

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'SMC', NEW DELHI**

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

ITA No. 7309/Del/2018

AY: 2014-15

NITIN AGARWAL (HUF) C/O KAPIL GOEL, ADVOCATE, F-26/124, SECTOR-7, ROHINI, DELHI (PAN: AAFHN4178R)	vs.	ITO, WARD 30(1), NEW DELHI
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(Appellant)

(Respondent)

ITA No. 7310/Del/2018

AY: 2014-15

KAILASH PRASAD AGARWAL (HUF) C/O KAPIL GOEL, ADVOCATE, F-26/124, SECTOR-7, ROHINI, DELHI (PAN: AAAHK2932D)	vs.	ITO, WARD 29(2), NEW DELHI
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(Appellant)

(Respondent)

ITA No. 7443/Del/2018

AY: 2014-15

MANISH AGARWAL (HUF) C/O KAPIL GOEL, ADVOCATE, F-26/124, SECTOR-7, ROHINI, DELHI (PAN: AAFHN4178R)	vs.	ITO, WARD 30(1), NEW DELHI
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(Appellant)

(Respondent)

Assessee by : Sh. Kapil Goel, Adv.

Revenue by : Sh. S.L. Anuragi, Sr. DR.

ORDER

These three appeals filed by the separate Assesseees are directed against the respective Orders of the Ld. CIT(A)-10, New Delhi relevant to assessment year 2014-15. Since the issues involved in these appeals are common and identical, hence, the appeals were heard together and are

being disposed of by this common order for the sake of convenience, by dealing with ITA No. 7309/Del/2018 (AY 2014-15) – Nitin Agarwal (HUF) vs. ITO. In all the three appeals assessee has raised as many as 11 grounds, but argued the only one common ground no. 8 in all the appeals, except the difference in figure. Therefore, I am reproducing the common ground no. 8 as under:-

..”8. That on the facts and in the circumstances of the case and in law Ld. CIT(A) erred in sustaining the action of AO in making addition of Rs. 22,13,779/- without appreciating that section 68 is not applicable to sale of shares as mentioned in the impugned assessment order.”

2. I will first take up the appeal in the case of Nitin Agarwal (HUF) vs. ITO being ITA No. 7309/Del/2018 (AY 2014-15) and my finding given therein will apply *mutatis mutandis* in other appeals, since similar facts and findings are permeating in other appeals also.

3. The brief facts of the case are that assessee filed e-return of income on 30.7.2014 declaring an income of Rs. 5,72,720/-. Subsequently, the case of the assessee was selected for the scrutiny under CASS. Accordingly, notice u/s. 143(2) of the I.T. Act, 1961 dated 18.9.2015 was issued. Subsequently, questionnaire u/s. 142(1) of the Act dated 6.6.2016 was also issued to the assessee. In response to the notice issued, the AR of the assessee attended the proceedings from time to time and furnished the requisite details. AO observed that assessee by

filing the return has shown income from business, capital gain and other sources and vide Schedule EI has not disclosed any long term capital gain. However, during the course of assessment proceedings, when the assessee was asked about purchase and sale of shares of M/s Kailash Auto Finance, the assessee filed a revised computation of income declared longer capital gain amounting to Rs. 20,94,300/-, which was claimed as exempt. AO further observed that the shares of the penny stock is controlled by a group of people viz. promoter / operator/ brokers. All purchases of shares were arranged by them on assurance of booking bogus LTCG in favour of the assessee. It is fact and evidence from the statement of several persons recorded u/s. 131 of the Act that they have not only sale of shares to the assessee but also arranged for sales of shares through their entities and by paying certain amount of commission to them. The entity from whom share was purchased is a entry operator and controlled by a group of entry operator. Therefore, generation of LTCG through the process from purchase to receipt of cheque is totally arranged and actually no capital gain arose, but assessee's own cash has been routed through different entities and ultimately reached to his hand by cheque in the disguise of sale proceeds of listed security. Therefore, the AO concluded that the transactions were sham and aimed only to bring unaccounted money in the semblance of exempted long term capital gains and paper work has been got up and done merely to give a colour of authenticity to the transaction and by creating a facade of legitimate transactions. Hence, he denied the

exemption claimed u/s. 10(38) of the Act and treated the entire receipt of Rs. 21,49,300/- as income of the assessee and added back to his hand u/s. 68 of the Act read with section 115BBE of the Act and also made addition being commission @3% amounting to Rs. 64,479/- paid by the assessee from undisclosed sources vide order dated 26.12.2016 passed u/s. 143(3) of the Act. Against the said assessment, assessee appealed before the Ld.CIT(A), who vide his impugned order dated 17.9.2018 has dismissed the appeal of the assessee. Aggrieved with the impugned order, the assessee is in appeal before the Tribunal.

4. At the time of hearing, Ld. counsel for the assessee has only argued the ground no. 8 by stating that exactly the similar issue to the ground no. 8 in the present appeal has been recently adjudicated and decided by the ITAT, Delhi 'B' Bench order dated 05.12.2018 in ITA No. 1931/Del/2016 (AY 2010-11) in the case of Inder Singh vs. ITO, Ward 43(3), New Delhi. He further stated that Section 68 is not applicable to the sale of shares as mentioned in the impugned order. He draw my attention towards para no. 6 of the order wherein it was stated that AO has invoked the section 68 of the Act, on cash deposit found in bank accounts and admittedly assessee is not maintaining any books of account and therefore, any addition u/s. 68 is untenable in law as section is applicable only where credits are found in books of account maintained by assessee. Therefore, the Assessee is neither required by law nor is maintaining books of accounts and therefore, addition u/s. 68 of the Act is bad in law; and without prejudice the deposit in bank account cannot be

added u/s. 68 of the Act. Therefore, he submitted that the issue in dispute is squarely covered by the ITAT, Delhi 'B' Bench order dated 05.12.2018 in ITA No. 1931/Del/2016 (AY 2010-11) in the case of Inder Singh vs. ITO, Ward 43(3), New Delhi. Further, in support of his contention he also filed the copy of various case laws in the shape of Paper Book in which he has attached copy of decision of the ITAT, SMC Bench decision dated 5.11.2018 in ITA No. 457/Del/2018 in the case of Arun Kumar; SMC bench, ITA No. 2021/Del/2018 dated 25.9.2018 in the case of Subhit Goel, HUF; SMC ITAT decision dated 6.11.2018 in the case of Jyoti Gupta in ITA No. 3510/Del/2018; ITAT, SMC decision dated 24.1.2018 in the case of Amit Rastogi HUF in ITA No. 2128/Del/2018; SMC, ITAT decision dated 27.6.2018 in ITA No. 3035/Del/2018 in the case of Shikha Dhawan; ITAT, F Bench, Delhi order dated 27.11.2018 in the case of Veena Gupta in ITA No. 5662/Del/2018 (AY 2014-15; SMC, ITAT, Delhi decision dated 26.11.2018 in the case of Mukta Gupta in ITA No. 2766/Del/2018 AY 2014-15 and ITAT, G, Bench, New Delhi decision dated 7.12.2018 in the case of Brij Bhushan Singal in ITA No. 1415 to 1417/Del/2018 and ITAT, 'F' Bench decision dated 27.11.2018 in the case of Vijay Kumar Prop. VK Medical Hall vs. ITO, in ITA No. 2483/Del/2015 (AY 2011-12).

5. On the contrary, Ld. DR relied upon the orders passed by the revenue authorities. He submitted that the entity from whom share was purchased is a entry operator and controlled by a group of entry operator. Therefore, generation of LTCG through the process from purchase to

receipt of cheque is totally arranged and actually no capital gain arose, but assessee's own cash has been routed through different entities and ultimately reached to his hand by cheque in the disguise of sale proceeds of listed security. Therefore, the AO rightly concluded that the transactions were sham and aimed only to bring unaccounted money in the semblance of exempted long term capital gains and paper work has been got up and done merely to give a colour of authenticity to the transaction and by creating a facade of legitimate transactions. Hence, AO denied the exemption claimed u/s. 10(38) of the Act and treated the entire receipt of Rs. 21,49,300/- as income of the assessee and added back to his hand u/s. 68 of the Act read with section 115BBE of the Act and also made addition being commission @3% amounting to Rs. 64,479/- paid by the assessee from undisclosed sources, which does not need any interference on my part.

6. I have heard both the parties and perused the records and the case laws cited by the Ld. counsel for the assessee. I find that in this case return of income was filed on 30.7.2014 declaring an income of Rs. 5,72,720/-. The AO completed the assessment at Rs. 27,86,500/- against the returned income of Rs. 5,72,720/- and made the additions. In appeal, Ld.CIT(A) has dismissed the appeal of the assessee. We find that in this case also AO has invoked the Section 68 of the Act on cash deposits found in the bank accounts. It is correct that since no books of account are maintained in the ordinary course of business of the assessee, no such addition u/s 68 of the Act is tenable. Therefore, in my

considered opinion the ground in dispute is squarely covered by the decision of the ITAT, Delhi 'B' Bench order dated 05.12.2018 in ITA No. 1931/Del/2016 (AY 2010-11) in the case of Inder Singh vs. ITO, Ward 43(3), New Delhi wherein, the Tribunal has adjudicated the similar and identical issue to the issue in dispute by holding as under:-

"5. We have heard both the parties and perused the records and the case laws cited by the Ld. counsel for the assessee. We find that in this case return of income was filed on 31.3.2011 declaring an income of Rs. 6,5,454/- inclusive of agricultural income of Rs. 2,60,800/- after availing deduction under Chapter VIA amounting to Rs. 1,00,000/-. The AO completed the assessment at Rs. 1,01,35,450/- against the returned income of Rs. 6,55,454/- and made the various additions. In appeal, Ld.CIT(A) has partly allowed the appeal of the assessee. We find that in this case also AO has invoked the Section 68 of the Act on cash deposits found in the bank accounts. It is correct that since no books of account are maintained in the ordinary course of business of the assessee, no such addition u/s 68 of the Act is tenable. Therefore, in our considered opinion the legal ground in dispute is squarely

covered by the decision of the ITAT, 'F' Bench vide order dated 27.11.2018 in ITA No. 2483/Del/2015 (AY 2011-12) in the case of Vijay Kumar Prop. V.K. Medical Hall vs. ITO wherein, the Tribunal has adjudicated the similar and identical issue to the issue in dispute by holding as under:-

"8. Ld. AR submitted that Assessing Officer has invoked section 68, on cash deposits found in bank accounts. He submitted that, admittedly assessee is not maintaining any books of account and, therefore, any addition under section 68 is untenable in law as section is applicable only where credits are found in books of accounts maintained by assessee. He referred to definition of "books of account in section 2(12A) of the Act, which reads as under:

"section 2(12 A):

"books or books of account" includes ledgers, day-books, cash books, account books and other books whether kept in the written form or as printouts of Tata stored

in a floppy, disk, tape or any other form of electromagnetic data storage device;

He also referred to following decisions of this Tribunal, in support of his argument:

S.No & Particulars/Title of Decision Bench etc.

(Citation/Reference No./Order date) Held

(Gist in brief) Relevant Para

- 1. Babbal Bhatia A Bench Delhi ITAT ITA 5430 & 5432/Del/2011 (08/06/2018) Para 19 (Para 14 to 26)*
- 2. Zaheer Abdulhamid Mulani SMC Pune Bench (Before Ms. Sushma Chowla and Shri Anil Chaturvedi) ITA 862/Pun/2017 (31.08.2018) Para 13*
- 3. Latif Ebrahim Patel Mumbai A Bench ITA 7097/Mum/2013 (23.03.2018) Para 7 & Para 8 (Mumbai ITAT decisions in 164 ITD 296 & 160 ITD 605 followed)*
- 4. Shamsher Singh Gill Delhi SMC Bench in ITA 2987/Del/2015 (28/02/2017) Para 4 to 7*
- 5. Danveer Singh Delhi SMC Bench in ITA 4036/Del/2017 (14/12/2017) Para 5*

6. *Om Prakash Delhi E Bench in ITA 1325/Del/2011 (11/08/2016)Para 5 to 8*
7. *Kamal Kumar Mishra Lucknow ITAT 143 ITD 686 Para 7*
8. *Sunil Vaid Delhi ITAT SMC Bench in ITA 2414/Del/2016 (30/12/2016)Para 7*
9. *On contrary, Ld. Sr. DR referring to definition of "books, books of account" as defined under section 2(12A) of the Act, submitted that, it is not an inclusive definition in order to restrict meaning of what is referred to therein. Ld. Sr. DR submitted that bank accounts do fall under term 'account books' and 'other books', which are to be construed generally. Ld. Sr. DR further submitted that assessee has not been able to explain source of cash deposited in bank account and, therefore, Ld. AO was right in invoking provisions of section 68 of the Act.*
10. *We have heard both sides in light of records placed before us.*
11. *Admittedly, assessee has not maintained any books of accounts, and it is also an*

undisputed fact that cash has been deposited in saving bank account of assessee, which he explains to be sale proceeds received on sale of agricultural plot. Ld. AO applied provisions of section 68 of the Act to cash found deposited in bank account, since assessee could not explain source to satisfaction of Ld. AO, and by holding that, assessee has not discharged identity, credibility and most importantly genuineness of transaction.

- 12. It has been vehemently canvassed by Ld.AR that passbook/bank statement obtained from a bank do not construe "books of account" of assessee, as defined under section 2(12A) of the Act. It is also been proposed by Ld.AR that section 68 of the Act is not applicable, when assessee does not maintain any books of accounts. He, thus, vehemently argued that, provisions of section 68 is applicable, only when, no explanation and/or explanation offered by assessee is not satisfactory, regarding any*

amount found credited in "books of account" of assessee.

13. Be that as it may, we have carefully perused provisions of section 68. This section starts with words, "where any sum is found credited in the books of an assessee maintained for any previous year,....." . Therefore, section 68 can be applied only where, there are sum found credited in "books of account" maintained by assessee. No doubt passbook /bank statement, are maintained by a bank for its customers. Thus in our considered opinion, we agree with proposition advanced by Ld.AR of non applicability of section 68 in case of cash credit found in saving bank account.

14. It is further observed that Ld. AO applied section 68 and made additions in hands of assessee, as unexplained cash credits, to such amount, which has been found deposited by assessee in his saving bank account. To our mind in present facts of case section 69 should have been initiated by Ld.AO. It is unfortunate that Assessing

Officers blindly apply provisions, which can be fatal to the interest of Revenue. However as a Tribunal, we are not competent to make addition u/s 69A of the Act, by virtue of the decision of Hon'ble Allahabad High Court in case of Smt. Sarika Jain vs. CIT reported in 407 ITR 254. Hon'ble High Court observed as under.

"18. In view of the above, when the said income cannot be added u/s 68 of the Act and the Tribunal was not competent to make the said addition under section 69A of the Act, the entire order of the Tribunal stand vitiated in law."

Respectfully following the above observation by Hon'ble Allahabad High Court, we allow additional ground raised by assessee, only because addition u/s 68 is not sustainable in present facts of case.

Accordingly the additional ground raised by assessee stands allowed.

16. As we have allowed additional ground, addition made by Ld.AO under section 68 stands

deleted and, therefore, we do not find it necessary to decide other grounds raised as they become infructuous.

Accordingly the other grounds raised in the ground of appeal stands dismissed as infructuous.

In the result appeal filed by assessee stands allowed.

6. Keeping in view of the facts and circumstances of the case and respectfully following the precedents, as aforesaid, the addition u/s. 68 is not sustainable in present case, hence, we delete the same and allow the ground no. 2 to 2.2 argued by the Ld. Counsel for the assessee.

7. In the result, the Appeal of the Assessee stands allowed.”

7. Keeping in view of the facts and circumstances of the case and respectfully following the precedents, as aforesaid, the addition u/s. 68 is not sustainable in present case, hence, I delete the same and allow the only ground no. 8 argued by the Ld. Counsel for the assessee. In the result, the Appeal of the Assessee stands allowed.

8. Since in other two appeals i.e. in the case of Kailash Prasad Agarwal (HUF) vs. ITO, Ward 29(2), New Delhi (AY 2014-15) and in the case of Manish Agarwal (HUF) vs. ITO Ward 30(1), New Delhi, similar facts are

permeating, therefore, my finding given above will apply *mutatis mutandis* in these two appeals also, because the ground involved therein are exactly similar and identical. Thus, these appeals are also allowed.

9. In the result, all the three appeals of the separate assesseees are allowed.

Order pronounced on 11.01.2019.

Sd/-

**(H.S. SIDHU)
JUDICIAL MEMBER**

Dt. 11-01-2019

SR BHATNAGAR

Copy forwarded to: -

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

- TRUE COPY -

By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches