THE INCOME TAX APPELLATE TRIBUNAL
"D" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 1434/Mum/2018 (Assessment Year 2009-10)
I.T.A. No. 1435/Mum/2018 (Assessment Year 2011-12)
I.T.A. No. 1436/Mum/2018 (Assessment Year 2012-13)
I.T.A. No. 1437/Mum/2018 (Assessment Year 2013-14)

Shri Mohan Thakur 4, Flora Villa, 35, St. Andrews Road, Bandra(W) Mumbai-400 050. PAN : AAAPT2966N	Vs.	ACIT, CC-8(4) 6th Floor Aayakar Bhavan M.K. Road Churchgate Mumbai-400 020.
(Appellant)		(Respondent)

Assessee by	Dr. K. Shivram
Department by	Shri Bharat Anohle
Date of Hearing	01.03.2021
Date of Pronouncement	24.05.2021

O R D E R

Per Shamim Yahya (AM) :-

These are appeals by the assessee against the respective orders of learned CIT(A) for the concerned assessment years. Since the issues are common and connected these appeals are consolidated and disposed of together for the sake of convenience

ITA 1434/Mum/2018 for assessment year 2009-10

2. The grounds of appeal raised read as under :-

"I. Addition of Rs. 25,97,980/- u/s. 69 based on information received from Australian Tax authorities:

1. No addition can be made based on mere information received from foreign authorities without any evidence on record, hence the entire addition is bad and may be deleted.

2. No addition can be made u/s 69 of the Income-tax Act, since no investment has been made by the Assessee, and it does not act as any source of income, for which, the assessee is also offering an explanation about its nature and source, thus not fulfilling the requirements of S.69.

3. The CIT(A) erred in confirming the addition of Rs. 25,97,980/- based on information received from DDIT(I&CI) via Australian Tax Office that there was receipt of money through alleged hawala system by the Appellant's Son from various parties, all of whom were living outside India, which was assumed to be transferred from the Appellant to his son without any evidence on record and a statement given by the appellant's son before the Australian tax authorities, the copy of which had not been provided to the Assessee and on mere suspicion and conjectures no addition can be made and hence the addition made may be deleted.

4. The CIT(A) erred in not appreciating that no transaction has taken place between appellant and his son and also that the transactions, which would be repaid by the Appellant's son and not the appellant himself, as confirmed by the parties providing loans, were outside the Jurisdiction of the Income Tax Act, where no provision has been provided under which such foreign transactions could be taxed, and hence the said addition may be deleted.

II. Addition of Rs.30.00.000/- on account of Loan written off through P&L a/c.

5. The Learned CIT(A) erred in confirming the order of the AO making an addition on account amount of Loan written off through P&L a/c, hence the addition may be deleted.

6. The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal."

Apropos issue of addition u/s. 69:

3. The brief facts of the case are as under :-

In this case, certain information with respect of assessee Shri Mohan Thakur was received from the office of the Director of Income Tax (I&CI), Mumbai alongwith the report of the Deputy Director of Income Tax (I&CI), under 'spontaneous exchanges of information from the Australian Tax authorities'. As per the report, information was received from the Australian taxation office that the Assessee under consideration has transferred funds amounting to Rs. 12,97,122 AU (Australian Dollars) To Shri. Shagun Thakur (Son) and the other family members i.e. Shri. Shikhar Thakur (Son) Smt. Desiree Ann Thakur (Wife) through hawala system (IMTSTnformal Money Transfer System) for the period of F.Y. 2007-08 to 2012-13. Shri. Shagun Thakur has claimed before the Australian Taxation office, that the said amount was received by him from his father as gift to buy a property situated in

Australia. In his statement recorded before the Australian Taxation Office, Shri. Shagun Thakur has submitted that his father has instructed to his friends and business associated overseas to send the funds to him through hawala system i.e. Informal Money Transfer System (I.M.T.S). As per the statement on oath of Shri. Shagun Thakur before the Australian Taxation Office, it is recorded that the said method is adopted by the assessee, Shri, Mohan Thakur due to the current restrictions in foreign exchange transfers in India. The A.O. noted that as per the documentary evidences, the information of the funds transferred have been received by the department and it pertains to F.Y. 2007-08 to F.Y. 2012-13. He noted that the Assessee has submitted an affidavit before the Australian taxation office on 27/07/2012 which is reproduced as follows:-

"TO WHOMSOEVER IT MAY CONCERN"

"I, Mohan Thakur, confirm that any and all amounts utilized by my son, Shagun Thakur, in 2007 to purchase the property located at 13, Bayliss Road, Kardinya were arranged by me, to him, for use at my direction i.e. to purchase a family home for my wife, Shagun and my other son Shikhar to reside in. I confirm that the amounts do not constitute consideration of income for other son Shikhar to reside in. I confirm that the amounts do not constitute consideration or income for the Shagun in return for any goods or services or otherwise. Rather, simply money arranged by me to my son so that my family could purchase and live in their own home in Australia. I conduct my business on my own and give help to my family as I may deem fit. I categorically deny any implication or my instruction that I am carrying on my business pursuant to a bare trust arrangement with my son. I confirm that there is no trust that has been set up, bare or otherwise, in India or overseas under which Shagun is entitled to disbursement or any benefit.

I further confirm that the amount transferred to Shagun in 2010 related to a payment made in the Australian Department of Immigration for the finalization of my wife and my permanent residency application to Australia. Any inference that amount was earned by Shagun is incorrect.

I trust this information, combined with documents establishing my financial capacity are now sufficient to establish that my 24 years old son did not have the financial capacity to purchase a house a worth $9,12,000 in 2007. Rather, the amounts were arranged by me to my son for the benefit of wife and the children in Australia to have their own house.

Sd/-
Mohan Thakur
Place: - Mumbai

Date :- 30.07.2012"

4. The A.O. further referred that the statements of the Assessee under section 131(A) of the I .T. Act were recorded before the department Authorities, Deputy Director of Income Tax (I & CI), Unit 1(1), Mumbai. He observed that the perusal of the statement of the Assessee in consideration to the above affidavit submitted by the Assessee before the Australian taxation Office reveals gross inconsistencies in the replies of the Assessee vis-a-vis affidavit submitted to the Australian Taxation Office (ATO). The A.O. observed that on perusal of the evidences in the form of Affidavit and the other documents received from the Australian Taxation Office, he was satisfied and have a reason to believe that Shri. Mohan Thakur, the assessee in consideration has transferred funds to his son during the Assessment year under consideration through Hawala system. He noted that the details of the entire funds transferred are as follows;

Funds transfer done by Shri. Mohan Thakur to bank Account of Shri. Shagun Thakur in Australia pertaining to A. Y. 2009-10			
Date	Amount US$	From Country	Ordering customer
8.4.2008	9509/-	Hong Kong	Royal Trading
2.4.2008	37,727/-	Unknown	Calibrated Colours

5. He further observed that as per the approximate exchange rate conversion of Rs. 55/- per Australian Dollar the amount totals to Rs. 55,97,980/- in terms of Indian rupees. Hence, the A.O. in the light of the above facts, issued a show cause to the assessee as to why the amount of Rs. 55,97,980/- should not added back to his income?

6. Without referring to the explanation in his assessment order, the A.O. observed that the Assessee could not explain the same satisfactorily. That the confirmation filed and the contradictory statements given by Shri. Mohan Thakur before the (I&Cl) wing vis-a-vis before Australian Tax Office is an afterthought and the same is hereby rejected. That this is mere an

afterthought devised by the Assessee to escape from the tax liability. Repeating his observation as above, he added Rs. 25,97,980/-under section 69 as unexplained investment made by the Assessee in the total income of the Assessee.

7. Against the above order assessee appealed before the learned CIT(A). The learned CIT(A) elaborately noted the submissions of the assessee. The assessee interalia refuted the allegations. The assessee also referred to the confirmations submitted. It was further submitted that the Department has not given the copy of the document received from Australian tax authorities even though the assessee has requested for the same. It was further submitted that the addition cannot be made under section 69 in as much as the impugned amount doesn't fall under the realm of provisions of section 69. Several case laws were also be referred. It was also submitted that the investment was in the name of the son and the property stands in his name in a foreign country and hence assessee cannot be subject to addition under section 69 of the I.T. Act.

8. The learned CIT(A) was not convinced he referred to the affidavit submitted by the assessee before the Australian tax office. Referring to the above he held that it was clear that assessee has transferred several amounts to his family members in Australia through hawala. He further noted that the funds transferred were not recorded in the books of accounts maintained by the assessee. That assessee has failed to conclusively prove the nature and source of the funds transferred to Australia. He held that the finding of the Australian tax office was conclusive. Hence referring to his order for assessment year 2008-09 he upheld the addition.

9. We have heard both the parties and perused the records. Learned Counsel of the assessee has made elaborate submission alongwith a paper books. The summary thereof has been submitted as under :-

> "No addition can be made on the basis of information received from Foreign Authorities without any evidences.

Addition cannot be made without providing a copy of the statement relied upon by the Ld. AO; No addition can be made on the basis of mere suspicion and conjectures

Facts

The Assessee had requested for copies of the statement relied upon by the Ld. AO vide letter dated September 3, 2016. The said statements have never been provided to the assessee in spite of specific requests. (Page 24 of PB -I)
The Ld. AO has made the additions relying on the said statements. (Page 5 of AO Order)

Proposition

No addition can be made merely based on the alleged information received from Australian Tax Authorities without providing any evidence of the information received. The said letter sine qua non for making the alleged addition against the assessee. The said statements have never been provided to the assessee in spite of specific requests.

The AO has made an addition merely on the basis of some information received from the Australian Tax Authorities without independently verifying the contents and as applicable to Indian law.

A specific request had been made to the AO vide letter dated September 3, 2016 (Page 24 of PB I) .(Statement on oath dated 25-3-2014 P. 7) where the statement recorded of Mr. Shagun Thakur was asked for, however, the same has yet not been provided to the Appellant due to which the veracity of the statement cannot be considered to be sacrosanct.

Reliance is placed on the decision of the HonlDle Supreme Court in the case of Kishinchand Chellaram v. CIT [1980] 125 ITR 713 (SC) page 269 - 274 of PB-III (at Para 6 at page 274) wherein it was held that where employee of one office of assessee made, through a bank, telegraphic transfer of certain amount to employee of another office, the ITO, on the basis of letters from bank manager, not shown to assessee, treated amount so remitted as income from undisclosed sources, it was held that the revenue authorities did not produce copies of the letters, addressed by the ITO to the manager of the bank. Copies of these letters, if produced, would perhaps have shown that the suggestion that the amount was remitted by the assessee was made by the ITO and taking the cue from this suggestion, the manager of the bank might have stated that the telegraphic transfer was sent by the assessee. burden of proof lay on department to show that remitted amount belonged to assessee by bringing proper evidence.

Reliance is placed on the decision of the ITAT Jodhpur Bench in the case of R.K. Synthetics v. ITO [2004] 3 SOT 268 (Jodhpur)[l 7-10-2O03] page 275-278 of PB III (at Para 10 at page 277) where based on an admission made by partner of assessee-firm before Central Excise authorities that they had received certain processed man-made fabrics from processors which were without cover of invoices and without payment of Central Excise duty, Assessing Officer made addition under section 69 of the Act. Further, a copy of the statements recorded by the Central Excise authorities was never

provided to the assessee. It did not justify additions under section 69 merely on basis of statement of said partner without any further supporting evidence being on record.

The facts of this case are similar to the case of the assessee, merely based on an alleged statement made by Mr. Shagun Thakur before the Australian authority, which has not been provided to the assessee, addition cannot be made under section 69 of the Act without any further supporting evidence.

Reliance is placed on the decision of the Hon'ble Supreme Court of India in the case of Goodyear India Ltd. v. CIT [2019] 112 taxmann.com 136 (SC)[16-10-2O19J page 279-281 of PB III (Para 6 -9 at page 281) where the Court upheld the decision of the Tribunal that there was no material to show that assessee had kept any amount outside its books of account and accordingly, deleted undisclosed income of assessee as recorded by SEC in USA.

Further, reliance is placed on the decision of Hon'ble ITAT Allahabad Tribunal in the case of Bioved Research Society v. CIT(E) [2018] 91 taxmann.com 268 (Allahabad -Trib.)[08-01-2O18] page 282-289 (Para 5.1 at Page 286) where except report received from Investigation Wing, there was no other material with Commissioner (Exemption) to assume that assessee was indulged in receiving unaccounted money in garb of fund or re-donating funds after charging commission, It was held that impugned order passed by Commissioner (Exemption) merely on assumption and presumption and without confronting any material to assessee was not sustainable

Further reliance is placed on the decision of the Hon'ble Supreme Court in the case of CIT v. Daulatram Rawatmull [1964] 53 ITR 574 (SC)[26-03-1964] page 290-294 of PB III (2nd last Para at page 294) where the Tribunal, however, held that since there was no connecting link in matter between assessee and amount deposited in name of 'S', said amount could not be brought to tax as secreted profit of assessee.

In light of the judicial precedents, the addition confirmed by the CIT (A) may be deleted. Without prejudice,

The investment is not in the name of assessee hence addition cannot be made under section 69 of the Act.

Reliance is placed on the decision of the Hon’ble High Court of Punjab 85 Haryana in the case of CIT v. Roshan Lal Seth [1989] 45 Taxman 187 (Punjab & Haryana) Page 295 -297 ofPB III (Para 12 at page 297) where it was held that an amount deposited with a firm in name of assessee's wife, could not be assessed in hands of assessee unless either person in whose name deposit stood or firm in whose books deposit appeared, was called upon to explain deposit. Since neither of them was called upon to do so. There was, thus, clearly no warrant for adding the sum to the income of the assessee.

Without prejudice to the above,

5. Ground 2
No addition can be made under section 69 of the Act where assessee has offered an explanation

Facts
The appellant has discharged the burden by providing confirmation by giving the explanation and giving statement on oath on several occasions. (Page 4 - 17 of PB I) and (Page 24 -28 of PB I)

Ms. Komal Rupani has stated on oath and confirmed to certain transaction with assessee's son. (Page 29 - 30 of PB I)

The Assessee has furnished proof of repayment of loan to Mr. Sanjay Balkrishna and confirmation from Mr. Trevor Fernandes. (Page 24 -28 of PB I)

Proposition
The appellant has discharged the burden by providing confirmations giving the explanation, and giving statement on oath on several occasions
When affidavit is filed and statement on oath is taken the contents are proved to be correct unless proved.

In the case of Mehata Parikh & Co v. CIT (1956) 30 ITR 181 (SC) Page 298-304 of PB III (Para 2 & last para at Page 303) wherein the revenue held that the alleged sums were from undisclosed sources, it was held that it was not enough without further scrutiny to dislodge position taken up by assessee which was supported by entries in cash books and affidavits put in by assessee. Therefore, treating a part of case balance as assessee's income from undisclosed sources was based on pure surmise and based on no evidence and, hence, to be quashed.

The appellant is not having any export transactions or dealing in abroad complete bank details were furnished hence the appellant has discharged the burden. It is for the revenue to prove that the appellant has made investment in abroad. Accordingly, the addition confirmed by the CIT(A) without providing the any evidence against the assessee, may be deleted.

It is a well settled proposition that with regard to burden of proof viz., the claim for deduction and/or exemption is upon an assessee. However, in matters of addition and disallowance the same is on Revenue.
Subsequently, once the assessee submits evidences the burden is discharged, the onus to disprove lies on the other side by way of onus of proof.

The Assessee has furnished proof of repayment of loan to Mr. Sanjay Balkrishna (AY 2012-13) and confirmation from Mr. Trevor Fernandes (AY 2013-14). Since apart from aforesaid alleged information there was no material on record justifying view taken by investigation wing and, moreover,

said information was not even supplied to assessee, Therefore, the impugned order passed by Commissioner (Appeals) is to be deleted.

Without prejudice,

Where the statement of the Assessee is taken to be an admission of transfer of money to his son Shagun Thakur whereas in fact, there was no transfer and merely the words 'arranged' have been picked from the affidavit of the assessee; which in no manner can be construed to be indirect payments made by the Assessee to his family.

The word "arrange" in no means signify that the assessee has made payment through indirect methods.

The affidavit and statements have to read as a whole, the revenue cannot pick up few words from the affidavit and come to the conclusion that the amount received by son from different persons from abroad is belongs to the appellant, ignoring the various statements given on oath from time to time before tax authorities.

Therefore, in absence of any evidence, addition made merely on the basis of presumption and assumption cannot be sustained

Reliance is placed on the decision of the Hon"ble Supreme Court in the case of Umacharan Shaw & Bros. v. CIT [1959] 37 ITR 271 (SC)[15.O5.1959] page 305-310 of PB III (last para at page 309) wherein it was held that there was no material on which the Income-tax Officer could come to the conclusion that the firm was not genuine. There are many surmises and conjectures, and the conclusion is the result of suspicion which cannot take the place of proof in these matters.

Addition confirmed by the CIT (A) may be deleted. Without prejudice to the above,

6. Ground 4
Transactions were between parties outside the jurisdiction of Indian Income-tax Act, 1961, hence addition cannot be made.

Facts
The transactions pertaining to deposits in the accounts of Mr. Shagun Thakur a Citizen of Australia and a Non-resident for Indian Income tax Law, and other non-residents.

Proposition
The transactions pertaining to deposits in the accounts of Mr. Shagun Thakur (Nonresident) have been received via non-residents. Therefore, the same does not have any nexus or impact with the territory of India.

Reliance is placed on the decision of the Hon'ble Supreme Court in the case of GVK Industries Ltd. v. ITO [2011] 197 Taxman 337/10 taxmann.com 3 (SC) page 311–332 of PB in (para 76 at page 332) where it was held that any

laws enacted by Parliament with respect to extra-territorial aspects or causes that have no impact on or nexus with India would be ultra vires and would be laws made 'for' a foreign territory.

Further reliance is placed on the decision of the HonTole Supreme Court in the case of Vodafone International Holdings B.V. v. Union of India [2O12] 204 Tax.rn.an 408/17 taxmann.com. 2O2 (SC) page 333 -415 of PB III (para 173 at page 412) where it was held that for imposing tax, it must be shown that there is specific nexus between earning of income and territory which seeks to lay tax on that income.

Since the transactions have taken place outside India, taxing the same is outside the jurisdiction of the Income-tax Act, where there is no provision provided under which such foreign transactions can be taxed and hence the said addition may be directed to be deleted.

Without prejudice to the above, the burden is upon the Department to prove that the addition is within the ambit and scope of Indian Income tax Laws.

In the case of Parimisetti Seetharamamma v. CIT [1965] 57ITR 532 (SC)[2.04.1965] page 416-421 of PB III (para 3 at page 419) wherein it was held that, in all cases in which a receipt is sought to be taxed as income, the burden lies upon the department to prove that it is within the taxing provision.

In the case of Dalmia Dadri Cement Ltd. v. CIT [1974] 94 ITR 303 (Bombay)[10.07.1973] page 422 -427 of PB III (last para at page 426) where it was held that burden of proving that sale proceeds of cement were received by assessee company or by someone on its behalf in taxable territories was on department and in absence of material in that behalf, department would suffer and not assessee-company

Summary of submission may be considered. (At Page 43 of PB I)

In view of the above contentions, since the department has not proved as how the same is taxable in India in the hand of the assessee, the additions confirmed by the CIT(A) may be deleted."

10. Per contra learned Departmental Representative relied upon the order of Assessing Officer.

11. Upon careful consideration, we find that the addition is solely made on the basis of statement of the assessee's son before Australian Tax Authorities and affidavit by the assessee before them that fund found in possession of the son were arranged by assessee by hawala transaction. When confronted by the investigation department of the Revenue, the assessee has rebutted the above

allegation. The rebuttal or refusal by the assessee has only been referred by the A.O. without bringing on record the actual rebuttal.

There is absolutely no other material in the hand of the A.O. of proving the addition in the hands of the assessee. Despite the assessee's request, the copy of information received from Australian tax Authority has not been given to the assessee. In these circumstances, the addition made, which is based upon the information from a foreign source, without confronting the same to the assessee and without any corroborative material is not at all sustainable. The case laws referred by the ld. Counsel of the assessee as above are germane and support the case of the assessee.

Since the addition is not at all sustainbale as found by us hereinabove, the other aspects of the assessee's challenge to the addition is only of academic interest. Hence, we are not dealing with the same.

Apropos addition of ₹ 30 lakh

10. On this issue the assessing officer noted that assessee has written off the balance of ₹ 30 lakh in profit and loss account. That assessee is in the business of real estate. That assessee receives brokerage income on transfer of property hence he held that the balance written off must be relating to immovable property which cannot be written off in the profit and loss account. The assessee responded that the impugned amount related to loan given to a party. The address of the said party was also furnished along with the pan No. It was further submitted that the company has not returned the loan to the assessee and it has become time barred. Hence assessee has written of the said amount in the profit and loss account.

11. Before the learned CIT(A) assessee stated that the said loan was granted in 2007. That the party was not paying back the money hence the assessee was claiming it as bad debts under section 36(2)(v) of the income tax act. It was further submitted that the said company which has received the loan is a private limited company and have applied to registrar of company for writing off the name of the company from records of the ROC. However learned CIT(A)

was not satisfied he found that the amount involved was never credited to the profit and loss account of the assessee in any of the earlier year Referring to the provisions of section 36(2) he held as under :-

> "In the present case at hand, the debt have neither been taken into account in computing the income of the assessee of the previous year nor in any of the earlier previous year. Further, the debt doesn't represent money lent in the ordinary course of the business of banking or money-lending. Hence the amount of Rs. 30 Lacs is not allowable as deduction under section 36(1)(vii) r.w.s. 36(2) of the Act."

12. The learned CIT(A) further referred to the judgement of honourable Delhi High Court in the case of Commissioner of income tax versus Escotrac Finance & Investments Ltd. (84 Taxmann.com 67).

13. Against the above order assessee is in appeal before us.

14. Upon hearing both the parties and perusing the case laws we find that the assessee's claim is that the assessee has given a loan to a party in the course of business several years ago. Since, the party has not repaid the loan and it has requested its name to be struck off from the Register of company by ROC, the assessee has claimed it u/s.36(2) as bad debt. The revenue has held that this cannot be allowed as it was not a debt which has been written off. We note that if a loan is no longer recoverable that can be considered as a loss and allowed u/s.37(i) of the Act. Quoting a wrong section is not falal. Hence, the fact that the amount has become irrecoverable needs to be examined. Hence, we remit the issue to the file of the A.O. to examine the case of the assessee in light of our observation as above. Needless to add that the assessee should be given an opportunity of being heard.

<u>ITA Nos. 1435, 1436 and 1437/Mum/2018 for A.Y. 2011-12, 2012-13 and 2013-14</u>

15. These are assessee's appeal against the addition u/s.69 as under:

A.Y.	Amount
2011	Rs.78,74,241/-
2012	Rs.9,86,665/-
2013	Rs.65,07,710/-

16. The ground raised and the order of the authorities below are identical to the one dealt with by us in the first issue already dealt by us in ITA No. 1434/Mum/2018 as above. Our above adjudication applies *mutates mutandis* to these appeals. Hence, the issue is decided in favour of the assessee.

17. Hence, ITA No. 1434/Mum/2018 is partly allowed and all the other appeals stand allowed.

Pronounced in the open court on 24.05.2021

Sd/-	Sd/-
(AMARJIT SINGH)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 24/05/2021

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)

PS ITAT, Mumbai