id. counsel did not press ground no.2(b) and hence the order of the CIT(A) on that issue is upheld.

4. As regards ground no.2(a), the case of the Id. counsel is that an addition u/s.68 of the Act was made by the AO without giving the

assessee a reasonable opportunity of being heard to prove his case that most of the credits pertain to earlier years and other credits do not call for consideration u/s.68 of the Act. For example, advance received against sale of flat cannot be added u/s.68. He furnished additional evidence before Id. CIT(A) vide letter dated 15-12-2008 wherein he explained as under :

"The appellant has obtained loan confirmation from all the persons mentioned in the statement. Most of the lenders are assessed to income-tax. Moreover, a sum of Rs.3,60,000/- has been received as advance towards sale of flat, which is shown under loans & advances but is not a loan. We enclose herewith the copy of agreement of sale of flat for your kind consideration.

The above loan confirmations could not be produced before the learned AO because of the circumstances which were beyond the control of the appellant and which are narrated in the letter of written submissions to be filed along with this.

We on behalf of the appellant, most humbly pray your honour to kindly admit, adjudicate upon and allow the above additional evidence and oblige."

However, the Id. CIT(A) ignored the request of the assessee and without admitting the additional evidence merely directed the AO to look into the balance sheet of the preceding year in respect of the claim of loans taken in the earlier year and thus did not adjudicate the other issues such as availability of confirmation letter, etc.

5. On the other hand, the Id. D.R. submitted that the assessee has not co-operated with the AO and thus there is no need for the Id. CIT(A) to admit fresh evidence.

6. We have carefully considered the rival submissions and perused the record. It is not the case of the assessee, at this stage, that the AO has not given sufficient opportunity; the case of the assessee is that the

additional evidence produced before the CIT(A) ought to have been admitted under Rule 46A. If additional evidence is not admitted, the Id. CIT(A) ought to have furnished reasons for non-admission so that the assessee could explain properly as to whether the reasons for non-admission of additional evidence are in accordance with law or not. In the instant case, the Id. CIT(A) completely ignored to take notice of the additional evidence. Under these circumstances, we are of the view that in the interests of substantial justice the matter requires to be sent back to the CIT(A), who is directed to give the assessee a reasonable opportunity of heard. Suffice to say that the Id. CIT(A) should consider the additional evidence in accordance with law. If there are no justifiable reasons for admission of the additional evidence, the Id. CIT(A) has to pass a speaking order so that a superior forum can consider the correctness of the reasons mentioned therein. With these observations, the issue concerning the disallowance u/s.68 of the Act, other than Rs.6,97,688/-, is hereby set aside to the file of CIT(A).

6. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced on the 4th day of June, 2010.

Sd/-
(RAJENDRA SINGH)
ACCOUNTANT MEMBER

Sd/-
(D. MANMOHAN)
VICE-PRESIDENT

Mumbai: 4th June, 2010.

NG:

Copy to :

1. Assessee.
2. Department.
- 3 CIT(A)-XXV,,Mumbai.
- 4 CIT, MC-25,Mumbai.
- 5.DR,"D" Bench,Mumbai.
5. Master file.
(TRUE COPY)

BY ORDER,

Asst.Registrar, ITAT, Mumbai.

	Details	Date	Initials	Designation
1	Draft dictated on	31-05-2010		Sr.PS/
2	Draft Placed before author	02-06-2010		Sr.PS/
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/
6.	Kept for pronouncement on			Sr.PS/
7.	File sent to the Bench Clerk			Sr.PS/
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			