

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**SURAT BENCH, SURAT**  
श्री सी.एम.गर्ग, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्य के समक्ष  
**BEFORE SHRI C.M.GARG, JUDICIAL MEMBER**  
**AND SHRI O.P.MEENA, ACCOUNTANT MEMBER**

आ.अ.सं./I.T.A No.3274/AHD/2015/SRT  
निर्धारण वर्ष/Assessment Year : 2005-06

Rajendra Raojibhai Patel, Trushna Bungalows, Opp.Suman Park, Ambika Niketan, Athwalines, Surat – 395 007.	<b>Vs.</b>	The Income Tax Officer, Ward-3(1), Surat.
<b>[PAN: AAVPP 8050 E]</b>		
<b>अपीलार्थी Appellant</b>		<b>प्रत्यर्थी/Respondent</b>

निर्धारिती की ओर से /Assessee by	Shri Hiren R. Vepari - CA
राजस्व की ओर से /Revenue by	Shri Anil Dhaka - Sr.DR

सुनवाई की तारीख/ Date of hearing:	19.09.2018
उद्घोषणा की तारीख/Pronouncement on	15.10.2018

**आदेश /ORDER**

**PER O. P. MEENA, ACCOUTANT MEMBER:**

1. This appeal filed by the Assessee is directed against the order of learned Commissioner of Income tax (Appeals)-II, Surat(in short “the CIT (A)”) dated 11.08.2015 pertaining to Assessment Year 2005-06, which in turn has arisen from the order passed by the Income Tax Officer, Ward-3(1), Surat(in short “the AO”) dated 11.07.2014 under section 143(3) of Income Tax Act, 1961 (in short ‘the Act’).

**2.** Ground No.I states that the CIT(A) ought to have held that assessment being time barred is not valid.

**3.** The Id.Counsel for the assessee submitted that order of ITAT in ITA No.2957/Ahd/2008 was passed on 30.07.2010 by Ahmedabad 'D' Bench Tribunal, therefore for giving effect to the order of the ITAT, the assessment should have been framed by 31.03.2012 whereas order giving effect to the ITAT order has been passed on 11.07.2014. Therefore, the assessment order is time barred in terms of section 153(2A) of the Act. The CIT(A) was not justified in taking reliance on section 153(3)(ii) which is subject to section 153(2A) of the Act. In support of this contention, the Id.Counsel has placed reliance in the case of Instruments and Control Company vs. Chief Commissioner of Income Tax [2012] 349 ITR 571 (Guj).

**4.** On the other hand, the Id.Departmental Representative(DR) submitted that the original assessment in the case of assessee was completed on 30.11.2007 by assessing total income at Rs.33,40,280/-. The additions made in the assessment order were confirmed by the CIT(A) vide his order dated 27.06.2008, the ITAT

vide its order dated 30.07.2010 confirmed the some additions and in respect of certain additions the matter was restored back to the AO. In compliance to thereof, the order giving effect to ITAT's order was passed on 11.07.2014 by assessing the total income of Rs.33,40,280/-. The ITAT has confirmed the additions made on account of cash credit of Rs.44,591/- and low household withdrawals of Rs.65,812/- and with regard to four other issues directed the AO to examine these issues after giving opportunity of being heard. These facts shows that the entire assessment therefore was not set-aside by the ITAT, but it had directed to examine the four additions on the basis of supporting evidences. Therefore, the assessment is not barred by limitation in terms of section 153(3)(ii) of the Act, wherein no such time limit has been prescribed. Therefore, provisions of section 153(2A) would not apply in this case, hence, the assessment is not barred by limitation. Therefore, the CIT(A) has rightly held that the order giving effect to the ITAT directions falls within the purview of section 153(3)(ii) and not section 153(2A) of the Act, Therefore, the order is valid and not barred by limitations.

**5.** We have heard the rival submissions and perused the relevant material on record. The findings in order of ITAT dated 30.07.2010 in para 7.1 and 7.2 reads as under :

*"7.1 In respect of unsecured loans from Rakha R. Patel amounting to Rs.44,591/-, the Id.counsel of the assessee fairly admitted that the assessee is not having the certificate indicating holding of shares in physical form, which were solely belonged to Rekha R. Patel. In these circumstances, the view taken by the Learned Commissioner of Income Tax (Appeals) confirming the addition of Rs.44,591/- is upheld. The addition made on account of low household withdrawal amounting to Rs.65,812/- is also upheld.*

*7.2 With regard to remaining additions, prima facie, it appears that the assessee being a non-resident, the various documents, which are now being filed, could not be produced before the authorities below. Therefore, in the interest of justice, the following additions/ disallowance are restored to the file of Assessing Officer :-*

- (1) Unexplained gift - Rs.6,54,672/-*
- (2) Unexplained cash credit of all the creditors except Rekha R.Patel (Rs.44,591/-)i.e. Rs.9,00,660/- (Rs.10,05,251/- (-)*
- (3) Unexplained cash deposit Rs.6,00,000/-*
- (4) Treating short-term capital gain as business income Rs.6,44,886/-*

*The Assessing Officer will examine the various additional evidences, may call further evidence, conduct enquiry, which he deem fit and re-adjudicate all the aforesaid restored additions afresh in accordance with law after giving opportunity of being heard to the assessee."*

**6.** The perusal of above order of the ITAT shows that the additions on account of unsecured loan of Rs.44,591/- and low household withdrawals amounting to Rs.65,812/- were confirmed by the ITAT. The perusal of para 7.2 shows that the addition in respect of remaining four items were restored to the AO with the direction to examine the various additional evidences and call further evidence and conduct enquiry, therefore, the assessment

order was not cancelled or set-aside and there is no direction to the AO for making a fresh assessment. A bare perusal of the section 153 would reveal that section 153(2A) usage of phrase “an order of fresh assessment” whereas section 153(3)(ii) use the phrase “assessment, re-assessment and re-computation” further section 153(2A) usage of phrase setting aside and cancelling the assessment whereas section 153(3)(ii) uses the phrase “in consequence of ought to give effect to any finding or direction contained in an order”. Therefore, in our considered opinion to attract the limitation contemplated u/s.153(2A) the entire order should have been set-aside or annulled/vacated. The term used in section 153(2A) makes it clear that when the entire assessment has been set-aside or cancelled, then only the limitation laid down u/s.153(2A) would apply. But, where the Appellate Authority has given certain findings and in consequent to that direction, the AO makes the assessment in accordance therewith, then the provisions as laid down u/s.153(3)(ii) would apply and not as given u/s.153(2A). Since the ITAT had partly restored the addition to the file of the AO and not used the word set-aside meaning thereby that the limitation u/s. 153(2A) has no effect on such direction. It is further seen that the AO has to passed the impugned order giving

appeal effect to ITAT order, and further the perusal of "order passed by the AO on 11.07.2014 also gives the heading that "order giving effect to the ITAT's order". The Id.Counsel has placed reliance on the decision of Instruments and Control Company (supra) wherein also the Hon'ble High Court has held that sub-section 2A of section 153 would cover cases where the AO is required to pass a fresh order of assessment when such fresh assessment is necessitate on account of an order setting aside or cancelling assessment. In comparison, Clause-(ii) of sub-section(3) of section 153 would apply where there is a need for an assessment, re-assessment or re-computation in consequence of to give effect to any finding or direction contained in an order passed u/s.250 etc., Therefore, in the light of ratio laid down by the Hon'ble Jurisdictional High Court, the assessment framed in consequence of ought to give effect to the terms of the ITAT would fall u/s.153 (3)(ii). Therefore, in our considered opinion the order is not barred by limitation, accordingly this ground of appeal of the assessee is therefore dismissed.

**7.** Ground No.II states that the CIT(A) was not justified in confirming the addition of gifts amounting to Rs.6,54,671/- made

by Renuka P.Patel, Rekha R.Patel, Ulhas R.Patel, Sumitra J.Patel Ramanlal F.Patel, Sudhakant S.Patel only because their passport etc., were not produced when they were never asked for at any stage. The CIT(A) failed to notice that the amounts gifted were not brought this year, but carried forward from earlier years and were transferred by book entries which were confirmed by the donors.

**8.** Briefly stated facts of the case are that the assessee has shown receiving gift of Rs.6,54,672/- from six relatives by book entries. The assessee did not furnish any additional evidences before the AO and relied on the submissions made at the time of original assessment proceedings. It was submitted that the six relatives who have given the gifts were having business interest and income up to year 1997 in the business group name “Welding Rods”. These relatives left India, hence, no income tax return etc., is available since 1997 onwards. The assessee submitted copies of ledger accounts of these persons for the last five years claiming that these accounts show that the balance were carried from earlier years and the confirmation from these persons have been furnished. In the original assessment, the assessee has failed

to furnish any gift declaration, copy of acknowledgment of return of income of the persons to prove the genuineness of the gift, hence the addition of Rs.6,54,672/- was made which was also confirmed by the CIT(A) by stating that the three conditions i.e. identity of alleged donors, their creditworthiness, as also the genuineness of the transactions were not fully established by the assessee. During the appellate proceedings, before the Tribunal the assessee submitted an application for admission of additional evidence. However, the AR of the assessee simply furnished the copies of ledger account in the books of the assessee in respect of six donors and it was also submitted that the gifts received were through books entries. Therefore, the AO observed that the assessee has failed to prove the identity of so-called donors, hence, the addition was made in the original assessment which was confirmed by the CIT(A) as the basic parameters as treating the gift as genuine are not satisfied, therefore, the AO made an addition of Rs.6,54,672/-.

**9.** Being aggrieved, the assessee has filed an appeal before the Id.CIT(A). The Id.CIT(A) observed that the appellant submitted copy of confirmation from following persons :

- a Renuka Patel from Nairobi, Kenya
- b Rekha R Patel from Glasgow, UK
- c Ulhas R Patel from Essex, UK
- d Sumitra J Patel from London, UK
- e Ramanbhai F Patel from London, UK

**10.** The Id.CIT(A) further observed that it is strange to note that the appellants were able to obtain the confirmation letters from the various persons spread in the different parts of the world, but none of them confirm any proof of identification in the form of passport, social security number etc., has been given. This fact is also mentioned by the assessee in its reply dated 15.12.2012 before the AO. The Id.CIT(A) observed that gift is shown generally out of natural love and affection and without any consideration which necessarily denotes the closeness between the donor and the donee. It can be given either on some occasion or to help of relative or a friend. To see the genuineness of the gift, the test of human probability is the most appropriate. A gift cannot be accepted, as such to be genuine, merely because the amount has come by way of cheque or draft through banking channel, unless the identity of the donor, his credit worthiness, relationship with the donee and occasions are proved. Unless the recipient proves the genuineness thereof, the same can very well be treated to be an accommodation entry of the assessee's own money, which is

not disclosed for the purpose of taxation. Since the claim of the gift was made by the assessee, the onus laid on him not only to establish the identity of the person making gift but also his capacity to make the gift and that it had only been received as a gift from the donor. This view was supported by CIT(A) by placing reliance of various decisions as quoted in the appellate order. Since the identity of the alleged donors, their creditworthiness, genuineness of the transaction occasion, relationship and evidences of natural love / affection which the courts have said are essential to prove the genuineness of any credit or cash credit were not fully established in the appellants case. If these parties actually existed have been near related with the appellant to surrender their credit balances to the appellant as a gift, then the appellant ought to have been accepted to produce some evidences with regard to their passport or any documentation to establish their identity. As the AO has rightly noted that there was no evidences to verify the signatures of the alleged donors. The copies of their accounts were not furnished nor were any evidences furnished to show that such balance sheet has been providing for several years. Therefore, the CIT(A) has held that the appellant had failed to discharge the initial burden which laid on him to

prove the genuineness of the gift. The CIT(A) further observed that the writing of the credit balances could not be claimed as receipt of the gift. Even if the said amounts totaling to Rs.6,54,671/- is to be examined as gifts. It is seen that the basic parameters for treating the gifts as genuine simply does not exist. Therefore, the addition made by the AO was confirmed.

**11.** Being aggrieved, the assessee has filed this appeal before us. The Id.Counsel for the assessee submitted that old amounts of sisters and others of the assessee from six parties aggregating Rs.6,54,671/- were transferred to his capital account, because they had left India long back and were not interested in the aforementioned amounts to be recovered from the assessee. Of the above four of his sisters, one is mother, and one is uncle. Besides, these were only entries transferred from their respective accounts to the account of the assessee. These accounts have been in the books of the assessee carried over years. The letters of gift in his case have been furnished by the assessee which are placed at paper book page no.17 to 62. Therefore, no addition is called for. The CIT(A) has accepted that these are book entries with the ledger accounts of earlier years have been filed nor bank

statements have been filed nor identity proof in form passport etc., have been filed. However, the CIT(A) has not considered the fact that these are old balances and the question of bank statement would not arise. Since, no amount is received during the year the question of filing income tax return does not arise. The donors or close relatives like sister and therefore all these are genuine and may be addition may therefore be deleted.

**12.** Per contra, the Id.DR submitted that the assessee has claimed the aforesaid amounts of gifts receipt by way of book entries, however, the assessee has failed to prove the identity of the donor, credit worthiness of the donor and genuineness of the transaction. Therefore, the lower authorities are justified in sustaining the additions.

**13.** We have heard the rival contentions and perused the material available on record. The perusal of aforesaid findings of the Lower Authorities reveals that a gift is generally shown as given out of natural love and affection and without any consideration either on some occasion or to help a relative or a friend. In the case of assessee, the carry forward balance appearing in the books of accounts of have been transferred by the assessee by way of gift

without on any occasion or reason. The assessee has obtained confirmation letters from six persons who residing across the world and claims to be his close relatives, but has failed to furnish any evidence to prove the identity of donor, in the form of PAN, Social Security Number, copy of passport of donors who are non-resident and occasion of gift. The perusal of the details as per paper book, we find that CIT(A) has rightly observed that the assessee has submitted ledger accounts in the books of assessee, but no proof of filing of any income tax returns have been failed to show that the evidence of earning income nor any copy of the passport is failed to prove the identity of the donor and prove the genuineness of the transaction, therefore, we are of the considered opinion that the assessee has failed to discharge the onus lay on him to establish the identity of the person making the gift but also his capacity to make the gift and that it had only been received as gift from the donor. Therefore, we do not find any infirmity in the order of CIT(A), accordingly, same is upheld. This ground of appeal is therefore dismissed.

**14.** Ground No.III states that the CIT(A) was not justified in making addition of Rs.45,251/- in respect of sister which Ulhas R.Patel.

**15.** Facts apropos of this ground are that the AO observed that the ITAT found that the assessee has shown loan of Rs.44,591/- from Rekha R.Patel. However, the ITAT find that the assessee is not having certificate indicating holding of shares in physical form which belongs to Smt. Rekha R.Patel, hence, confirmed the said addition. Similarly, the assessee has claimed loan of Rs.45,251/- in the name of Smt.Ulhas R.Patel and submitted that same has arisen on account of sale of shares, hence it is not a loan. However, the AO observed that before the ITAT it was argued that the assessee purchased shares from Smt.Ulhas R.Patel amount shown as payable represents amount in respect of shares purchased by the assessee. On one side the assessee has shown the amount Rs.45,251/- as loan in the balance sheet and on another side the assessee has taken the plea that the said amount is payable to Smt.Ulhas R.Patel for the purchase of shares. The assessee has not tendered any proof with regard to his claim of purchase of shares from Smt.Ulhas R.Patel at any such of proceedings, therefore this addition was confirmed.

**16.** In appeal, the CIT(A) observed that in absence of supporting documents / details, the contention of the appellant cannot be

accepted, therefore the addition made by the AO of Rs.45,251/- is confirmed.

**17.** Being aggrieved, the assessee has filed this appeal before us. The Id.Counsel submitted that this amount has been carried forward from earlier years and is reflected in the balance sheet of the appellant as on 31.03.2005 paper book, page 56 & 57, therefore it was submitted that the addition was not called for as the amount was shown as liability.

**18.** Per contra, the Id.DR relied on the orders of the Lower Authorities.

**19.** We have considered the facts and find that the assessee has shown the amount of Rs.45,251/- as loan in the balance sheet, whereas the other plea is that the said amount is payable to Smt.Ulhas R.Patel for the purchase of shares of which no evidence has been furnished to prove that the amount represents the purchase of shares from Smt.Ulhas R.Patel, therefore, in absence of any evidence to substantiate its claim the addition sustained by the CIT(A) is found to be in order and this ground of appeal is therefore dismissed.

**20.** Ground No.IV & V states that the CIT(A) ought to have deleted the addition of cash of Rs.6,00,000/- without sufficient evidence was furnished to show that there was substantial cash on hand as on 01.04.2004.

**21.** Briefly stated the facts of the case are that the assessee is deposited an amount of Rs.5,00,000/- on 23.02.2005 and Rs.1,00,000/- on 24.02.2005. The assessee has submitted a cash flow statement for the A.Y. 2004-05 but no details of day to day cash inflow / outflow statement in support of cash deposit during the year under consideration had been submitted, hence, the same were treated as unexplained.

**22.** The assessee carried the matter before the CIT(A). The CIT(A) noted that the AO noticed that during the year the appellant had made very few cash transactions up to the month of January 2005 and cash available at the beginning from remaining almost the same i.e. Rs.7,09,843/- the AO held that perusal of bank statement of The Surat People's Co-operative Bank Ltd. shows that the appellant has deposited cash amounting Rs.6,00,000/- on 23.02.2005 and 24.02.2005 whereas 2 cheques of

Rs.3,00,000/- each were cleared on 28.02.2015 for the investment made in the post office. The AO held that the amount of cash available in the cash book had been utilised in the clearance of those cheques for the investment made in the post office. The appellant submitted that the cash deposits of Rs.6,00,000/- is from the cash balance in hand since 01.04.2004 and he had deposited the sum of Rs.6,00,000/- in his bank accounts from his cash balance when he last visited India during the month of February, March 2005. The appellant submitted the copy of Income Tax Returns for A.Y. 2004-05 along with balance sheet date 31.03.2004. However, on perusal on this details the CIT(A) observed that the appellant has shown a cash in hand of Rs.7,43,843/- as on 31.03.2004 to show the availability of cash in the cash book as opening balance on 01.04.2004. The perusal of the cash book shows that the appellant had their few transactions up to the month of January 2005 and the balance of Rs.7,09,843/- was available at the beginning of January 2005. The details furnished show that the appellant visited February for the first time during April 2004 for five days during June, July for 21 days during October, November 2004 for 19 days and finally 24 days during the February, March 2005. No explanation for nexus was established

between the cash in hand as on 01.04.2004 and the cash deposited in the month of February 2005. The question arises that why this amount of cash in hand was not deposited during the earlier visits to India? The assessee has filed his return of income for A.Y. 2004-05 on 29.11.2004 along with statement of income. However, no balance sheet was filed with his return of income in absence of any balance sheet along with the return of income the claim of the appellant that he had opening cash balance of Rs.7,43,843/- as on 01.04.2005 is not verifiable. Therefore, the addition made by the AO is confirmed.

**23.** Being aggrieved, the assessee has filed this appeal before us. The Id.Counsel submitted that the assessee was having opening cash of Rs.7,43,843/- has shown in the balance sheet of the appellant as on 31.03.2004 which is placed at paper book, page 58 & 59. This amount continue because most of the times assessee was abroad. Out of the above cash deposits have been made on 23.02.2005 & 24.02.2005, therefore, it was urged that addition made by the AO may be deleted.

**24.** Per contra, the Id.DR relied on the orders of the Lower Authorities.

**25.** We have heard the rival contentions and perused the material available on record and we find that the assessee was having opening cash balance of Rs.7,43,843/- which has been shown in the balance sheet placed at paper book, page 58 & 60 and also as per the AO's version the assessee has made from few cash transactions up to the month of January 2005 and the cash available at the beginning of year remains almost sum at Rs.7,09,843/-, therefore, the cash deposits of Rs.6,00,000/- during the month of February 2005 can be said that the out of cash balance available with the assessee as on 01.04.2004. Therefore, we are of the considered opinion that the Lower Authorities are not justified in making addition on this account, accordingly the addition of Rs.6,00,000/- is therefore deleted.

**26.** In the result, appeal of the assessee is partly allowed.

**27.** The order pronounced in the open Court on 15-10-2018.

Sd/-

(सी.एम.गर्ग /C.M. GARG)

न्यायिकसदस्यतथा/JUDICIAL MEMBER

सुरत/ Surat, दिनांक Dated: 15<sup>th</sup> October, 2018/ S.Gangadhara Rao, Sr.PS

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

Sd/-

(ओ.पी.मीना/O.P.MEENA)

लेखासदस्यकेसमक्ष /ACCOUNTANT MEMBER

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Assistant Registrar, Surat