

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष  
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 1014/JP/2015  
निर्धारण वर्ष/Assessment Year :2009-10

Shri Devi Singh 3C, 3 <sup>rd</sup> Floor, Tilak Bhawan, Tilak Marg, C- Scheme, Jaipur	बनाम Vs.	Income Tax Officer, Ward-4(2), Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: BLKPS8501G		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से/ Assessee by : Shri Shiwangi Samdhani &  
Shri Rajiv Sogani (CA)  
राजस्व की ओर से/ Revenue by : Shri J. C. Kulhari (JCIT)

सुनवाई की तारीख/ Date of Hearing : 27/08/2018  
उदघोषणा की तारीख/Date of Pronouncement: 01/10/2018

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A)-2, Jaipur dated 27.10.2015 for A.Y. 2009-10 wherein the assessee has taken following grounds of appeal.

- "1. (a) In the facts and circumstances of the case and in law the Id. CIT(A) has erred in confirming the action of Id. AO in treating cash deposits of Rs. 10,33,563/- as undisclosed income. The action of Id. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may

*please be granted by deleting the said additions of Rs. 10,33,563/-.*

*(b) In the facts and circumstances of the case and in law the Id. CIT(A) has erred in confirming the action of Id. AO in calculating the peak balance in bank account which has not been correctly worked out. The action of Id. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by appropriately working the peak balance.*

- 2. In the facts and circumstances of the case and in law the Id. CIT(A) has erred in confirming the action of Id. AO in treating the opening balance of capital account of Rs. 4,31,450/- as undisclosed income. The action of Id. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the said additions of Rs. 4,31,450/-.*
- 3. In the facts and circumstances of the case and in law the Id. AO has erred in estimating the net profit @ 8% against the declared net profit rate of 2.30% resulting into trading addition of Rs. 6,23,202/-. The action of Id. AO is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the trading addition of Rs. 6,23,202/-."*

2. Briefly stated, the facts of the case are that the assessment was completed u/s 143(3) read with section 144 wherein the AO has treated cash deposit of Rs. 10,33,563/- as undisclosed income in the hands of the assessee. Further, the opening balance of capital account of Rs. 2,51,450/- was also treated as undisclosed income. Besides, the AO has estimated the net profit of assessee from his liquor business at 8% as against 2.3% declared in the return of income.

3. Being aggrieved, the assessee carried the matter in appeal before Id. CIT(A) who has confirmed the said additions and now the assessee is in appeal before us.

4. Regarding ground No. 1, the assessee has submitted as under:-

3.1 During the year under consideration, the assessee has declared a turnover of Rs. 1,09,33,148/- from his business of liquor trading, which was accepted by the lower authorities. It was also submitted that it is a well established fact that the entire sales of liquor shop are made in cash only, the lower authorities again accepted the said fact without disputing the same.

3.2 The assessee during the year deposited a total sum of Rs. 19,22,790/- i.e 17.59% of his total turnover in his SBBJ SB A/c. Keeping in view the nature of the business in which the assessee is engaged, there is a direct nexus between the sales and the cash deposits. The assessee on various dates deposited a part of cash generated from business and used the same for making purchases of liquor from Government agencies namely Rajasthan State Beverages Corporation Limited (RSBCL) and Rajasthan State Ganganagar Sugar Mills (RSGSM) and for making purchases of the liquor licenses.

3.3 Further, it is pertinent to note that out of the entire money deposited in the bank account, some of the money was of assessee's father. The assessee's father is a farmer and do not have a bank account. It is a well known fact that small farmers do not keep bank accounts. Thus, in order to keep money in safe custody, assessee's

father gave his money to the assessee as trust money with a direction to deposit the same in bank.

3.4 It is submitted that Id. AO erred in making the addition in an arbitrary manner without looking into the nature of the business of the assessee. Further, Id. AO failed to discharge his duty for making addition by bringing on record any other source of income for generation of cash. Hence, there can be no doubt on deposition of Rs. 19,22,790/- keeping in view the above submissions.

3.5 It is further submitted that during the appellate proceedings, the assessee submitted before Id. CIT(A) that the cash deposited was the part of cash generated from the sale of liquor. However, Id. CIT(A) without considering the contention of the assessee on the basis of surmise and conjecture, in a very summary manner upheld the addition made by the Id. AO.

3.6 It is clear that lower authorities have erred in interpretation of section 69. As per the language of section, ITO is not obliged to treat such source of investment as income in every case where the explanation offered by the assessee is found to be not satisfactory. A discretion has been conferred on the ITO under section 69 to treat the source of investment as the income of the assessee if the explanation offered by the assessee is not found satisfactory and the said discretion has to be exercised keeping in view the facts and circumstances of the particular case. Reliance is placed on the decision of Hon'ble Supreme Court in the case of CIT vs. Smt. P.K. Noorjahan [1999] 103 TAXMAN 382 (SC) wherein it is held as under:

*" ..The submission is that once the explanation offered by the assessee for the sources of the investments found to be non-acceptable the only course open to the ITO was to treat the value of the investments to be the income of the assessee. The submission is that the word 'may' in section 69 should be read as 'shall'. We are unable to agree. As pointed out by the Tribunal, in the corresponding clause in the Bill which was introduced in the Parliament, the word 'shall' had been used but during the course of consideration of the Bill and on the recommendation of the Select Committee, the said word was substituted by the word 'may'. This clearly indicates that the intention of the Parliament in enacting section 69 was to confer a discretion on the ITO in the matter of treating the source of investment which has not been satisfactorily explained by the assessee as the income of the assessee and the ITO is not obliged to treat such source of investment as income in every case where the explanation offered by the assessee is found to be not satisfactory. The question whether the source of the investment should be treated as income or not under section 69 has to be considered in the light of the facts of each case. In other words, a discretion has been conferred on the ITO under section 69 to treat the source of investment as the income of the assessee if the explanation offered by the assessee is not found satisfactory and the said discretion has to be exercised keeping in view the facts and circumstances of the particular case..."*

5. The Id. DR relied on the findings of the lower authorities and taken us through the findings of the Id. CIT(A) which is contained at Para 2.3 of his order which is reproduced as under:

*"2.3 I have perused the facts of the case, the assessment order and the submissions of the appellant. The facts of the case as they emerge are that the Assessing Officer had information of a Bank Account of the assessee with SBBJ Chakasu in which huge cash transaction had been made. **This is the first year of business in liquor, of the assessee. The assessee initially did not disclose this Bank Account and also the cash book produced by the assessee did not have any entry related to this account. This was an account which was concealed and was being used to deposit unrecorded receipts of the assessee.** Further as per the Audit Report, the statutory Auditors have reported that no stock register is being maintained by the assessee. Considering, the entire factual matrix the books of accounts were rejected by the Assessing Officer u/s 145(3) of the IT Act, 1961 and the profit from the liquor business has been estimated at 8%. As regards, the amounts in the undisclosed Bank Account, the peak credit has been arrived at and added as undisclosed receipts. Further, the Assessing Officer has telescoped the addition of business income with the addition for the amounts found in Bank Account. In the present proceeding the AR has submitted that the addition of Rs. 4,10,361 may be deleted / telescoped with 8% of turnover. This plea of the AR cannot be heeded to as the telescoping has already been correctly allowed by the Assessing Officer. This ground of appeal is dismissed."*

6. We have heard the rival contentions and perused the material available on the record. The Id CIT(A) has returned a finding that "this is the first year of business in liquor, of the assessee. The assessee initially did not disclose this Bank Account and also the cash book produced by the assessee did not have any entry related to this account. This was an account which was concealed and was being used to deposit unrecorded receipts of the assessee." Given that the cash deposits were found deposited in the bank account maintained by the assessee in his own name, the onus is on the assessee to demonstrate that these deposits are out of his business transactions. In this regard, the Id AR has mainly contended that there is a direct nexus between the sales and the cash deposits. The assessee on various dates deposited a part of cash generated from business and used the same for making purchases of liquor from Government agencies namely Rajasthan State Beverages Corporation Limited (RSBCL) and Rajasthan State Ganganagar Sugar Mills (RSGSM) and for making purchases of the liquor licenses. In our view, there are merely contentions which may sound attractive but unless and until the same are supported and demonstrated through verifiable evidence, the same cannot be accepted. The assessee has failed to link the cash sales so claimed with the deposits in the bank account as the Id CIT(A) has clearly returned a finding that the cash book produced by the assessee did not have any entry related to the deposit in this bank account and the said findings of the Id CIT(A) remain uncontroverted before us. Further, we have gone through other contentions so raised by the Id AR as well as the legal decision relied upon by the Id AR however, we find that the same doesn't support the case of the

assessee. In the result, we donot see any infirmity in the order of the lower authorities and the same is hereby confirmed. The ground so taken by the assessee is hereby dismissed.

7. Regarding ground No. 2, the Id. AR has submitted as under:-

"31. It is submitted that in the year under consideration the assessee for the first time started his business. Prior to starting the said business of liquor shop, the assessee was assisting his father in carrying out agriculture activities. It is a well known fact that when a new business is set up there is requirement of capital which is generally provided by the father out of his love and affection. In the present case also, the assessee's father gifted him a sum of Rs. 6,31,450 so as to help him to set up his own new business.

3.2. During the assessment proceedings elaborate submissions along with the following evidences establishing the identity, genuineness and creditworthiness were made before Id. CIT(A):

- Copy of Jamabandi Report in the name of assessee's father.
- Copy of Khasra Girdawari Report i.e. statement of crops cultivated.
- Copy of three latest photographs of agriculture land, to substantiate that land is engaged in agriculture activities even after he gave gift.
- Copy of affidavit of the assessee' father, accepting the fact that gift of Rs. 6,31,450 was given by him to the assessee.
- Copy of receipt from Newai Krishi Upaj Mandi for a recent sale transaction of Rs. 1,42,650.

- Certificate from Sarpanch of village stating that a land is owned by the father of the assessee on which cultivation is done.

3.3. It is submitted that Id. CIT(A) erred in holding that since Bank Statement of the assessee's father and Gift Deed evidencing such gift has not been produced, the transaction is not genuine and the creditworthiness is also not established.

3.4 It is submitted that the assessee has produced all the possible evidences as stated above in order to establish creditworthiness of his father. It is a well known fact that farmers generally do not maintain Bank Accounts and don't even keep Books of Account since their income is exempt from tax. The assessee's father is also a farmer and from past many years till date is engaged in carrying out agriculture activities on his land. The assessee by providing Jamabandi, Girdawari Report, Certificate of Sarpanch and latest photographs of his land has proved the creditworthiness of his father. Further, the assessee has also bought on record that assessee's father has made a recent sale to Newai Krishi Upaj Mandi of Rs. 1,42,650/-. It is submitted that when assessee's father can raise more than Rs. 1,00,000/- from a single sale transaction, then he could have saved Rs. 6,31,450/- over years and gifted the same to his son for setting up of his first business.

3.5 The assessee also established the genuineness of the transaction by providing an Affidavit confirming the gift and amount of gift was duly submitted. Further, before Id. CIT(A) the assessee

also showed his willingness to produce his father. It is submitted that Id. CIT(A) only due to non furnishing of Gift Deed formed a belief that gift is not genuine. In this regard it is submitted that the assessee belongs to a rural background and was not aware of the fact that a Gift Deed has to be executed in such cases. Therefore, by proving affidavit and by making a request to produce his father the assessee has discharged his onus.

3.6 The lower authorities have erred in making/ confirming the addition without bringing any evidence, direct or indirect, to show that the money so received actually belonged to the assessee. Nowhere the Id. AO or Id. CIT(A) has suggested that the money given by the father has actually flown from the assessee. In absence of this finding, no addition can be made to the income of the assessee merely on suspicion. Since the identity of the assessee's father is duly established by the assessee, the Id. AO at best could have assessed such amount in the hands of the assessee's father. Reliance is placed on the decision of Hon'ble Rajasthan High Court in the case of PCIT vs. Shubh Mines Pvt. Ltd. — Appeal No.m 96/15. The relevant extract is as under:-

*"...In the considered opinion of this court, in absence of any cogent evidence on record establishing that the money shown to have received as share application money, was as a matter of fact, unaccounted money belonging to the assessee company, the finding arrived at by the AO, which is based on suspicion, has rightly been held not sustainable in the eyes of law. Suffice it to say that the finding arrived at by the CIT (A), affirmed by the ITAT, which*

*remains a finding of fact , cannot be said to be capricious or perverse.."*

8. Per contra, the Id. DR relied on the findings of the lower authority and taken us through the order of the Id. CIT(A) at para 3.3.

*"3.3 I have perused the facts of the case, the assessment order and the submissions of the appellant. The opening balance of capital account of Rs. 6,31,450/- was sought to be explained by the assessee as gift from the assessee's father, who is an agriculturist. The Authorized Representative further submitted a copy of Khasra Giralawari Report, some photographs of crops being cultivated and an affidavit from the father stating that the gift had been given, confirmation of sale of crop of mustard and a certificate from the Sarpanch of village Gunshi, in the present proceeding in support of the creditworthiness of the father to extend the gift referred above.*

*All evidence now filed were forwarded to AO for his comments also. The assessee has submitted an affidavit of the father affirming that he owns agricultural land and an amount of Rs. 6,00,000/- was given by him to his son as gift and the amount was paid in cash. Further as no gift deed was executed, this affidavit can at best acknowledge that the father is making a claim of having made the gift and also regarding his land holding, but the important question of creditworthiness of the donee, the genuineness of the transaction are still not proved. Further, no bank account statement as evidence to prove the availability of cash has been produced. The AO during initial proceeding has given credit for Rs. 2 lakhs in*

*opening balance to the assessee. In my view as the genuineness of gift could not be proved by the assessee and a credit of Rs. 2 lakh has already been given, the balance amount of Rs. 4,31,450/- is correctly added to the income of the assessee. Thus, this addition is confirmed and the ground of appeal is dismissed."*

9. We have heard the rival contention and pursued the material available on the record. The assessee has claimed the opening capital of Rs 6,31,450 as a gift from his father. In absence of gift deed or confirmation, the AO found it reasonable to restrict to restrict the opening capital to Rs 2,00,000 and added an amount of Rs 4,31,450. Firstly, we find it difficult to understand if the AO has doubted the gift transaction, what made him to restrict the addition to Rs 4.31 lacs. Either the transaction has to be accepted or rejected in totality. To our mind, this arbitrariness in the approach of the AO is a good ground for us to delete the subject addition. Further, during the appellate proceedings, the assessee submitted the affidavit of the father of having given the gift to the assessee and also other supporting documentation in support of creditworthiness which we have noted above. In peculiar facts of the case, where the assessee has started a new business, it would be reasonable to believe the contention of the assessee of having received the initial finance from his father by way of a gift. Therefore, the genuineness of the transaction and also the creditworthiness of the father has been established which has been supported by land records/earnings. In light of the same, the addition so made by the AO is hereby deleted and the ground is allowed.

10. Ground No. 3 was not pressed during the course of hearing, hence the same is dismissed as not pressed.

In the result, appeal filed by the assessee is partly allowed.

Pronounced in the Open Court on 01/10/2018

Sd/-  
(विजय पाल राव)  
(Vijay Pal Rao)  
न्यायिक सदस्य / Judicial Member

Sd/-  
(विक्रम सिंह यादव)  
(Vikram Singh Yadav)  
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 01/10/2018.

\*Ganesh.

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

1. अपीलार्थी / The Appellant- Shri Devi Singh, Jaipur
2. प्रत्यर्थी / The Respondent- ITO, Ward-4(2), Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 1014/JP/2015}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar