

IN THE INCOME TAX APPELLATE TRIBUNAL,  
AMRITSAR BENCH; AMRITSAR (SMC)

BEFORE SH. A.D. JAIN, JUDICIAL MEMBER

ITA No.468(Asr)/2014  
Assessment year:2010-11  
PAN: AKHPK-7255Q

Sh. Dushiant Kumar  
Prop. S.P. Traders,  
Rampura Phul.  
(Appellant)

vs. Income Tax Officer,  
Ward 1(3),  
Bathinda.  
(Respondent)

Appellant by:Sh. J.K. Gupta, Advocate  
Respondent by:Sh. Tarsem Lal, DR

Date of hearing: 06/11/2015  
Date of pronouncement: 27/11/2015

**ORDER**

This is the assessee's appeal for the assessment year 2010-11  
against the order dated 29.04.2014 passed by the ld. CIT(A), Bathinda.

The assessee has raised the following Revised Grounds of appeal:

- "1. That on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in upholding the addition of Rs.30,000/- in trading account.
- 1A. That on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in upholding the addition when the audited books of account have not been rejected by the AO by invoking section 145(3) of the Act.
- 1B. That on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in upholding the addition as there is fall in Gross Profit at 18.86% not 51% as calculated by the AO and ignoring the fact there is increase in sales by 37.54%.

2. That on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in upholding the cash credit of Rs.1,14,500/- in the name of Shree Pal.
  3. That on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in upholding the addition of Rs.1,25,000/- u/s 69 in respect of Sh. Rajinder Kumar Mittal.
  4. That on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in upholding the addition of Rs.40,030/- on account of low household expenses.
  5. That on the facts and in the circumstances of the case and in law, the ld. CIT(A) should have set off the addition of balance house hold expenses with cash credit as was done by him in the case of trading addition.”
2. Concerning Ground no.1, the AO made an addition of Rs.50,000/- in the trading account of the assessee. It was observed that the assessee deals in tea leaves; that on the gross turnover of Rs.66,83,514/-, the GP had been shown by the assessee at Rs.4,68,938/- which worked out to 7.01% as compared to GP of 8.64% shown for the immediately preceding assessment year, i.e. 2009-10; that on query the assessee had contended that during the year his sales rose to Rs.66.83 lac as compared to those of Rs.48.48 lac in the earlier year and hence, the margin was reduced to achieve higher sales. The AO rejected the assessee’s contention in part, for the reason that though one has to compromise with one’s margin to achieve higher sales, but in assessee’s case the fall in GP was 51%, which was abnormally high. Thus, the AO made the addition of Rs.50,000/- on account of low GP.
3. The AO reduced the addition to Rs.30,000/-.

4. The ld. counsel for the assessee has contended that the ld. CIT(A) has failed to taken into consideration the fact that the assessee's audited books of account were not rejected and that so, no addition could have been made on account of GP. In this regard, reliance has been placed on the decision dated 31.10.2014 of the Singh Bench of the Amritsar Bench of the Tribunal, in the case of "Vinod Kumar vs. ITO", passed in ITA No. 467/Asr/2014 for the assessment year 2010-11.

5. The Ld. DR, on the other hand, placed strong reliance on the impugned order in this regard.

6. The contention on behalf of the assessee is found to be correct. Once the books of account have not been rejected and that assessment order has been passed u/s 143(3), no addition on account of GP could be made. In this regard, in "Vinod Kumar vs. ITO" (supra), it has been observed as follows:

"7. I have heard the rival contentions and perused the facts of the case. There is no dispute to the fact that the A.O. has not pointed out any defect in the books of account and the books of account have not been rejected by invoking provisions of Section 145(3) of the Act. Even if this ground has not been raised before the learned CIT(A) or even before us in the grounds of appeal, the fact remains that no books of account have been rejected by invoking the provisions of Section 145(3) of the Act and therefore, the trading results will be deemed to have been accepted by the A.O. Therefore, no additions can be made by the A.O. and the additions so made by the AO and sustained by learned CIT(A) are directed to be deleted. Thus, ground no. 1 raised by the assessee is allowed."

7. No decision to the contrary has been produced on behalf of the Department. Thus, in keeping with “Vinod Kumar vs. ITO” (supra), the audited books of account of the assessee having not been rejected, the assessee’s trading results for the year under consideration are deemed to have been accepted by the AO. Accordingly, the addition of Rs.50,000/- restricted to Rs.30,000/- by the Id. CIT(A), is deleted. Ground Nos. 1, 1A & 1B are accepted.

8. Coming to Ground no.2, the AO found the assessee to have raised fresh loans from Shree Pal S/o Sh. Bhim Sain and Sh. Rajinder Mittal at Rs.50,000/- and Rs.1,25,000/- respectively. However, from the books of account of the assessee, the AO observed that Shree Pal was an employee of the assessee, to whom, salary of Rs.64,500/- was claimed to have been paid, as follows:

i)	29.04.2009 :	Rs.2,000/-
ii)	29.05.2009 :	Rs.2,000/-
iii)	25.09.2009 :	Rs.2,500/-
iv)	26.09.2009 :	Rs.2,500/-
v)	26.10.2009 :	Rs.2,500/-
vi)	04.12.2009 :	Rs.3,000/-
vii)	05.03.2009 :	Rs.50,000/-

9. The AO observed from the above that actually salary of Rs.14,500/- was withdrawn by Shree Pal during the whole of the year; as an amount of Rs.50,000/- had been paid only through cheque in March, 2010. The AO found it strange that a person deriving salary of Rs.5,000/- had received salary during the whole of the year of Rs.14,500/-. The AO observed that it was highly improbable to manage

one's affair with a petty amount of Rs.1200/- per month only. The AO also found it peculiar that Shree Pal had advanced a loan of Rs.50,000/- on 07.04.2009 to the assessee without charging any interest, which remained with the assessee for the whole of the year. The AO observed that it was not believable that a person of such meager income, after meeting the household expenses, would have been in a position to spare sizeable amount of Rs.50,000/- with the assessee without charging any interest. The assessee was queried in this regard. Shree Pal was asked to be produced for examination. The assessee failed to do so. The AO, thus, concluded that the salary paid to Shree Pal was nothing but artificial funds had been generated in the hands of Shree Pal for utilizing the assessee's unaccounted money, which had been brought back in the garb of loan. The AO, accordingly, disallowed the salary and loan as bogus. An addition of Rs,1,14,500/- was, accordingly, made u/s 68 of the Act.

10. The Id. CIT(A) confirmed the addition.

11. Challenging the action of the Tax Authorities, the Id. Counsel for the assessee had drawn my attention to APB 7-8, which is a copy of salary account of Shree Pal for the financial years 2008-09 & 2009-10. It has been contended that the Id. CIT(A) has failed to appreciate the specific submission made before him, that the assessee could not produce Shree Pal before the AO on 13.03.2013, as he had brought kavar from Haridwar on 10.03.2013 and had fallen ill due to long

journey by foot; that three colleagues of Shree Pal were crushed by truck on 10.03.2013 and he was under mental tension also; that the AO had not tried to find out as to whether Shree Pal was doing the work on assessee's shop and no enquiry was made in the matter; that Shree Pal had issued almost all the bills for the sale of tea leaf; that the assessee's books of account were written by Shree Pal' that he was going on tours to various Mandi's for sale and ugrahi; that for non-production of Shree Pal on one date, the AO wrongly jumped to his conclusion and disallowed the salary and cash credit; that if Shree Pal had withdrawn less amount of salary, this could not be taken against the assessee and the reasons there for not examined; that if Shree Pal was explaining fewer amounts for his house-hold expenses, the assessee could not be penalized on this count; that though the assessee had not paid interest on this loan, he had claimed less expense. The ld. counsel for the assessee contends that the ld. CIT(A) erred in not considering these submissions specifically made before him, as also recorded at page 5 of the impugned order. It has been contended that the assessee had requested that since the AO had not given reasonable opportunity to produce Shree Pal on another date, Shree Pal be allowed to be produced before the ld. CIT(A), which request was also wrongly taken into consideration.

12. The ld. DR, on the other hand, has placed strong reliance on the impugned order, in this regard.

13. It is seen that the ld. CIT(A) confirmed the addition by observing as follows:

“3.3. The AO has rightly made addition of Rs.1,14,500/- on account of unexplained credit and salary in the account of Shree Pal who is an employee of the appellant. The finding of the AO that a person getting salary of Rs.64500/- cannot advance a loan of Rs.50,000/- to the appellant and maintaining his family with the amount of Rs.14,500/- received from the appellant which comes about to Rs.1200/- per month, is correct. Moreover, he could not be produced before the AO to prove that somebody in the name of Shree Pal was actually working with the appellant as employee. The AO has also recorded the finding which is correct on facts and salary paid to this employee is nothing but artificial funds has been generated in the hands of this firm which have been brought back in the books of account of the appellant in the garb of loan. In such circumstances, the addition of Rs.1,14,500/- being the amount of salary and advance both is confirmed and the grounds of appeal are dismissed.”

Thus, the assessee is correct in contending that the specific submissions made before the ld. CIT(A) were erroneously not taken into consideration and that the ld. CIT(A) confirmed the addition merely on the basis that the assessee had failed to produce Shree Pal before the A.O.

14. Having considered this matter, I find it expedient and in the interest of substantial justice, to allow the assessee an opportunity to produce Shree Pal before the AO, who, after examining Shree Pal and giving due and adequate opportunity of hearing to the assessee, shall redecide the matter. Accordingly, Ground no.2 is accepted for statistical purposes.

15. Regarding Ground no.3, the AO made an addition of Rs.1,25,000/- , as loan by the assessee from Sh. Rajender Kumar Mittal. As per the assessment order, creditor was produced and was examined on oath by

the AO. The AO observed that although he deposed that he had given loan to the assessee, he also deposed that he earned around Rs.1.5 lac and Rs.2 lac per annum and the loan was given out of his savings; that, however, from the bank account of the creditor, it was observed that cash deposits had been made in this account before giving loan to the assessee and no deposits out of the savings had been made in this account; that on being confronted, the creditor deposed that the savings were kept at home; that he could not satisfactorily explain the source of deposit of Rs.2.25 lac; that the loan was given to the assessee on 18.04.2009 and it remained with the assessee throughout the year and no interest has been charged on the amount; that in response to the question as to when the amount had been received back, the creditor contended that the money had been received back, but he did not remember as to when it was received back. From these facts, the AO concluded that the assessee's own unaccounted money had been brought back in the garb of fresh unsecured loan and bank account of the assessee had been utilized as conduit pipe to give it a colour of loan. The AO added the amount of Rs.1,25,000/- to the income of the assessee u/s 69 of the Act. The ld. CIT(A) confirmed the addition.

16. The assessee contends that the ld. CIT(A) has erred in confirming the addition of Rs.1,25,000/-, made u/s 69 of the Act; that Sh.Rajender Kumar Mittal, the creditor was having income of Rs.1.5/2.00 lacs per annum from doing part time work; that the money was received

through banking channel; that if the assessee had not paid interest on loan, then the assessee had, in fact, claimed less expense, which goes in favour of the department; that if the depositor did not tell the exact date of having received back the amount; and that too after expiry of considerable time no adverse inference can be drawn against the assessee, it is not the case either of the Authorities below that the lender is not doing any work; that it is not the assessee's onus to prove the source of source of deposits; that the assessee cannot be presumed to have the knowledge of source from which the depositor obtained the money; that once the assessee has established the identity of his creditor and the creditor has accepted having advanced the amount in question to the assessee, the burden immediately shifts on to the department to show as to why the assessee's case is not acceptable and as to why it must be held that the entry though purporting to be in the name of third party, still represents the income of the assessee from the suppressed source; that in the present case, there is no material whatsoever to arrive at such a conclusion; that the AO's rejection of the assessee's explanation regarding the source of deposits by itself, again lead to an adverse inference regarding non-genuineness or fictitious character of the entry in the assessee's books of account' that the moments the assessee gives a satisfactory explanation and produces the creditor, his burden is discharged and the credit entry cannot be treated to be income of the assessee for the purposes of income tax and it is open to

the AO to take appropriate action u/s 69 of the Act, against the person who has not been able to explain the investment; that it has been so held in "CIT vs. Metachem Industries", 245 ITR 160 (MP); and that in this view of the matter, the addition, which is not entitled to be sustained, may kindly be deleted.

17. On the other hand, the ld. DR has placed strong reliance on the impugned order. It has been contended, as rightly observed by the ld. CIT(A), no explanation has come forward for the cash deposit of Rs.2,25,000/- in the bank account of the depositor. Further, no interest was paid by the assessee to his creditor. Moreover, Sh. Rajender Kumar Mittal, the creditor, in his statement, could not state as to whether money was received back and if so when. The ld. DR has contended that in this manner, the assessee has miserably failed to prove his claim and the addition, therefore, has rightly been confirmed.

18. Here, the first observation of the ld. CIT(A) regarding there being no explanation with regard to the cash deposit of Rs.2.25 lacs in the bank account of the depositor is incorrect. It remains undisputed that the Sh. Rajender Kumar Mittal, the depositor, was having income of Rs.1.5/2.00 lac per annum from doing part time work as accountant. His deposition apropos question no.3, in his statement dated 13.03.2013 recorded by the AO in this regard is categorical and undisputed. Moreover, it is the case of the either Authorities below that the depositor/lender was not doing any work. As per the return of income of Sh. Rajender Kumar

Mittal, for the AY 2008-09, filed on 3.3.2009, income of Rs.1,05,120/- has been shown. As per the computation of income for the year ending 31.03.2008, net income is Rs.1,05,116/- or say Rs.1,05,120/-. Out of this an amount of Rs.95,500/- is by way of salary and other income, Rs.60,000/- having come from M/s. Balanwali Rice Mills and Rs.35,500/-, income from part time accounts, for the AY 2009-10, Sh. Rajender Kumar Mittal has earned Rs.84,000/- from M/s. Prime Traders, Rs.48,200/- from part time accounts and Rs.1,500/- as on-line tax commission, total amounting to Rs.1,33,700/-. For the AY 2010-11, the gross total income of Sh. Rajender Kumar Mittal is Rs.2,19,609/-. After claiming deduction under Chapter VI-A amounting to Rs.50,000/-, the total income depicted at Rs.1,69,609/-.

19. Furthermore, the factum of no interest having been paid by the assessee to his creditor, by itself, cannot go against the assessee. The factum of creditor having not received any interest on the loan has been categorically admitted by Sh. Rajender Kumar Mittal in response to question no.7 put to him by the AO in his statement dated 13.03.2013. In fact, no further question was put by the AO to Sh. Rajender Kumar Mittal on this issue of interest.

20. Further, the ld. CIT(A) has gone wrong in observing that "creditor in her statement could not state that whether the money was received back and if so when". This observation is clearly a result of complete misreading and non-reading of the statement of Sh. Rajender Kumar

Mittal recorded by the AO u/s 131 of the Act, in as much as vide third last question, the AO specifically asked the depositor as to whether this money had come back to the depositor. The answer was that the money has been taken back, but the depositor did not remember as to when come back. The relevant question and answer are reproduced hereunder, for ready reference:

Question: Kya Jeh paisa aap ke pass bapis aa giya he ?

Ans. Paisa bapas le lia he, muje yaad nahin he kab bapas aaya he.

21. On the other hand, the assessee, it is seen has amply discharged his onus by identifying the depositor and duly producing along with him relevant documents before the AO. The AO recorded the statement of the depositor u/s 131 of the Act. The factum of the depositor having earned income of Rs.1.5/2.00 lacs per annum from doing part time work, has nowhere been questioned by the department. It is also equally true that the amount in question was received through banking channel. It is also true that the depositor specifically stated having received back the loan amount. The assessee is also right in contending that it was not his responsibility to prove the source of the amount in the account of the depositor. In this regard as per the decision of the Hon'ble Madras High Court in the case of "S. Hastimal vs. CIT", 49 ITR 273 (Madras), there is no presumption that the assessee had special knowledge of the source of his source or the origin of origin. In "Tolaram Daga vs. CIT", 59 ITR 632 (Assam), it has been held that even if the credit is in the name of close

relation, the assessee cannot be presumed to have the knowledge of the source from which the depositor obtained the money. So far as regards the deposit in the assessee's bank account, the depositor categorically stated that it was out of previous savings. This contention has not where been successfully repelled by either of the Authorities below.

22. In "Sarogi Credit Corporation vs. CIT", 103 ITR 344 (Patna), it has been held that it is not for the assessee to explain further as to how the or in what circumstances the depositor obtained the money, or how he came to make an advance of the money as a loan to the assessee; that once such identity is established and the creditors, have pledged their oath that they have advanced the amounts in question to the assessee, the burden immediately shifts on to the department to show as to why the assessee's case can not be accepted and as to why it must be held that the entry though purporting to be in the name of a third party, still represents the income of the assessee from a suppressed source; that in order to arrive at such a conclusion, even the department has to be in possession of sufficient and adequate materials. In the present case, whereas on the one hand, the assessee has successfully discharged, his onus, the department has not been able to gather any material much less sufficient or adequate material, to conclude that the entry in question represented the income of the assessee from suppressed source.

23. In "CIT vs. Metachem Industries", 245 ITR 160 (MP), it has been held that as soon as the assessee gives a satisfactory explanation and

produces the person who has deposited the amount, the burden of the assessee is discharged and in that case, the credit entry cannot be treated as to be the income of the assessee for the purposes of income tax and it is open to the AO to take appropriate action u/s 69 of the Act, against the person who has not been able to explain the investment.

24. In view of the above, finding force in the grievance raised by the assessee, by way of revised Ground no.3, the same is accepted, while deleting the addition of Rs.1,25,000/-.

25. Apropos Ground nos. 4 & 5, the AO made an addition of Rs.52,030/- on account of low household expenses. It was observed by the AO that the capital account of the assessee showed a petty withdrawal of Rs.43,970/- having been made for household expenses. This appeared to the AO on the lower side. On being confronted, the assessee submitted that household expenses were sufficient for his family of self, wife and one child. The AO observed that the withdrawals came to Rs.3,665/- p.m., which was quite insufficient. He estimated the household expenses @ Rs.8,000/- per month, i.e., at Rs.96,000/- per annum thereby, he made an addition of Rs.52,030/-.

26. On appeal, the ld. CIT(A) reduced the household expenses to Rs.7,000/- p.m. and the AO was directed to recompute the addition accordingly.

27. As per the assessee, the ld. CIT(A) has erred in upholding the addition of Rs.40,030/- on account of low household expenses. It has

been contended that the ld. CIT(A) ought to have set off the addition of balance household expenses with cash credit as was done in the case of trading addition.

28. Here also, the ld. DR has placed strong reliance on the impugned order.

29. I, however, find the action of the ld. CIT(A) to be more than reasonable. It has been shown that the household withdrawals @ Rs.7,000/- per month for a family of three including wife and single child is sufficient and adequate. Therefore, Ground nos. 4 & 5 are rejected.

30. In the result, the appeal is partly allowed.

Order pronounced in the open court on 27th November, 2015.

Sd/-  
(A.D. JAIN)  
JUDICIAL MEMBER

Dated: 27/11/2015

/skr/

Copy of order forwarded to:

1. The Assessee: Sh. Dushiant Kumar, Rampura Phul.
2. The ITO, ITO Wards 1(3), Bathinda
3. The CIT(A), Bathinda
4. The CIT, Bathinda
5. The Sr. DR, ITAT, ASR.