

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J" MUMBAI**

**BEFORE SHRI JOGINDER SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 4000/MUM/2016
Assessment Year: 2011-12**

Rajbahadur B. Yadav
Room No. 442, Namdev
Nagar, Dighe Thane, Near
Digha Bab Temple, Belapur
Road, New
Mumbai-400708.
PAN No. ABKPY2651C
Appellant

ITO-22(3)(3),
Room No. 308, 3rd
Vs. floor, Tower No. 6,
Vashi Railway Station
Complex, Navi
Mumbai-400705.

Respondent

Assessee by : Mr. Subodh Ratnaparkhi, AR
Revenue by : Mr. Saurabh Kumar Rai, DR

Date of Hearing : 22/03/2018
Date of pronouncement : 18/04/2018

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2011-12. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-26, Mumbai and arises out of the assessment completed u/s 143 (3) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal raised by the assessee reads as under:

1. The CIT(A) erred in confirming the addition of Rs.22,92,880/- made by the Ld. AO u/s 69 of the Act 1961, as unexplained investment, on account of cash

deposits in the bank account of the appellant with Mahanagar Co-op. Bank Ltd. Airoli Branch, not appreciating the explanation of the appellant with regards to such deposits which was supported by evidences.

2. The Hon'ble CIT(A) erred in refusing to admit u/r 46A of the IT Rules, 1962, the evidences in the form of affidavits of relatives produced before her in the course of appeal hearing.
3. Briefly stated, the facts of the case are that the Assessing Officer (AO) found from the bank account of the assessee maintained in M/s Mahanagar Co-operative Bank Ltd., Airoli Branch, that there were many cash deposits/other credits totalling to Rs.26,03,100/- which were not verifiable with the income shown by the assessee during the year. During the course of assessment proceedings, the assessee failed to explain the source of these deposits. Cash withdrawals of Rs.6,31,200/- as per the cash flow statement did not match with cash withdrawals of Rs.8,54,100/- as per the cash book submitted by the assessee before the AO. The assessee also failed to explain the source of opening balance. Therefore, the AO rejected the cash book of the assessee and treated the cash deposits of Rs.25,86,880/- in bank account as unexplained investment u/s 69 of the Act.
4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). Along with the written submission filed before the Ld. CIT(A), the assessee also filed fresh evidence by way of affidavits from the six persons from whom he claimed to have received cash gifts which was explained to be the source of cash deposits in the bank.

The Ld. CIT(A) declined to admit the additional evidence on the ground that (i) the assessee did not make an application for admission

of fresh evidence during the course of appeal proceedings, (ii) the assessee did not even make out any case for satisfying the conditions of Rule 46A in the matter of admission of additional evidence, (iii) it is not the case of the assessee that the AO refused to admit any evidence. On the contrary, the AO had in the questionnaire dated 09.10.2013 raised specific query requiring the assessee to give date wise summary of all the bank accounts maintained by him, details of loans and advances given and taken as on 31.03.2011 and details of gifts etc. received during the year. The assessee has not explained any cause which prevented him from producing the said evidence before the AO.

Therefore, the Ld. CIT(A) held that the production of the intended additional evidence was an afterthought and the bar envisaged in the main provision of Rule 46A could be operative. Accordingly, the Ld. CIT(A), relying on the order of the Tribunal in *Sagar Sardhadi v. ITO* (2012) 135 ITD 153 and *Baroda Acetates v. ITO* (1994) 48 TTJ 60, dismissed the plea of the assessee to admit the additional evidence in the form of affidavits.

4.1 Also the Ld. CIT(A) observed that the total unexplained cash deposit which is added by the AO as unexplained investment is Rs.22,92,880/- while the total cash claim to have been received from family members is Rs.18,00,000/-, which is less than the cash deposit in the bank account. If the amount claimed to be past savings of the assessee (Rs.5,40,160/-) is added to the pool of available cash as suggested by the assessee then the total cash becomes Rs.23,40,160/- which is more than the cash deposits of Rs.22,92,880/-.

The Ld. CIT(A) also noted that (i) the explanation that the amounts were received in cash as gifts finds reference for the first time in the grounds of appeal. It was never put forth before the AO during the course of assessment proceedings, (ii) nothing has been filed in support of the claim that different family members had contributed cash as the assessee was searching for a flat.

The Ld. CIT(A), although declined to admit the additional evidence filed by the assessee by way of affidavits, nonetheless analysed the same and concluded that in four out of the six above affidavit, they are not having Permanent Account Number (PAN), one person (Lalbahadur Yadav) has PAN but no return is filed. In all six cases, neither the creditworthiness of these persons nor the genuineness of transaction has been established by the assessee. Therefore, considering the above facts, the Ld. CIT(A) confirmed the addition made by the AO.

5. Before us, the Ld. counsel of the assessee files a Paper Book containing (i) written submission filed before the CIT(A), (ii) affidavits of six family members of the assessee in Hindi with English translation, (iii) bank statement and bank book of the assessee with Mahanagar Co-operative Bank, Airoli Branch, Navi Mumbai (SB Account No. 11431), (iv) financial statements along with computation of income and acknowledgement for filing the return for AY 2010-11 and AY 2011-12, (v) agreement for sale dated 17.02.2010 between M/s Mahakali Enterprises and the assessee/brother Shri Chandrajeet B. Yadav.

It is clarified by him that the affidavits of six family members were filed for the first time before the Ld. CIT(A). The Ld. counsel submits that

the assessee and his younger brother have jointly purchased the property and in order to meet the fund requirement, the assessee had received gifts from the following family members and close relatives:

Name of Family Member	PAN	Relation with the assessee	Amount (Rs.)
Mr. Chandrajeet Yadav	AGBPC2148N	Brother	5,00,000/-
Mrs. Pushpa Chandrajeet Yadav	AGHPY6241Q	Sister in law	3,50,000/-
Mr. Rajbahadur Yadav	ABKPY2651C	Self	5,40,160/-
Mrs. Shudevi Rajbahadur Yadav		Wife	3,00,000/-
Mr. Bansraj Yadav		Father in law of the assessee	2,00,000/-
Mr. Ramcharit Yadav		Father in law brother	2,00,000/-
Mr. Lal B. Yadav	AGAPY9368D	Brother	2,50,000/-
Total			23,40,160/-

6. On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A) and submits that the assessee failed to prove the source of cash deposits in his bank account.

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

It is the contention of the assessee that he has received Rs.23,40,160/- as gifts from seven of his family members and close relatives. In this regard, he filed affidavits of the persons indicating gifts before the Ld. CIT(A) for the first time. These were not filed before the

AO. It is the contention of the assessee that the Ld. CIT(A) should have admitted under Rule 46A the additional evidence in the shape of affidavits filed before him.

In Smt. Prabhavati S. Shah v. CIT [(1998) 231 ITR 1, 8-9 (Bom)], loans taken by the assessee were treated by the ITO as income from undisclosed sources because the summons could not be served on the creditors. Before the first appellate authority, the assessee wanted to prove the genuineness of the loan from one of the borrowers by relying upon the fact that the amount had been received by the assessee by cheque and repaid by cheque. For that purpose, the assessee wanted to produce photostat copies of the cheques, a certificate from the bank to show that the loan was received by the assessee by cheque and a copy of the account of the assessee with the bank. The first appellate authority refused to admit such additional evidence. It has been held that the case of the assessee does fall under the exception as per clause (c) of Rule 46A(1). Such additional evidence should have been allowed to be produced by the assessee and the same was to be considered by the first appellate authority.

The purpose of Rule 46A appears to be to ensure that evidence is primarily laid before the AO.

Having perused the relevant materials placed on record, we are of the considered view that the case of the assessee in the present appeal falls under the exception as per clause (c) of Rule 46A(1). It has been held in *CIT v. Shree Kangra Steel Pvt. Ltd.* (2010) 320 ITR 691 (HP) that Rule 46A(3) provides that no evidence produced under Rule 46A(1)

shall be taken into account unless the AO has been given a reasonable opportunity of examining the evidence or documents produced or permitted to cross-examine the witnesses examined or permitted to produce any evidence or document in rebuttal to the additional evidence produced by the appellant.

In the instant appeal the appellant has claimed to have received gifts from family members and close relatives. Though an affidavit may not be substituted for proof, it cannot be rejected without cross-examination or further inquiry as held in *Rajshree Synthetic Pvt. Ltd. v. CIT* (2002) 256 ITR 331 (Raj).

In matters of transactions with interested person, the burden of proving that the transaction is genuine and that consideration is adequate will be on the assessee as held in *CIT v. Shatrunjay Diamonds* (2003) 261 ITR 268 (Bom). The High Court, while remanding the case to the Tribunal laid down the following guidelines:

1. The assessee should file an affidavit along with information to show that the price paid is reasonable.
2. The Assessing Officer may require the assessee to establish its claim. It would be open to the Assessing Officer to cross-examine the witnesses, if he deems fit.
3. If the AO has any information relevant to claim of the assessee, such information along with copies of documents should be furnished to the assessee. The assessee will have the right to question the document by cross-examination, if he so desires.
4. The AO can thereafter draw his conclusion and put such conclusion before the assessee for rebuttal and come to a final conclusion.

7.1 In view of the above reasons, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make a *de novo* order after examining the evidence or document produced by the assessee and after cross-examining the witness. We direct the assessee to file the relevant documents/evidence before the AO. Needless to say, the AO would give reasonable opportunity of being heard to the assessee before finalizing the order.

8. In the result, the appeal is allowed for statistical purposes.

Order pronounced in the open Court on 18/04/2018.

Sd/-
(JOGINDER SINGH)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 18/04/2018

Rahul Sharma, Sr. P.S.

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.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai