

आयकर अपीलीय अधिकरण, पुणे न्यायपीठ "बी" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE**

श्री डी. करुणाकरा राव , लेखा सदस्य
एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

**BEFORE SHRI D.KARUNAKARA RAO, AM
AND SHRI VIKAS AWASTHY, JM**

आयकर अपील सं. / ITA Nos. 680 to 685/PUN/2016
निर्धारण वर्ष / Assessment Years : 2005-06 to 2009-10 & 2011-12

Prakash B. Shah
Poojan Jewellers,
A/p. Manchar,
Dist.- Pune, Pin-410 503
PAN : AMUPS1087K

....अपीलार्थी/Appellant

Vs.

The Deputy Commissioner of Income Tax,
Central Circle- 1(1), Pune

....प्रत्यर्थी / Respondent

Assessee by : Shri Suhas P. Bora
Revenue by : Shri Shivraj Morey

सुनवाई की तारीख / Date of Hearing : 26.09.2018	घोषणा की तारीख / Date of Pronouncement: 26.09.2018
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आदेश / ORDER

PER D. KARUNAKARA RAO, AM :

There are six appeals by the assessee under consideration involving assessment years 2005-06 to 2009-10 and 2011-12 respectively. They are filed against the consolidated order of CIT(A)-13, Pune, dated 29-01-2016.

2. Assessee raised identical grounds in ITA Nos. 680 to 684/PUN/2016 for the A.Yrs. 2005-06 to 2009-10. The solitary issue raised by the assessee in these appeals relate to granting of telescoping benefit in respect of the addition made by the AO on account of Fixed Deposits with bank. Assessee argues that the sources for the impugned Fixed Deposits is the interest income accrued in the past assessment

years. AO rejected the explanation given by the assessee and CIT(A) confirmed the same.

We shall take up appeal of the assessee for A.Y. 2005-06 as the standard one.

ITA No.680/PUN/2016
A.Y. 2005-06

3. Background facts of the case include that the assessee is an individual. Assessee is father of Shri Pritam Shah and Shri Devendra Shah. Both are Directors of the company Parag Milk and Milk Products Private Limited. There was search action u/s.132 of the Act in the Parag group of cases on 04-02-2011. Some of the group concerns were covered u/s.133A of the Act. Search resulted in seizure of incriminating material viz., loose papers, computer print outs, handwritten chits, computer data (in soft form) etc. pertaining to the assessee. Search also resulted in seizure of cash/jewellery. Assessment was made u/s.153C of the Act.

Relying on the details of the seized papers discovered during the said search, AO noticed that assessee made certain fixed deposits in various banks on various dates. Details of the same are given in pages 5 to 8 of the assessment order. AO asked the assessee to justify the sources of the said fixed deposits in the banks. At the end of the assessment proceedings, the AO opined that an amount of Rs.96,319/- is not reflected in the books of account for the assessment year under consideration. Therefore, AO treated the same as undisclosed income of the assessee as unexplained investment made in fixed deposits. Assessee attempted to explain the sources as the income earned in the earlier assessment years. However, the AO rejected the same. Eventually, the AO invoked the provisions of section 69 of the Act and made addition of Rs.96,319/-.

Similar additions are made in A.Yrs. 2006-07 to 2009-10. The addition in these 5 assessment years on this account works out to Rs.8,52,508/-. The same was revised to Rs.7,32,907/-.

Details of the returns, income declared u/s.153C, additions made u/s.153C or u/s.143(3) as the case may be are given below :

Particulars	Assessment Years					
	2005-06	2006-07	2007-08	2008-09	2009-10	2011-12
Original returned income	2,18,628	2,76,296	1,87,600	2,45,743	1,68,796	--
Income declared in the returns u/s.153/153C	2,99,240	3,50,530	3,15,302	2,00,31,760	2,89,710	9,88,710
Unexplained investment in fixed deposits	96,319	1,25,524	5,26,604	79,060	25,000	10,62,182
Assessed income	3,95,559	4,76,054	8,41,906	2,01,10,820	3,14,710	20,50,895

4. During the First appellate proceedings, the CIT(A) confirmed the additions made by the AO for all the assessment years under consideration. The finding given by the CIT(A) reads as under :

“2.2.6 I have considered the facts and arguments of the Appellant. Initially, the Appellant had tried to explain the source of the investment made in the FDs as belonging to his HUF. The learned AO rejected the Appellant's contention and observed that the Appellant did not establish that his HUF existed before the search. The Appellant had not filed the HUF's return of income nor did he furnish its capital account or balance sheet. Subsequently, during the post-remand report proceedings, the Appellant did not contend that the FDs belonged to his HUF but has requested that telescopic benefit be given for the investment made in the FDs. It was submitted that the investment in the FDs was made out of the funds available from the FDs matured in the earlier year. In other words, the Appellant stated that he reinvested the same funds in the new FDs out of the funds available on maturity of the old FDs.

2.2.7 It is clear from the Appellant's request that the Appellant has given up its contention that the FDs belonged to his HUF though he has not expressly stated this. This is because; telescoping of the income against investment can be granted only if income and investments; both are of the same person. Telescoping cannot be given for the investment made by one person out of the income of the other person. In this case, the Appellant contends that the source of the investment in the new FDs is out of the amount available on maturity of the old FDs. I do not find any problem against this argument at the academic level. However, it is

fundamental that the benefit of telescoping cannot be granted without the cash-flow statement and without examining the date of the maturity and date of reinvestment in FDs. Again, the date of maturity of the FDs should be sufficiently close to date of the reinvestment in FDs to support the conclusion that the same amount was reinvested in the new FDs. This has to be established with the cash-flow statement.

*2.2.8 The Appellant **has not furnished the cash-flow statement, dates of maturity of the FDs and date of reinvestment in the fresh FDs.** I find the Appellant's defence is half hearted. In the beginning, the Appellant contended that the investment belongs to his HUF and now, it is stated that it is the same funds, which were rotated in the FDs without supporting this contention with evidence. Therefore, I do not consider his explanation on the source of the investment made in the FDs to be satisfactory in terms of the provisions of the section 69A without the cash-flow statement. I confirm the addition made by the learned AO in all the AYs on this account."*

4.1 However, in respect of addition for A.Y. 2007-08, the CIT(A) made addition of Rs.4,07,004/- as against Rs.5,26,604/- wrongly made by the AO and thus gave relief of Rs.1,19,600/-.

5. Aggrieved with the order of CIT(A), the assessee filed the present appeals before the Tribunal with the following grounds :

"On the facts and in law,

1.The learned CIT(A) erred in rejecting the contention of the appellant for granting telescopic benefit regarding the addition of Rs.96319/- made on account of Fixed deposits with bank.

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

6. During the proceedings before us, Ld. Counsel for the assessee relied heavily on the submissions made before the AO/CIT(A). However, he could not rebut the conclusions drawn by the CIT(A) in the said paras 2.2.6 to 2.2.8 of his order.

7. On the other hand, Ld. DR for the Revenue relied on the orders of the AO and the CIT(A). During the rebuttal time, Ld. Counsel for the assessee fairly mentioned that the amounts involved in all these appeals is merely around Rs.7,32,910/- and therefore, the decision is left to the Bench.

8. On hearing both the sides and noting the concession given by the Ld. AR for the assessee qua the smallness of the additions made by the AO, we find that the additions involved are based on the seized documents during the search and seizure action u/s.132 of the Act. In such matters, the onus is on the assessee for discharging before the AO. As such, the transactions are essentially in cash form. In this regard, we perused the reasoning given by the CIT(A) vide Para Nos. 2.2.6 to 2.2.8 of his order and find that the finding given by the CIT(A) is fair and reasonable and it does not call for any interference. Accordingly, the grounds raised by the assessee for the A.Yrs. 2005-06 to 2009-10, being common, are dismissed.

9. In the result, appeals of the assessee for the A.Yrs. 2005-06 to 2009-10 are dismissed.

We shall now take up the appeal of the assessee for A.Y. 2011-12.

ITA No.685/PUN/2016
A.Y. 2011-12

10. Grounds raised by the assessee are extracted here as under :

“On facts and in law,

1. *The Ld.CIT(A) erred in confirming addition of Rs.10,62,182 on account of unexplained money u/s.69A, disregarding the submissions given by the appellant.*

2. *The Ld.CIT(A) erred in not appreciating the contention of the appellant that the total cash found in the group as per books is more than cash found and therefore the cash found is duly explained as the appellant is one of the member of the group.*

3. *The appellant craves leave to add, alter, amend or delete any of the above grounds of appeal.”*

From the above, it is evident that the solitary issue raised by the assessee in this appeal relates to cash seizure of Rs.10,62,182/- and addition of the same in the assessment proceedings.

11. Before us, on this issue, Ld. Counsel filed the following written submissions and the same are extracted here as under :

“1. The said issue of cash found during the course of search has been considered in the application before Settlement Commission filed by the Parag Milk Food Products Pvt. Ltd.,

2. The appellant submits that during the course of search action, cash of Rs.38,41,000/- was found at Mumbai and cash of Rs.16,28,929/- was found at Manchar. Out of the total cash found of Rs.54,69,929/- cash of Rs.15,00,000 was seized at Manchar and Rs.36,00,000 was seized at Mumbai, thus aggregate cash seized amounts to Rs.51,00,000/- (Refer Page No.3 of the Assessment order).

3. The appellant submits that as on the date of search action, cash in hands in the regular books of account of the applicant group members is as under :

04.02.2011	Parag Foods Pvt. Ltd.,	31,33,669.81
04.02.2011	Bhagyalaxmi Dairy Farms Pvt. Ltd.	18,29,927.50
04.02.2011	Devendra Prakash Shah	31,66,274.59
04.02.2011	Preeti Devendra Shah	62,423.00
04.02.2011	Pritam Prakash Shah	26,03,795.28
04.02.2011	Netra Pritam Shah	9,09,152.25
04.02.2011	Parag Foods Palamner	7,92,850.00
	Total	1,24,98,092.43

4. The applicant thus submits that the total cash found in the course of search action is part of the regular books of account of the applicant group and hence, the same is accounted cash and not considered in the fund flow statement.

5. The issue of cash found during the course of search is considered at Para No.10.2 of the order of Settlement Commission and they have accepted contention of the issues (Refer Page No.12 of the PB).

6. In support of our above contention, we also wish to draw kind attention of your Honour to Para No.18 on page 29 and 30 of the order of Settlement Commission wherein our request for capitalization and in particularly note No.2 wherein issue of cash found is discussed and the Hon'ble Settlement Commission in the order on page 30 (Refer page No.30 of the PB) has categorically stated that cash found and seized is fully explained by cash as per books of accounts of the applicant and group members and therefore addition made in the individual members Devendra shah 38.41 lakhs, Pritam Shah 3.94 lakhs and Prakash Shah Rs.10.621 lakhs is uncalled for. We have considered the claim of the appellant for capitalization as mentioned above and we find it in order and we allow the capitalization.

7. In the circumstances, since the issue is covered by the Settlement Commission, the addition made by the AO on the same issue, therefore it will amount to double addition which is not permissible and not justified in law.

8. *In view of above facts, it is submitted before Your Honour that the additions made on account of unexplained money made by the AO and confirmed by the CIT(A) be deleted.”*

In this regard, Ld. Counsel for the assessee brought our attention to the order of the Settlement Commission and the contents of Para Nos.10.2 and Para No.18 of the said order of Income Tax Settlement Commission dated 23-06-2014. Ld. Counsel submitted that the ITSC recognised the fact of existence of adequate cash balance in the books of the group and discouraged making separate addition on this account in all the cases in general and in the case of the assessee in particular.

12. Ld. DR for the Revenue relied on the orders of the AO and the CIT(A).

13. We heard both the parties on this issue of addition of Rs.10,62,182/-. We have considered the submissions made by the Ld. Counsel for the assessee as well as the order of the Settlement Commission dated 23-06-2014 on this very issue. We find it relevant to extract the findings given by the Settlement Commission at Para No.10.2 as well as Para No.18. The said paras read as under :

“10.2 Cash found : (Extract from the order of ITSC)

Shri Karia stated that in respect of cash found at the time of search totalling to Rs.93.11 lacs, Rs.51 lacs were seized. Shri Karia also stated that on the date of search as per the regular books of accounts, the cash available was totalling to Rs.1,24,98,092/- and therefore the cash found need no further explanation as it is out of the cash already available in the books of accounts. The CIT in his Rule 9 report has claimed that the explanation of the applicant cannot be accepted because the unaccounted cash was nothing but generated cash sales of milk product and it had no co-relation with cash available in the books.

We have considered this issue carefully and we find that the cash as per the books of account is more than the cash found at the time of search. In these circumstances the plea of the Department based only on presumptions cannot be accepted. We as such, do not find any justification of any addition on this account.

18. **Capitalization : (Extract from the order of ITSC)**

The applicant has made formal prayer for capitalization is the SOF filed. During the arguments for capitalization the applicant emphasized for capitulation based on actual utilization of the funds as under :

Sr.No.	Particulars	Amount
a.	Excess stock of FAT	2,25,87,120
b.	Investment in Bhagyalaxmi	42,28,500
c.	Share Capital will be reversed	3,00,83,600
d.	Investment in Ranjangaon Land	12,22,56,000
	Total	17,91,55,220

Note 1. Credit for Rs.14 crores on account of expenses through hands of individual members Devendra Shah (Rs.5.12 cr.) Netra Shah (Rs.4.72 crores) and Priti Shah (0.06 cr.) – not capitalized but credit sought total Rs.9,90,00,000/-.

Note 2 : Cash found and seized is fully explained by cash as per books of accounts of the applicant and the group members and therefore addition made in the individual members Devendra Shah Rs.38.41 lakhs, Pritam Shah Rs.3.94 lakhs, and **Prakash Shah Rs.10.621 lakhs is uncalled for.**

We have considered the claim of the applicant for the capitalization as mentioned above and we find it in order and we allow the capitalization.”

14. The above extracts are self explanatory and they are in favour of the assessee directly. The Settlement Commission has already decided the issue in favour of the assessee and considered the availability of cash in the group concerns of the assessee and allowed the telescoping benefit of the said cash seized against the cash available on records. The reasoning given by the CIT(A) on this issue is unsustainable in view of the categorical finding in the case of the assessee particularly. Considering the same, we are of the opinion that the orders of AO/CIT(A) are required to be reversed. Accordingly, the grounds raised by the assessee are allowed.

15. In the result, appeal of the assessee is allowed.

16. To sum up, appeals of the assessee for A.Yrs. 2005-06 to 2009-10 are dismissed and appeal of the assessee for A.Y. 2011-12 is allowed.

Order pronounced on 26th September, 2018.

Sd/-

Sd/-

(VIKAS AWASTHY)

(D. KARUNAKARA RAO)

न्यायिक सदस्य / JUDICIAL MEMBER

लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 26th September , 2018
सतीश

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. The CIT(Appeals-13, Pune.
4. The Pr.CIT(Central), Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “ बी”
“B” Bench” Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune