

**आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'एस.एम.सी' अहमदाबाद ।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**“SMC” BENCH, AHMEDABAD**

स्वश्री महावीर प्रसाद, न्यायिक सदस्य एवं वसीम अहमद, लेखा सदस्य के समक्ष ।  
BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER And  
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 336/Ahd/2016  
(निर्धारण वर्ष / Assessment Year : 2008-09)

Shri Tejas Arvindbhai Raval, 803, Anand Hari Tower, Opp. Chanakya Tower Bodakdev, Ahmedabad – 380 015.	<b>बनाम/ Vs.</b>	ITO(OSD), Ward – 7(1), Ahmedabad.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AFUPR 7933 J		
(अपीलार्थी/ <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

अपीलार्थी ओर से/ <b>Appellant by :</b>	Shri S.N. Divatia, A.R.
प्रत्यर्थी की ओर से/ <b>Respondent by:</b>	Shri N. J. Vyas, Sr. D.R.

सुनवाई की तारीख/ <b>Date of Hearing</b>	15/10/2018
घोषणा की तारीख/ <b>Date of Pronouncement</b>	01/01/2019

**आदेश / ORDER**

**PER WASEEM AHMED, ACCOUNTANT MEMBER:**

The captioned appeal has been filed at the instance of the Assessee against the order of the Commissioner of Income Tax (Appeals)–3, Ahmedabad [CIT(A) in short] vide appeal no.CIT(A)-3/ITO.Wd-3(3)(5)/189/2014-15 dated 03.12.2015 arising in the matter of assessment order passed under s.143(3) of the Income Tax Act, 1961(here-in-after referred to as "the Act") dated 27.12.2010 relevant to Assessment Year (AY) 2008-09.

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

*“1.1 The order passed u/s.250 on 3-12-2015 for A.Y.2008-09 by CIT(A)-3, Abad upholding the additions made by AO is wholly illegal, unlawful and against the principles of natural justice.*

*1.2 The Ld. CIT(A) has grievously erred in law and or on facts in not considering fully and properly the submissions made and evidence produced by the appellant with, regard to the impugned additions.*

*2.1 The Ld. CIT(A) has grievously erred in law and on facts in confirming the following additions:*

- |                                      |                         |
|--------------------------------------|-------------------------|
| <i>(a) Cash deposits in Bana a/c</i> | <i>- Rs.4,27,192/-</i>  |
| <i>(b) Credit card payments</i>      | <i>- Rs. 1,50,633/-</i> |
| <i>(c) STCG from sale of shop</i>    | <i>- Rs. 4,00,000/-</i> |

*2.2 That in the facts and circumstances of the case as well as in law, the Ld.CIT(A) ought not to have upheld the above said additions.*

*It is, therefore, prayed that the additions upheld by the CIT(A) may kindly be deleted.”*

3. At the outset, we note that there was a delay in filing the appeal by the assessee for one day. The assessee accordingly filed the petition for the condonation of delay.

4. The learned DR after considering the delay did not raise any objection. Accordingly, we condone the delay and proceed to adjudicate the appeal filed by the assessee.

5. The first issue raised by the assessee is that learned CIT(A) erred in confirming the addition of Rs. 4,27,192/- out of the total addition made by the AO for Rs. 8,35,672/-.

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6. Briefly stated facts are that the assessee is an individual and engaged in the following businesses:

- i. Trading of U-form & Rubber under the name and style as M/s. Krishna Foam Palace.
- ii. The assessee is also a partner in M/s. Krishna Web Express.
- iii. Trading in wooden activities.

6.1 The AO during the assessment proceedings observed that the assessee had made the deposit as well as the withdrawal of money from the saving a/c of Bank of Baroda bearing a/c no. 07340100007908 as well as in the capital a/c maintained with partnership firm namely M/s. Krishna Web Express. The necessary details of the amount withdrawn and deposits of money from the Bank and Capital Account stands as under:

Sr. No.	Particulars	Amount withdrawn	Amount deposits	Deposits net withdrawn
1.	Bank of Baroda	1,51,500/-	10,33,390/-	8,81,890/-
2.	M/s. Krishna Web Services	3,96,111/-	4,35,793/-	39,682/-
<b>Total</b>				<b>9,21,572/-</b>

In view of the above, the learned AO proposed to make the addition of Rs. 9,21,572/- u/s 68 of the Act and accordingly sought an explanation from the assessee.

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6.2 The assessee in compliance thereof submitted that the AO had not considered certain withdrawal entries from the bank as detailed under:

i.	Cash withdrawal from Bank of Baroda	- 26,900/-
ii.	Cash withdrawal from the Indian Overseas Bank	- 59,000/-
<b>Total</b>		<b>- 85,900/-</b>

6.3 The AO after considering the submission of the assessee has given the benefit of Rs. 85,900/- and treated the balance amount of Rs. 8,35,672/- (9,21,572 – 85,900) as unexplained cash credit u/s 68 of the Act. Accordingly, the AO added the said difference to the total income of the assessee.

7. Aggrieved, assessee preferred an appeal to learned CIT(A). The assessee before the learned CIT(A) submitted as under:

- i. There was the withdrawal of Rs. 3,10,970/- from the partnership account namely M/s. Krishna Foam Palace which has been used for the deposit of cash. The assessee further submitted that the income from such partnership concern was not disclosed in the Income tax return. Accordingly, the profit worked out by the AO of Rs. 1,62,980/- was admitted during the assessment proceedings. Accordingly, the assessee claimed that he should be allowed set off from the deposit of cash in the Bank to the tune of Rs.3,10,970/-.
- ii. He has incurred a sum of Rs. 1,38,480/- on behalf of the partnership firm namely M/s. Krishna Web Express which was reimbursed to him in the form of cash or cheque. The amount reimbursed by the firm was used in the deposit of cash in the bank account with the Bank of Baroda.

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7.1 The assessee also claimed that it had made payment to Reliance Group towards the telephone bills, expenses, etc. through his CITI Bank Credit Card on behalf of customers. As such, these customers have reimbursed to him a sum of Rs. 1,44,190/- which was used for the deposit of cash in the Bank account of Bank of Baroda.

7.2 He has taken a gift in cash from his wife amounting to Rs. 2,70,000/-. The assessee claimed that she had given a loan to him out of the past savings. The assessee in support of his claim has filed the copy of Income Tax Return as well as an affidavit of his wife.

7.3 There was cash income from the trade of Wooden Activities amounting to Rs. 31,973/- which was duly disclosed in the Income Tax Return. Therefore, the same should have been considered by the AO while making the addition on account of cash credit for the money deposited in the Bank Account. The Learned CIT(A) after considering the submission of the assessee deleted the addition made by the AO in part by observing as under:

*“I have gone through the facts including those mentioned in Remand Report and perused the appellant's rejoinder. As regards gift of Rs. 2,70,000/- received from wife who has filed affidavit dated 02.05.2014, it is mentioned that the contents of affidavit are not proved wrong by the AO, the same is given credence and appellant's related cash credit of Rs. 2,70,000/- is considered as explained. By filing the name of donor mode and amount received through an affidavit, the appellant has shifted the onus to the department She is regularly filing I.T. returns.*

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*As regards reimbursement of Rs. 1,38,480/- in cash by different 4 clients, u is submitted by appellant that the equivalent payments were made by appellant through account payee cheque to the principal for and on behalf of clients. In view of appellant's proprietary business and compulsions mentioned for business expediency, a benefit of doubt is given to appellant and Rs. 1,38,480/- is considered as explained as specific names and amounts are on record. This is the total amount which has been allowed in relation to the business with Reliance Group whether it is web or telephony services and in relation to any of the business entity of the appellant. In guise of such explanation, appellant further desired benefit for Rs. 1,44,190/- in a roundabout manner, which is not accepted, hence the amount of Rs. 1,44,190/- is confirmed.*

*The facts as emanating from Remand Report and rejoinder of appellant do indicate that appellant was engaged in business of trading in U-Form & Rubber in the name & style of M/s Krishna Foam Palace, the income of such business remained to be disclosed by the appellant in return of income. The addition of Rs. 1,62,980/- was made by AO in assessment order for the profits so arisen in this undisclosed business The appellant is trying to explain another cash deposits equivalent to Rs. 3,10,970/- saying that the said cash was withdrawn from this undisclosed business and file statement of income etc. Appellant cannot get benefit out of its illegal activity i.e business which was unearthed by the A O. during assessment proceedings. I am constrained to conclude that these are manufactured design to deceive the department. I reject this explanation and confirm the addition of Rs. 3,10,970/- accordingly.*

*Similarly appellant has manufactured design to explain cash of Rs. 31,973/-saying that the cash was from plywood business which remained to be disclosed. The attitude of appellant and surrounding circumstances do not imbibe confidence to accept such explanation at a stage when much of water has passed under the bridge. Appellant is doing many business in unorganized manner and beyond the realm of his books of account. Appellant has not come to appellate authority with clean hands Appellant's argument is rejected and addition of Rs. 31,973/-is confirmed.*

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*It is clarified that there is overlapping of figures by the appellant during submission of explanations for different cash deposits amounting to Rs. 14,69,183/- The AO accepted all possible explanations and made addition u/s.68 only of Rs. 8,35,672/-. The appellant has further got relief of Rs. 4,08,480/- out of the addition made for cash deposits in the bank accounts. Consequently, addition of Rs. 4,27,192/- is confirmed. The ground No.3 is therefore partly allowed.”*

Being aggrieved by the order of Learned CIT(A) assessee is in appeal before us.

8. The Learned AR before us filed a paper book running from pages 1-116 and reiterated the submissions as made before the Learned CIT(A).

9. On the other hand, Learned DR vehemently supported the order of authorities below.

10. We have heard the rival contentions and perused the materials available on record. From the preceding discussion, we note that the issue relates to the cash deposited by the assessee during the assessment year under consideration. Such cash deposit was treated by the AO as an unexplained cash credit u/s 68 of the Act. Therefore the addition made by the AO. However, in first appeal, the Learned CIT(A) partly confirmed the order of AO.

Now the controversy before us relates to the confirmation of the addition made by the Learned CIT(A) in respect of the following items:

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- i. Use of Credit Card on behalf of the assessee amounting to Rs. 1,44,190/-.
- ii. Withdrawal of cash amounting to Rs. 3,10,970/- from the partnership firm.
- iii. Income from the wooden activities amounting to Rs. 31,973/-.

**First Issue: Uses of Credit Card on behalf of the customers amounting to Rs. 1,44,190/-**

The assessee in his cash book has shown payment to Credit Card by way of cash amounting to Rs. 93,050/-. As per the assessee, this cash was received against the use of Credit Card on behalf of the customers. It means that such cash payment was not deposited in the Bank Account. So no credit can be given to the assessee for the deposit of such cash in Bank. As such, the argument of the assessee is contrary to the cash book filed before us. The amount of Rs. 93,050/- received by the assessee from the customers for the expenses incurred by him was never deposited in the Bank Account. Therefore, we hold that the argument of the assessee is misleading and accordingly we agree with the view of the Learned CIT(A) to this extent i.e. deposit of cash in the Bank of Rs. 93,050/- only.

For the balance of Rs. 51,140/- (1,44,190 – 93,050), the assessee claim to have received this money from the customers in cash for the expenses incurred on their behalf through Credit Card. However, the assessee before us failed to furnish the basic details of the parties who have given money to the assessee.

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The assessee has also not furnished the details of the parties justifying whether such payment for customers was received in cash or through banking channel. As per the assessee, it was received in cash which has been shown in its cash book. But in the absence of any supporting documents and the details of the customer/parties on whose behalf the expenses were incurred through credit card, we are not inclined to interfere in the order of the authorities below.

The addition was made by the AO u/s 68 of the Act, and the onus is on the assessee to prove that the impugned amount does not represent the cash credit as envisaged u/s 68 of the Act. Thus, in the absence of documentary evidence, we are not inclined to uphold the order of lower authorities for the addition to the extent of Rs. 51,140/-.

Regarding the burden of proof on the assessee to explain the source of unexplained cash credit, we rely on the order of Apex court in case of **Kale Khan Mohammad Hanif (50 ITR 1)** wherein it was held as under:

*“The first question that arises for discussion is question No. 4, which was in these terms:*

*“Whether the burden of proving the source of the cash credits is on the assessee ?”*

*It seems to us that the answer to this question must be in the affirmative and that is how it was answered by the High Court. It is well established that the onus of proving the source of a sum of money found to have been received by the assessee is on him.”*

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**Next issue: Withdrawal from the firm namely M/s. Krishna Foam Palace amounting to Rs. 3,10,970/-:**

It is an undisputed fact that the assessee has not shown any income in the Income Tax Return from M/s. Krishna Foam Palace. Therefore, the AO worked out the income of Rs. 1,62,980/- from M/s Krishna Foam Palace and added to the total income of the assessee which was not disputed by the assessee.

However, on perusal of the materials available on record, we note that the assessee has shown income from M/s Krishna Foam Palace in the immediately preceding assessment year which was also accepted by the Revenue. On perusal of the financial statements of Krishna Foam Palace of the previous assessment year, we note that the assessee has shown balance in its capital account amounting to Rs. 4,96,077/- as evident from the Balance Sheet of the assessee placed on page 46 of the Paper Book. The relevant extract is reproduced as under:

TEJAS ARVINDBHAI RAVAL  
PROP. M/S KRISHNA FOAM PALACE  
BALANCE SHEET AS ON 31.03.2007

CAPITAL AND LIABILITIES	AMOUNT
<b><u>TEJAS A. RAVAL CAPITAL A/C</u></b>	
BAL B/D	435780
ADD: PROFIT	<u>140297</u>
	576077
LESS: DRAWING	<u>80000</u>
	496077

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On perusal of the capital account of the assessee maintained with M/s. Krishna Foam Palace, we note that the assessee has withdrawn a sum of Rs. 3,10,970/- in the year under consideration. Accordingly, the assessee claimed that he had deposited the cash in the Bank of Baroda for an amount of Rs. 3,10,970/-. Accordingly, the assessee sought to give the credit for the deposit of the money which was withdrawn from the capital account. It is an undisputed fact that the AO has accepted the income from the business of M/s. Krishna Foam Palace which was brought under the net of tax. In our considered view, the documentary evidence by which the AO has determined the income for Rs. 1,62,980/- has to be accepted in totality. As such the assessee in the same set of documents, has shown withdrawal from the capital account for Rs. 3,10,970/- for which no credit was given to him. The relevant extract of the capital account is placed on page 42 of the Paper Book which reads as under:

TEJAS RAVAL CAPITAL A/C FOR THE F.Y. 2007-08

PARTICULARS	AMOUNT	PARTICULARS	AMOUNT
TO CASH WITHDRAWAL	310970	BY OPENING BALANCE	496077
TO LIC	29075		
TO CLOSING BALANCE	319012	BY NET PROFIT	162980
<b>TOTAL</b>	<b>659057</b>	<b>TOTAL</b>	<b>659057</b>

Because of the above, we are of the view that the assessee is entitled to the credit of the amount which was withdrawn from the capital account of the firm.

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We also note that the Learned CIT(A) has not given credit to the assessee considering the nature of income of the assessee as illegal. However, we note that no reason has been adduced by the Learned CIT(A) for treating the business of the assessee as illegal. As such, we are of the view that the assessee has not carried out any illegal activity. It is because the same activity was disclosed in the Income Tax Return in the immediately preceding assessment year which was duly admitted by the Revenue. There was no issue regarding the activities whether there were illegal during the earlier assessment year. Thus in our considered view, merely non-disclosure of income cannot render the activity of the assessee as illegal. Therefore, we disagree with the finding of the lower authorities.

We also note that the explanation to Section 37 of the Act denies for the deduction of the expenses which are in the nature of illegal. However, in the case before us, the assessee is not claiming any expenses against such income rather he was trying to justify the source of cash deposited in the Bank Account of the assessee.

We further note that the assessee has shown drawing of Rs. 80,000/- in the immediately preceding AY from the business carried out under the name of M/s. Krishna Foam Palace. Therefore, the argument of the assessee that entire withdrawal of Rs. 3,10,970/- was used for the deposit of cash in the Bank Account is not tenable. In our view, there must be some element of personal drawings which cannot be used for depositing

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of cash in the Bank. In the absence of any information about the drawings in the year under consideration, we are assuming the same for Rs. 1,00,000/- only. Thus, we infer that the sum of Rs. 2,10,970/- was used for the deposit of cash in the bank.

**3<sup>rd</sup> issue: Income from Wooden Activities amounting to Rs. 31,973/-:**

It is an undisputed fact that the income from wooden activity amounting to Rs. 31,973/- was disclosed by the assessee in Income Tax Return which was duly admitted by the AO. Therefore, we can infer that the amount of Rs. 31,973/- must be available to the assessee to deposit the same in the Bank.

Because of the above, we reduced the amount of Rs. 31,973/- and Rs. 2,10,970/- being the profit from wooden business and withdrawal of money from the M/s. Krishna Foam Palace from the addition confirmed by the Learned CIT(A). Thus, the assessee gets the relief for Rs. 2,42,943/- only. Accordingly, the assessee fails for the addition of Rs. 1,84,249/- and accordingly we confirmed the same. Thus, the ground of appeal of the assessee is **partly allowed**.

11. The next issue raised by the assessee is that Learned CIT(A) erred in confirming the addition of Rs. 1,50,633/- for the use of Credit Card expenses.

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12. The assessee during the year has incurred expenses through CITI Bank Credit Card amounting to Rs. 3,14,536/- only. The AO during the assessment proceeding found that the assessee has made payment against the use of Credit Card for Rs. 1,63,903/- through Banking channel, i.e. Bank of Baroda and Indian Overseas Bank.

However, there was no detail furnished by the assessee for the payment of the remaining amount of Rs. 1,50,633/- (Rs. 3,14,536 – 1,63,903). Therefore, the same was added by the AO u/s 69C of the Act to the total income of the assessee.

13. Aggrieved, assessee preferred an appeal to Learned CIT(A). The assessee before the Learned CIT(A) submitted that he had utilized the Credit Card for making the payment on behalf of his customers. The assessee also submitted that an amount of Rs. 93,050/- has been paid through cash which was received from the customers. The assessee in support of his claim filed the copies of the Credit Card statement as well as Cash Book. However, the Learned CIT(A) disregarded the contention of the assessee and confirmed the order of AO by observing as under:

*“The appellant is using credit cards and cash transactions for quite a few undisclosed activities and some such business activities have got unraveled only because of scrutiny assessment. Appellant can't get benefit of certain acts undertaken against law as per provisions of I.T. Act 1961. The AO has already given adequate credit to the appellant and made addition only of Rs. 1,50,633/- out of total amount of Rs. 3,14,536/-. The explanation of appellant for Rs. 1,50,633/- is hereby*

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*rejected and the addition made by the AO is hereby confirmed. The ground No.4 is therefore dismissed.”*

Being aggrieved by the order of Learned CIT(A) assessee is in appeal before us.

14. The Learned AR before us submitted that the Credit Card was utilized for making the payment on behalf of his customers. As such, these customers have been reimbursed the payment to the assessee in cash which was partly deposited in cash in the Bank Account, and partly cash was used directly to make the payment to the CITI Bank.

14.1 The assessee further submitted that there was an outstanding amount of Rs. 44450/- in the Credit Card Statement as on 31.03.2008, which was not paid to the Bank. The Learned AR in support of his claim drew our attention on Page 72 of the paper book where the summary of the transactions of the Credit Card Statement vis-à-vis Debit and Credit amounts towards payment made on behalf of customers were placed.

15. On the other hand, Learned DR vehemently supported the order of authorities below.

16. We have heard the rival contentions and perused the materials available on record. On perusal of the Credit Card Statement, we note that the assessee has been making payment to the Reliance Webstore and

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Reliance Infocom Limited. The assessee also claimed to have been engaged with the Reliance Group for his business activities. On perusal of the Balance Sheet of the assessee placed on page 43 of the Paper Book, we also found that the assessee has shown dealership deposit with Reliance Infocom for Rs. 44000/-only. None of the authorities below has doubted the fact of dealership deposit with Reliance Infocom Ltd. Therefore, we can infer that the assessee was engaged with the Reliance Group for the business.

In view of the above, we hold that the assessee has incurred the expenses through Credit Card on behalf of his customers. It is also evident from the cash book produced by the assessee and placed on record where the assessee has shown the reimbursement from the customers. On perusal of the cash book, we find that the assessee has made payment directly to the CITI Bank in Cash for Rs. 93,050/- only. Therefore, we are inclined to hold that the assessee has not utilized the Credit Card for his personal purposes. Rather, the Credit Card has been utilized by the assessee on behalf of the customers who subsequently reimbursed the cost to the assessee as evident from the cash book placed on record.

Besides the above, we also note that the assessee has shown an outstanding amount of Rs. 44,450/- on 31.03.2008 in the account of CITI Bank Credit Card which has not been paid in the year under consideration . Thus the source of utilization of Credit Card to the extent

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of Rs. 44,450/- stands explained. Therefore, the provision of Section 69C of the Act cannot be applied.

In addition to the above, we also note that the assessee has shown reimbursement of the money from the customers against the use of Credit Card. But none of the authority below has brought anything contrary to the argument advanced by the assessee. It is evident that the assessee has received money from his customers against the use of Credit Card as evident from the cash book placed on record. Under the provision of Section 69C of the Act, the onus lies on the Revenue to prove that the assessee has incurred expenses out of undisclosed sources. In this regard, we place our reliance on the order of this tribunal in case of **S.F. Wadia vs. ITO (19 ITD 306)** wherein it was held as under:

*“14. The phraseology in the section goes to show that before invoking the section it must be conclusively established by evidence or material to prove that the amount spent is an expenditure and the expenditure is incurred by the assessee only and the same is not deductible while computing the income under any head under the Act. Thus, the primary onus is on the revenue.”*

As the activity of the assessee with Reliance Group has been admitted, then the amount of expenses incurred through Credit Card for the purpose of business activities can be a subject matter of profit. The entire amount cannot be added to the income of the assessee. In this connection, we find support and guidance from the judgment of Hon'ble Gujarat

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High Court in the case of **President Industries reported in 258 ITR 654** wherein it was held as under:

*“The amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales. The sales only represent the price received by the seller of the goods for the acquisition of which it has already incurred the cost. It is the realisation of excess over the cost incurred that only forms part of the profit included in the consideration of sales. Therefore, unless there is a finding to the effect that the investment by way of incurring cost in acquiring goods which have been sold has been made by the assessee and that has also not been disclosed, the question whether entire sum of undisclosed sales proceeds can be treated as income, answers by itself in the negative.”*

Considering the above facts in totality, we are of the view that no addition is warranted u/s 69C for Rs. 1,50,633/- in the given facts and circumstances. Therefore, we set aside the order of Learned CIT(A) and direct the AO to delete the addition made by him. Hence, the ground of appeal of the assessee is **allowed**.

17. The last ground raised by the assessee is that Learned CIT(A) erred in adding the sum of Rs. 4,00,000/- as Short Term Capital Gain on account of sale of the commercial shop.

18. The AO during the year observed that the assessee had sold commercial shop amounting to Rs. 4,00,000/- dated 28.03.2008 but the assessee showed no income in his Income Tax Return.

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18.1 The AO further observed that the property sold by the assessee was commercial in nature accordingly he presumed that the assessee must have claimed depreciation on such shop in the Income Tax Return of the entire cost of acquisition. Accordingly, the AO treated the entire amount of sale consideration as Short Term Capital Gain and added to the total income of the assessee.

19. Aggrieved, assessee preferred an appeal to Learned CIT(A). The assessee before the Learned CIT(A) submitted that he was acting as a power attorney holder on behalf of the owner Shri Hirenabhai Devendrabhai Dave. As such, the assessee has received a sum of Rs. 4,00,000/- on behalf of Shri Hirenabhai Devendrabhai which was subsequently remitted to the owner in cash. The assessee in support of his claim filed a copy of sale deed dated 28.03.2008. The assessee also claimed that the shop was acquired by Shri Hirenabhai Devendrabhai Dave on 24.12.1999. Thus, the shop is Long Term Capital Asset.

19.1 The assessee also submitted that a power of attorney in his name does not entitle him to be the owner of the property. Therefore, the same cannot be added to his hands.

19.2 Without prejudice to the above, the assessee also submitted that the property is Long Term Capital Asset and therefore only Long Term Capital Gain can be added in his hand after considering the cost of

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acquisition as on 24.12.1999. However, the Learned CIT(A) disregarded the contention of the assessee and confirmed the order of AO by observing as under:

*“I have gone through the facts of the case and find the action of AO in order and as per law. Basically, undisclosed transaction brought into the books for which appellant infact should be more than happy. Monetary affairs can't prolong for long out of books of account. There has not been any fact brought on record by the appellant as to why he acted as power of attorney of Shri Herenbhai Devendrabhai Dave and why the transaction was in cash, what relation the appellant has with Shri Dave or the Developer, is not known. Appellant is concealing more than revealing to the department, maybe it is serving his purpose as more information may lend him in more trouble under various provisions of the Act. For instance who is acting benamidar of whom i.e. appellant or Shri Dave or vice versa and who was behind the designing of routing the transaction through cash. The balance of evidences is entirely against the appellant as inconsistent stand is apparent from the very beginning on this issue. The transaction was totally concealed and when caught then appellant is trying half-heartedly for so-called cost-indexation claim. When nothing historically is validated as per IT provisions, appellant can't be given benefit out of nothing. The ground No5 is therefore dismissed.”*

Being aggrieved by the order of Learned CIT(A) assessee is in appeal before us.

20. The Learned AR before us drew our attention on Page 103 to 116 where the copy of sale deed dated 27.03.2008 was placed. As per the AR further submitted that the Assessee was not the owner of the property and as such he was merely the power of attorney holder. Therefore, no addition can be made in the hands of the assessee.

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21. On the other hand, Learned DR vehemently supported the order of Authorities Below.

22. We have heard the rival contentions and perused the materials available on record. From the preceding discussion, we note that the observation of the AO suffers from several infirmities /discrepancies as detailed under:

- i. There is no detail brought on record by the AO showing that the assessee claimed depreciation in its books of accounts of the entire amount representing the cost of acquisition of the shop.
- ii. The assessee is merely a power of attorney holder. Therefore no capital gain in his hands can be added.
- iii. There is no information available whether the real owner namely Shri Hirenbhai D. Dave has shown any income in their hands on account of sale of such property. If it is so, then it will lead the double addition of the same amount. The claim of the assessee that he has collected the money from the sale of Property on behalf of the owner and subsequent payment to the owner has not been disputed by the authorities below.

In view of the above, we are of the view that the authorities below have not brought sufficient details suggesting that the assessee has sold the property without showing in the Income Tax Return. As such, it was claimed by the assessee that he is not the owner of the property. Therefore, it was not disclosed in the Income Tax Return. In the absence of any documentary evidence, we are of the view that the order passed by the authorities below by making addition on account of short-term capital

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gain amounting to Rs. 4,00,000/- is not sustainable in the given facts and circumstances. Therefore, we reverse the order of authorities below and direct the AO to delete the addition made by him. Hence, the ground of appeal of the assessee is **allowed**.

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

<b>This Order pronounced in Open Court on</b>	<b>01/01/2019</b>
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Sd/-  
(महावीर प्रसाद)  
न्यायिक सदस्य  
(MAHAVIR PRASAD)  
JUDICIAL MEMBER

Sd/-  
(वसीम अहमद)  
लेखा सदस्य  
(WASEEM AHMED)  
ACCOUNTANT MEMBER

Ahmedabad; Dated 01/01/2019

*Priti Yadav, Sr.PS*

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

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

आदेशानुसार/BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)  
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad