

आयकर अपीलीय अधिकरण “एक-सदस्य मामला” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH, MUMBAI

श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।
BEFORE SHRI SANJAY ARORA, AM

आयकर अपील सं./I.T.A. No. 7374/Mum/2014

(निर्धारण वर्ष / Assessment Year: 2008-09)

Atulkumar Rajkumar Agarwal 203, Rajkar Bhavan, Sector 17, Vashi, Navi Mumbai-400 703	बनाम/ Vs.	ITO-10(3)(4), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AANPA 3025 A		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	Shri M. P. Chhajed
प्रत्यर्थी की ओर से/Respondent by	:	Shri B. S. Bist
सुनवाई की तारीख / Date of Hearing	:	17.11.2015
घोषणा की तारीख / Date of Pronouncement	:	27.11.2015

आदेश / ORDER

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-22, Mumbai (‘CIT(A)’ for short) dated 01.09.2014, dismissing the Assessee’s appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 (‘the Act’ hereinafter) for the assessment year (A.Y.) 2008-09 vide order dated 27.12.2010.

2. Per Ground 1, reproduced as under, the assessee raises the issue of the order u/s.143(3) without issue of notice u/s.143(2) and, thus, the impugned assessment, as bad in law:

‘1. The learned Assessing Officer erred in passing the order u/s.143(3) without issuance of proper notice u/s. 143(2) and thereof the order passed u/s. 143(3), is bad in law and needs to be set aside.’

Though the words used in the Ground are: ‘... without issuance of proper notice u/s. 143(2).....’, the Id. Authorized Representative (AR), the assessee’s counsel, on enquiry, would contend non-issue of notice u/s. 143(2), so that by implication no notice there-under stood issued. As for the basis of this claim; no such objection having been raised before either the assessing authority or the first appellate authority, he would draw attention to the assessment order, which states of notice u/s. 143(2) being issued on 08.5.2009 (refer para 1 of the assessment order). How could this be a valid notice when the return of income itself was furnished only on 09.7.2009, he asseverated. The date of the notice, as it would appear, is a typing mistake. To ascertain the facts, therefore, the assessment record was called for vide order sheet entry dated 03.11.2015. The same was duly produced by the Id. Departmental Representative (DR) on the next date of hearing, i.e., 17.11.2015. The same revealed notice u/s. 143(2) dated 08.09.2010 by Sangeeta Gokhale, ITO-10(3)(4), Mumbai, the Assessing Officer (A.O.). This was showed to the Id. Authorized Representative (AR), with in fact there being a notice u/s.143(2) even prior thereto, on 17.08.2010, i.e., the very same dates on which notices u/s. 142(1) stand issued and served on the assessee (refer pg. 1 of the assessment order). He did not raise any objection. Accordingly, the assessee’s challenge vide its Ground 1 fails.

3. Ground No. 2, which raises the issue of the A.O. not following the CBDT Instruction dated 08.09.2010, was not pressed at the time of hearing nor, accordingly, responded to by the Revenue, and is accordingly dismissed as not pressed.

4. The last and the third ground challenges the addition in the sum of Rs.5,25,000/- toward unexplained cash deposits in the assessee’s, a salaried person, bank account with the Bombay Mercantile Bank, Vashi, Navi Mumbai, as:

- Rs.5,00,000/- on 12.06.2007
- Rs. 25,000/- on 28.01.2008

The same was not found satisfactorily explained, i.e., as to its nature and source, and accordingly added to income and, further, confirmed by the Id. CIT(A) for the same reason.

5. Before me, the assessee's principal plea was that in-as-much as he is not running any business or profession, he does not maintain any books of account, so that no addition u/s.68, as effected, could be made. Further, on the merits of the addition, i.e., on the factual aspect, it was submitted that the assessee had cash withdrawal of Rs.7.93 lacs and Rs.2.20 lacs for the financial years 2005-06 and 2006-07 respectively, which would justify an opening cash in hand of Rs.3.50 lacs. The balance Rs.1.5 lacs is by way of temporary loans from friends and relatives, from whom confirmations stands submitted. The cash deposit on 28.1.2008 (of Rs.25,000/-) is from the cash withdrawal from the bank during the current year.

6. The parties have been heard, and the material on record perused.

With regard to the legal objection of section 68 being not applicable in-as-much as the assessee did not maintain any books of account, the argument is misconceived. As explained during hearing itself, the addition is toward unexplained cash deposit in his bank account during the year. The same would fall u/ss. 69/69A as the cash deposit in his account implies, firstly, unexplained cash-in-hand (to that extent) and, two, the bank account itself qualifies to be money and, in any case, investment. As explained in *CIT vs. Jauharimal Goel* [2005] 147 Taxman 448 (All), the two, i.e., the unexplained credit and unexplained money only represent two different aspects of the same transaction, though referable to the separate provisions of the Act. Where the books of account are maintained, it is the nature and source of a credit entry appearing therein that is required to be explained u/s.68. On the other hand, where not

maintained, it is the corresponding debit, as in the form of cash-in-hand (say), as bank deposit in the present case, which would need to be similarly explained. *Why, one may not maintain books of account even where engaged in business or profession?* Not maintaining of books of account, thus, would be of no assistance to the assessee. It is even otherwise trite law that the exercise of a power would be referable to a jurisdiction which conferred validity upon it and not to a jurisdiction under which it would be nugatory (refer: *L. Hazarimal Kuthiala vs. ITO* [1961] 41 ITR 12 (SC)). As long as, therefore, the action of the A.O. has the sanction of law, it could matter little if he does not refer to the appropriate provision; the provisions of section 68 and sections 69/69A being even otherwise cognate provisions.

The assessee's principal contention on merits is of the same being deposited from cash-in-hand. The same has not been accepted by the Revenue as, in that case, there was no need for him to borrow further cash from friends and relatives. Further, confirmation/s itself would not prove a credit, and there is no substantiation of the capacity of the creditors. Admittedly, no books of account are maintained. The assessee has nowhere submitted a cash flow statement for the relevant years. The cash-in-hand would, therefore, have to be justified in terms of the cash withdrawal from the bank (or any other source), and its utilization. *What, one may ask, as does the Revenue, is the purpose of cash accumulation?* True, the cash withdrawal of nearly Rs.8 lacs during financial year 2005-06 could lead to cash-in-hand. But, then, nobody would withdraw cash only to maintain cash-in-hand, and continue doing so in-as-much as it stands built-up over time. Even assuming the same was withdrawn for some purpose, which remains unspecified, and which did not materialize, one would redeposit cash in bank or adjust it against the future requirement of cash. This is in fact also inferable from the drastic decrease in the cash withdrawal for the following year, with that for f.y. 2006-07 being at Rs.2.20 lacs, i.e., nearly 1/4th of that withdrawn during the immediately preceding year, with that from 01.4.2007 to 12.6.2007 being at Rs.40,000/- only. Further, though date-wise cash withdrawal is not

available, it is clear that cash was withdrawn at Rs.2.20 lacs for the following year (f.y. 2006-07), and also for the current year, implying utilization of the cash-in-hand, if any, available. The assessee has not specified the cash required for house-hold and/or personal purposes, as well as toward investments, if any, made from f.y. 2005-06 onwards, to have any purposeful assessment of the cash with him in June, 2007 and January, 2008, whereat excess cash of Rs.3.50 lacs and Rs.0.25 lacs is stated to be available.

Further still, there is no explanation for cash received from friends and relatives when the assessee himself has surplus cash of Rs.3.50 lacs. It is stated that the same is to cover the short-fall to honour a cheque of Rs.5 lac, which though did not materialize. However, no details of this payment/investment are provided - to whom was the cheque issued/to be issued, and for what purpose. *Then, again, why was the amount not refunded back when the transaction did not materialize?* Why, for all we know, the amount is outstanding for payment even to date – so much for the temporary loans.

As regards the cash deposit of Rs.25,000/-, the same has been explained as sourced from the cash withdrawal during the current year. The same only implies a reduction in the cash withdrawal for the year by Rs.25,000/-. The least that the assessee is therefore required to state is the cash withdrawal for the year, i.e., upto 27.1.2008. The cash withdrawal for the year has already been observed to be lower for the initial months, suggesting absorption of the surplus cash, if any, and in any case only to meet the day-to-day requirements. I have already observed of no case being made out with reference to the date-wise withdrawal or by way of cash flow statement, specifying the cash requirement for maintenance purposes and/or investments, if any.

The assessee's explanation and, thus, case, as would be apparent from the foregoing, is wholly unsubstantiated and unproved. Accordingly, the action of the Revenue in bringing to tax a sum of Rs.5.25 lacs is confirmed. I decide accordingly.

6. In the result, the assessee's appeal is dismissed.

Order pronounced in the open court on November 27, 2015

Sd/-

(Sanjay Arora)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 27.11.2015

व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai