

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'SMC', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "SMC", MUMBAI
Before Shri Shamim Yahya, Accountant Member

ITA No.3118/Mum/2016 : Asst.Year 2005-2006

Shri Firdaus Merchant Amir Villa, 43 Pali Mala Road Bandra (West), Mumbai – 400 050. PAN : AFPPM1011F	बनाम/ Vs.	The Income Tax Officer Ward 19(3)(1) Mumbai.
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से /Appellant by : Shri Bhupendra Shah
प्रत्यर्थी की ओर से /Respondent by : Shri B.Satyanarayana Raju (Sr.DR)

सुनवाई की तारीख / Date of Hearing : 18.05.2017	घोषणा की तारीख / Date of Pronouncement : 10.07.2017
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आदेश / ORDER

This appeal by the assessee is directed against the order of the learned CIT(A) dated 10.02.2016 and pertains to assessment year 2005-2006.

2. Grounds of appeal read as under:-

"1. In the facts and circumstances of the case and in law, the learned Commissioner of Income Tax(A) erred in confirming Rs. 16,18,350/- u/s 68 made in the assessment reopened by the Assessing Officer u/s 148 for which reasons recorded are not furnished .

2. In the facts and circumstances of the case and in law, the learned Commissioner of Income Tax(A) erred in confirming Rs. 16,18,350/- u/s 68 made in the assessment reopened by the Assessing Officer after 5 years and 11 months without adequate approvals.

3. *In the facts and circumstances of the case and in law, the learned Commissioner of Income Tax(A) erred in confirming Rs. 16,18,350/- u/s 68 made in the assessment reopened by the Assessing Officer by issuing erroneous notice u/ 142(1) with PAN not belonging to the Appellant.*

4. *In the facts and circumstances of the case and in law, the learned Commissioner of Income Tax(A) erred in confirming Rs.16,18,350/- u/s 68 without issuing notice u/s 143(2).*

5. *The A.O. has wrongly charged interest u/s 234 A, B, C & initiated penalty u/s 271(1)(c)."*

3. Brief facts of the case are as under:-

3.1 In this case, information was received regarding cash deposits of Rs.21,13,350 made by the assessee in his savings bank account with Union Bank of India, Turner Road, Bandra (W) branch. In view of the same the assessee was given an opportunity to offer an explanation of the said transaction. However, no explanation was forthcoming from the assessee. Subsequently, notice u/s.142(1) was issued dated 25.6.2012. In response to these notices, however nobody attended before the AO. No compliance was there from the assessee to the statutory notices issued by the AO u/s. 142(1) dated 25.6.2012. 21.9.2012 & 21.12.2012. Hence the A.O. proceeded to pass order u/s. 144 of the IT Act, in respect of-the cash deposits made by the assessee in his savings bank account with Union Bank of India. The A.O. sought information u/s. 133(6) calling for the bank statement of the assessee. From the information received from Union Bank of India, it was seen that the assessee had made cash deposits in his savings A/c. No.414502010005434 on various dates. Since the assessee has despite giving several opportunities not offered any explanation, the AO held that

there is no other alternative but to conclude that the assessee had no reasonable explanation and the cash deposits made are out of undisclosed sources. The total cash deposits made by the assessee of Rs. 21,13,350 was considered as the income from undisclosed sources u/s.68 by the A.O.

3.2 Upon assessee's appeal, the learned CIT(A) examined the additional documents being submitted by the assessee as well as obtained remand report from the Assessing Officer. He held as under:-

"This is against the action of the AO in assessing a sum of Rs.21,13,35 being the cash deposited in the bank account as income from undisclosed sources. During appeal, the appellant furnished the balance sheet, P&L A/c of Lokhandwala Automobiles, TAR and the capital account as well as the current account of Firdaus Merchant in the books of Lokhandwala Automobiles as additional evidence and requested that the AO be directed to examine the evidence on remand. Accordingly the AO was directed to examine the additional evidence filed and offer his comments. The AO responded vide his report dated 20th Nov 2015. Therein the AO objected to the admission of the additional evidence itself on the grounds that sufficient opportunities were given to the appellant to produce proof of cash deposit in his bank accounts. The AO also stated that the appellant refused to accept the statutory notices issued to him on the grounds that the notice mentions a different PAN no. The AO stated in his remand report that the PAN No on which the statutory notices were issued actually belonged to the appellant and that the PAN No which the appellant claims to belong to him is actually deactivated. The appellant claimed that his PAN No is AFPPM 1011F. The AO however noted that this PAN no is belonging to the appellant but however is deactivated and his correct active PAN is AGUPM2273K which has been quoted in the bank account in which cash has been deposited.

5.1.1 The AO further submitted on merits that the appellant had no cause "to appropriate the sale proceeds of petrol and diesel from the petrol pump run by him on a power of attorney basis. The appellant submitted that he did so to issue pay orders to HPCL on behalf of the firm as there were no cheque leaves available in the cheque book of Lokhandwala Automobiles, The AO stated in his remand report, that the firm has a current account in the same bank and the payments to HPCL are being made through the current account of the firm. The AO however verified with the bank as to in whose favor the pay orders were issued from the appellants SB account. The AO fairly admitted that the pay orders issued from the appellants SB account were in favor of HPCL

5.1.2 On rejoinder, the appellant reiterated his submissions made earlier and stated that the source of the cash deposits is from the sale of petrol and diesel. The appellant stated that the evidence produced by him clearly shows that movement of entries from the books of the firm into his current account with the firm and the subsequent deposit in to his SB account. The appellant also filed before me, a copy of the order of the CIT(A) in his own case for AY 2008-09 where a similar addition was made on identical facts. The CIT(A) there has allowed the appeal on this issue. I have carefully examined the matter and have analyzed the current account of the appellant in the books of Lokhandwala Automobiles and compared the same to the bank account of the appellant. Cash has been deposited in the bank account as :- Rs 4,95,000 on 02/12/2004, Rs 4,95,000 on 06/12/2004, Rs 5,23,050 on 10/12/2004, Rs 4,95,000 on 14/12/2004, Rs 10,000 on 17/01/2005, Rs 5,000 on 27/01/2005 and Rs 90,300 on 31/01/2005. On the debit side of the current account, it is seen that the appellant has withdrawn cash from the books of the firm, at which stage an appropriate entry has been passed in the cash book and per contra in his current account in the books of the firm. Naturally the credit side of the current account should then reflect the date on which the cash is deposited in the bank. The entries on the credit side of the current account are revealing. There is only one entry of Rs 4,95,000 on 02/12/2004 which tallies with the date of cash

deposits in the bank account. The other entries of the so called cash deposit are 08/02/2005, 17/02/2005 for Rs 4,95,000 each, Rs 5,00,000 on 27/02/2005, Rs 5,25,000 on 13/03/2005 and Rs 90,000 on 20/03/2005. These dates are at complete variance with the dates of deposit in the bank account. Moreover the entries of Rs 10,000 and Rs 5,000 deposited in the bank on 17/01/ & 27/01/2005 do not find mention in the current account at all. One more thing to be observed is that the 1st entry on the debit side of the current account has the narration "By Bank (P.O)". All other entries have a narration of only "By Cash". The facts as narrated above clearly indicate that all cash is deposited in Dec 2004 and one cash deposit is in Jan 2005. However, except for one entry of Rs 4,95,000 on 02/12/2004, no other entry in the current account tallies with the dates of cash deposited in the bank. The narration in the current account also reveals that only 1 entry pertains to the cash deposit in bank account, while the others (entries titled "By Cash"), indicate that cash has been used elsewhere. The additional evidence filed by the appellant is therefore against him on facts. This leads to a conclusion that the appellant is able to explain the source for only one deposit of Rs 4,95,000 made on 02/12/2004. To put it simply, cash of Rs 26,00,000 has flown the cash book of Lokhandwala Automobiles but only Rs 4,95,000 out of the same has been deposited in the appellants bank account. The utilization of the balance cash by the appellant remains a mystery as yet unexplained. It would appear that the appellant has utilized the balance cash withdrawn from the firm amounting to Rs 21,05,000 to his own benefit not revealed either to the AO or to me. In the circumstances, the decision of my predecessor in this case is of no use to the appellant as the facts are different. Based on the facts and discussion above, I hold that the appellant has sufficiently explained the source of cash deposits to the tune of Rs 4,95,000 only. The appellant accordingly gets a relief of Rs 4,95,000 and the addition made by the AO is sustained to the extent of Rs 16,18,350."

3.3 As against the other challenges of the assessee regarding the jurisdiction of other aspects, the learned CIT(A) dismissed the same by holding as under:-

“Ground 2: This ground challenges the validity of the reopening on the grounds that the reasons were not furnished. I find that the order itself is u/s 144 rws 147. The appellant did not appear before the AO and neither did he ask the AO to furnish the reasons. The AO has stated in para 2 of his assessment order that the appellant refused to accept the' notices issued to him on the grounds that his PAN no was different. However I find that the AO made a search of the PAN database and found that the PAN no which the appellant claimed to belong to him (AFPPM1011F) is a deactivated PAN and the active PAN of the appellant is AGUPM2273K. On these facts, I am of the opinion that the AO has correctly reopened the assessment. The appellant is only seeking shelter of a deactivated PAN to challenge the assessment. I accordingly dismiss this ground and uphold the action of the AO in reopening the assessment.

5.3 Ground 3: This ground is against the reopening as the appellant claims it is without statutory approvals. This is a mere bland statement of the appellant without being backed up by any evidence whatsoever. In fact in the very first para I find that the AO has clearly stated that he has obtained the statutory approval from his range head being the Addl CIT Range 19(3). During appeal also, the appellant did not produce any evidence to back his claim. In absence of any facts to the contrary, I see no reason to disbelieve the emphatic statement of the AO regarding statutory approval. Accordingly, ground 3 is dismissed.

5.4 Ground 4: This is against the action of the AO in issuing notice u/s 142(1) in respect of a PAN not belonging to the appellant. I have already discussed the facts in this regard earlier in the order. The appellant claims that his correct PAN is AFPPM1011F belonged to him. The AO noted that this is a

deactivated PAN and the appellants active PAN is AGUPM2273K, The AO has therefore correctly used this active PAN in the case of the appellant. Accordingly- ground 4 is dismissed.

5.5 Ground 5: This is against the action of the AO in not issuing notice u/s 143(2). Once again this is a bland statement of denial on part of the appellant and no evidence whatsoever is produced in this regard. In absence of any cogent evidence no credence can be given to this averment of the appellant. Accordingly ground 5 is dismissed.”

3.4 Against the above order, the assessee is in appeal before the ITAT.

4. I have heard both the Counsel and perused the records.

5. The learned Counsel of the assessee referred to the decision of the ITAT in assessee's own case for assessment year 2008-2009 in ITA No.3336/Mum/2012. He submitted that in the above order vide order dated 08.07.2015, ITAT had remitted the matter to the file of the Assessing Officer with certain directions. He further submitted that thereafter the Assessing Officer has passed consequential order in favour of the assessee.

6. Upon careful consideration I note that ITAT in assessee's own case for assessment year 2008-2009 had remitted the matter to the file of the Assessing Officer with the following observation:-

“5. However, after giving a thoughtful consideration to the findings of the Ld.CIT(A), we find that the Ld.CIT(A) has simply accepted the submissions made by the assessee without any further verification. At the same time we find that the AO has also not made any verification before making the additions.

Therefore, in the interest of justice and fair play, we restore this issue to the file of the A.O.

5.1 In so far as the deposit of cash in Centurian Bank of Punjab is concerned, the AO is directed to cross check from the bank account of M/s.Lokhandwala Automobiles and decide the issue afresh after giving fair opportunity of being heard to the assessee.

5.2 In so far as deposits of cash in Union Bank of India is concerned, the assessee is directed to furnish the name of the persons with supporting evidences from who he has claimed to have received advances of Rs.17,00,000/-. The assessee is further directed to furnish a cash flow statement to justify the claim of re-deposit of cash out of withdrawals amounting to Rs.39,55,300/- and in so far as the amount received from Smt.Roshanbanu Merchant is concerned, no supporting documentary evidence has been filed or brought to our notice. We direct the assessee to furnish the supporting documentary evidences before the AO. The AO is directed to verify the same and decide the issue afresh after giving reasonable and sufficient opportunity of being heard to the assessee.”

7. I find that in the present case also a similar direction can be given as of the same order of learned CIT(A) as in 2008-2009 which the learned CIT(A) is referring in the present case. Accordingly, I remit the issue to the file of the Assessing Officer with similar directions as above. The Assessing Officer is directed to consider the issue afresh in line with the directions hereinabove.

8. On other aspects of the assessee's challenge I do not find any infirmity in order of learned CIT(A). Accordingly, I uphold the same.

9. In the result, this appeal filed by the assessee stands allowed for statistical purposes.

Order pronounced on this 10th day of July, 2017.

Sd/-
(Shamim Yahya)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 10th July, 2017.

Devdas*

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai