आयकर अपीलीय अधिकरण] पुणे न्यायपीठ "एक सदस्य" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "SMC", PUNE

BEFORE
SHRI ANIL CHATURVEDI, AM

आयकर अपील स / ITA No.1487/PUN/2015

निर्धारण वर्ष / Assessment Year : 2011-12

Shri Paras Javerilal Jain,
Plot No.267, Shahada Road,
Dondaicha, Pin – 425408,
Tal : Shindkheda,
Dist. Dhule.

..... अपीलार्थी /
Appellant

PAN : AAKPJ8353R.

बनाम v/s

The Dy.Commissioner of Income Tax,
Circle-3(1), Dhule.

..... प्रत्यर्थी /
Respondent

Assessee by : Shri Sunil Ganoo.

Revenue by : Shri M.K. Verma.

सुनवाई की तारीख / Date of Hearing : 18.10.2018		घोषणा की तारीख / Date of Pronouncement: 11.01.2019

आदेश / ORDER

PER ANIL CHATURVEDI, AM :

1. This appeal filed by the assessee is emanating out of the order of Commissioner of Income Tax (A) – 1, Nashik dated 14.09.2015 for the assessment year 2011-12.

2. The relevant facts as culled out from the material on record are as under :-

Assessee is an individual stated to be engaged in the business of wholesale trading of Guar Refined Dal and Trading in plots. Assessee electronically filed his return of income on

14.09.2011 declaring total income of Rs.10,37,650/- and agricultural income of Rs.1,47,709/-. The case was selected for scrutiny and thereafter assessment was framed u/s 143(3) of the vide order dated 26.03.2014 and the total income was determined at Rs.18,30,421/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who vide order dated 14.09.2015 (in appeal No.Nsk/CIT(A)-1/122/2014-15) granted partial relief to the assessee. Aggrieved by the order of Ld.CIT(A), assessee is now in appeal and has raised the following grounds :

"1. On the facts and in the prevailing circumstances of the case and as per the provision of law, it may please be held that the learned CIT(A) has grossly erred In confirming the addition of Rs.6,50,000/- even-though, all the ingredients requires to prove the credits as per the provision of section 68 of the I T Act, have been full-filled by the appellant and also proved the genuineness of said gift. Therefore, finding of the A.O and CIT(A) may please be vacated and addition may please be deleted.

2. On the facts and in the circumstances prevailing in the case and as per the provision of law, it may please be held that the learned CIT(A) has grossly erred in confirming the addition of Rs.21,849/- even-though, provision of section 14A is not applicable to the facts of the case, as sufficient own funds were available with the appellant for making such investment and A.O has not proved any nexus of the said investment was made out of the borrowed fund. The CIT(A) violating the principles laid down in the decision of Jurisdictional High Court, and confirmed the addition. Therefore, finding of the AO and CIT(A) may please be vacated and addition may please be deleted.

3. On the facts and in the circumstances prevailing in the case and as per the provision of law, it may please be held that the learned CIT(A) has grossly erred in restricting the development expenses at Rs.2,00,000/-, as against claimed at Rs.5,89,000/- in the year 2009-10. Therefore, the said expenditure incurred in the earlier year and which was either allowed u/s 143(1) or 143(3), cannot be disallowed arbitrarily on assumption and presumption basis. Therefore, finding of the A.O and CIT(A) may please be vacated and addition may please be deleted."

3. 1st ground is with respect to addition of Rs.6,50,000/- u/s 68 of the Act.

3.1. During the course of assessment proceedings AO noticed that assessee had received gift of Rs.6,50,000/- from Sushiladevi Ramesh Jain (the donor) which was credited to his capital account. The assessee was asked to explain the amount credited in the capital account with supporting evidence and material. Assessee furnished the copy of the acknowledgment of return of income and computation of income of the donor. On perusing the computation of income of the donor, AO noticed that donor had declared total income of Rs.1,86,177/- which comprised on interest from Bank (Rs.456/-), interest on FDRs (Rs.2,130/-) and interest from parties (Rs.2,12,364/-). AO thereafter issued a letter to the donor u/s 133(6) of the Act asking the details for PAN, computation of income, ledger account etc. The donor furnished her bank statement with SBI Branch, Bekaner, Jodhpur bearing account No.61001363152. On analyzing the bank statement, AO noticed that the donor has deposited cash of Rs.5,00,000/- on the same day on which the gift was given by her to the assessee. He further noticed that the bank statement reflected the transactions involved in the small amount except one transaction of Rs.1.5 lacs on 27.09.2010 which was again gift by her to the assessee. He noticed that except for the gift related transactions of major amounts, no transactions involving major amounts were noticed in the bank account. He also noticed that that donor neither had received nor had given any gift in the last four years except to the

assessee. AO therefore concluded that there was nothing to show that the donor has financial capacity and creditworthiness to give gift to the assessee. AO therefore did not accept the credit of gift of Rs.6,50,000/- to assessee. He accordingly treated the amount of gift of Rs.6,50,000/- claimed by the assessee as income of the assessee and made its addition u/s 68 of the Act. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who upheld the order of AO by observing as under :

> *"6.6 From the discussion cited, supra, it emerges that the opinion of the AO is required to be formed objectively with reference to the material on record. Such opinion formed by the AO itself constitutes a prima facie evidence against the assessee i.e. the receipt of money and if the assessee fails to rebut the said evidence the same can be used against the assessee by holding that it was a receipt of income in nature. All issues are essentially in the realm of appreciation of facts.*
>
> *6.7 In the present case, the AO after considering the material available on record and examining the facts produced has observed that the donor has deposited the cash on the same day on which the gift was given to the done. Therefore, the inference drawn By the AO that the gift is non genuine is not without any basis. The AO also found that the donor had no balance to give this gift. Just before giving gift it deposited cash and forwarded the same to the appellant. This shows that donor did not possess the creditworthiness to give the gift. Further, the appellant neither before the AO nor before me could produce any substantiating document to prove the genuineness of transactions. Merely proving the identity of the donor does not discharge the onus of the assessee if the capacity or creditworthiness of the donor is not proved. The assessee also has to prove the capacity to give gift of the donor. For example in Shankar Ghosh v ITO (1985) 23 TTJ (Cal.) 20 the assessee failed to prove the capacity of the person from whom he had allegedly taken loan. Further, the assessee could not explain the reason for the gift or what was the special occasion for which the gift was given. Therefore, the gift amount was rightly held as assessee's own undisclosed income. In view of this fact, through the appellant is able to establish the identity of the donor, it cannot be said that the assessee was able to prove the creditworthiness of the donor or the genuineness of transaction of the gift. A harmonious construction of section 106 of the Indian Evidence Act and 68 of the IT Act will be that though apart from establishing the identity of the donor the assessee must establish the genuineness of the transaction as well as the creditworthiness of the donor. In view of this fact, through the appellant is able to establish the identity of the donor, it cannot be said that the assessee was able to prove the*

creditworthiness of the donor or the genuineness of transaction of the loan. Therefore, the AO had rightly added the sum of Rs.6,50,000/- to the appellant's income and held it to be subject to tax.

6.8 Human probability test is one of the important tests laid down by Supreme Court in order to check the genuineness of transaction entered into books of account of the assessee.

She thereafter after referring to the Human Probability Test as laid down in Durga Prasad More reported in (1971) 82 ITR 540 (SC) and the decision in the case of Sumati Dayal Vs. CIT (1995) 214 ITR 801 (SC) observed as under :

6.9.2. Thus, the court has laid down a test to analyses the genuineness as of the entry through the logical analysis. The Human Probability Test has been applied in plethora of cases for Hacienda Farms (P) Ltd., Vs. CIT (2011) 239 (Bom) 385, Major Metals Ltd. 2012 251 CTR (Bom) 385 etc. Applying the human probability test in my opinion the appellant is not able to prove the creditworthiness of the lender and the genuineness of the loan transaction.

6.9.3 Similarly, the assessee has placed reliance on number of other case laws in support of its contention that no addition on cash credits can be made. However, the assessee has not been able to depict similarity and equitability of facts from the case cited with his own case. Perusal of these decisions, however, shows that the judgments of Hon'ble Courts were based on the facts and the cases which are being decided and which are distinguishable from the facts in the case of assessee.

6.10 In view of the facts of the case and relevant judicial pronouncement, I hold that the Assessing Officer was right in rejecting the claim of appellant of gift of Rs.6,50,000/- as the bonafide of the same was not established. The contention of the appellant stands rejected."

Aggrieved by the order of Ld.CIT(A), assessee is now in appeal.

4. Before me, Ld.A.R. reiterated the submissions made before AO and Ld.CIT(A) and further pointed to the letter of the donor which was addressed to the AO wherein the donor had confirmed the gift made by her to the assessee. He submitted that the gift

was through cheques. He also pointed to the computation of income which is placed at page 126 of the paper book and from the aforesaid computation, he submitted that the assessee had total income of Rs.2.6 lakhs. He thereafter pointed to the declaration of gift which is placed at page 179 of the paper book wherein the donor has confirmed the giving of gift to the assessee. He further submitted that the assessee was brother-in-law of the donor and the gift was between close relatives. He submitted that assessee has demonstrated the capacity and the genuineness of gift. He further submitted that no query with respect to deposit of cash was raised by the AO and the same was not confronted to the donor. He thereafter placed reliance on the decision of Hon'ble Gujarat High Court in the case of DCIT Vs. Rohini Builders reported in 256 ITR 360, decision of Hon'ble Gauhati High Court in the case of Nemi Chand Kothari Vs. CIT and another and the decision of Pune Tribunal in the case of ITO Vs. Smt. Indira Kamalakar Yeula (in ITA No.021/PN/2012 order dt.27.11.2012). He also placed on record the copy of the aforesaid decisions. He therefore submitted that since the assessee has satisfied the three conditions stipulated u/s 68 of the Act namely, the identity of the creditor, the genuineness of the transaction and the creditworthiness of the creditor no addition is called for and submitted that the addition be deleted. Ld.D.R. on the other hand, took me through the findings of AO and Ld.CIT(A) and further submitted that assessee has not proved the capacity of the donor to the gift. He also pointed to the findings of AO wherein he has noted that cash was deposited on the same day on which the cheque was issued to the assessee. He

also placed reliance on the decision of Hon'ble Calcutta High Court in the case of CIT Vs. Precision Finance (P) Ltd., reported in (1994) 208 465 (Calcutta). He thus supported the order of AO and Ld.CIT(A).

5. I have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to addition u/s 68 of the Act. It is undisputed fact that assessee has received a gift of Rs.6,50,000/- from Susheela Devi Jain, who is stated to be related to the assessee. It is also an undisputed fact that gift has been received through bank channels. However, I find that AO after calling for the details u/s 133(6) of the Act and on examination of the bank account of the donor has noted that the donor (Susheela Devi Jain) had deposited cash of Rs.5,00,000/- on the same date on which the gift was given by her to the assessee. AO has also noted that the bank statement reflected only the small transactions involving small amounts except for the transaction of Rs.1.5 lacs on 27.09.2010 which was the gift to assessee. AO has also noted that donor had neither received nor given gift to any person in the last four years except to the assessee and that the donor had declared total income of Rs.1,86,177/-. The aforesaid findings of AO has not been controverted by Ld.A.R. Further the onus u/s 68 of the Act can be said to have been discharged only when the assessee proves identity and capacity of the creditor along with the genuineness of transaction to the satisfaction of the AO. All the three constituents are required to be

cumulatively satisfied. If one or more of them is absent, then AO can lawfully make addition.

6. Before me Ld.A.R. has however relied on the decisions of DCIT Vs. Rohini Builders (supra) Nemi Chand Kothari Vs. CIT and another (supra) and ITO Vs. Smt. Indira Kamalakar Yeula (supra). It is a settled legal position that every case depends on its own facts and even a slightest change in the factual scenario makes one case distinguishable from another. I find that the facts in the cases relied upon by Ld.A.R. are distinguishable and are not applicable to the present set of facts because in none of the cases it was a case where the AO had found that the donor had deposited cash on the same day on which the gift was given by the donor whereas in the present case, AO has observed that cash was deposited before giving the gift to assessee and the bank account of the donor did not reflect any major monetary transactions. Considering the totality of the aforesaid facts, I find no reason to interfere with the order of Ld.CIT(A) and **thus, the ground of the assessee is dismissed.**

7. 2nd ground is with respect to addition of Rs.21,849/- u/s 14A of the Act.

7.1. During the course of assessment proceedings, assessee had received exempt income in the form of dividend from the companies and exempt capital gains from shares apart from maturity proceeds from LIC money back policy. Assessee was asked to

explain as to why the provisions of Sec.14A of the Act were not applicable. AO also noticed that assessee had debited the net interest of Rs.8,68,012/-. AO noted that assessee has not proved the nexus of investments with own funds. He was of the view that the provisions of Sec.14A of the Act are applicable. He thereafter worked out the disallowance u/s 14A of the Act at Rs.21,849/- and made its disallowance. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who upheld the order of AO. Aggrieved by the order of Ld.CIT(A), assessee is now in appeal.

8. Before me Ld.A.R. reiterated the submissions made before AO and Ld.CIT(A) and further submitted that no proper satisfaction was recorded by the AO before invoking the provisions of Sec.14A of the Act. On the merits he pointing to the capital account of the assessee which is placed at page 38 of the Paper Book submitted that assessee's capital account is in excess of Rs. 2.29 crores as against the investments in shares of Rs.7.92 lacs. He thereafter submitted that assessee has earned net interest income and it is not a case of net interest payment and in support of the aforesaid contention, he pointed to the profit and loss account which is placed at page 34 of the Paper Book. He therefore relying on the decision of Hon'ble Bombay High Court in the case of HDFC Bank Limited Vs. DCIT reported in (2014) 366 ITR 505 (Bom) submitted that in such a situation, no disallowance of interest under Rule 8D(2)(ii) is called for. He therefore submitted that no disallowance is called for in the present case. As an alternative contention, he

submitted that 50% of the disallowance may be upheld. Ld.D.R. on the other hand, supported the order of AO and Ld.CIT(A).

9. I have heard the rival submissions and perused the material on record. The issue in the present case is with respect to disallowance of interest u/s 14A r.w.r 8D of the Income Tax Rules. The copy of the Balance-Sheet as on 31.03.2011 which is placed in the Paper Book reveals that assessee's capital account is 2.29 crores as against the investments of Rs.7.92 lacs meaning thereby that the availability of interest free funds are much more than the investments. The Hon'ble Bombay High Court in the case of HDFC Bank Limited (supra) has held that when the own funds are more than investments then no disallowance of interest u/s 14A of the Act is called for. The aforesaid ratio of Hon'ble Bombay High Court has been followed in various decisions rendered by the Pune Benches of the Tribunal. Before me, Revenue has not placed any contrary binding decision in its support. Further the Profit and Loss account which is placed at page 34 of the Paper Book also shows that assessee has earned net interest income. Considering the aforesaid facts and in the light of the aforesaid decision of Hon'ble Bombay High Court in the case of HDFC Bank Ltd., (supra), I hold that no disallowance of interest under Rule 8D(2)(ii) is called for in the present case. I therefore direct that the deletion of addition to the extent of Rs.18,044/- made by the AO. As far as disallowance u/s 14A r.w.r 8D(2)(iii) of administrative expenses of Rs.3,805/- is concerned, I find no reason to interfere with the

order of Ld.CIT(A). **Thus, the ground of the assessee is partly allowed.**

10. 3rd ground is with respect to disallowance of development expenses.

10.1. During the course of assessment proceedings AO noticed that assessee has shown long term capital gains of Rs.7,61,373/-. The assessee was asked to furnish evidence and material supporting income from capital gains. On the basis of submissions made by the assessee, AO noticed that assessee had purchased a land for Rs.1,20,000/- in 2013 at Sy.No.88/1 of Dondaicha. Assessee had further added cost of improvement incurred in the year 1999-10 at Rs.5,89,540/-. The assessee was asked to substantiate the cost of improvement of Rs.5,89,540/-. AO noticed that assessee did not furnish any evidence with respect to the cost of improvement. He accordingly denied the cost of improvement and re-worked the capital gains at Rs.8,56,712/- and denied the excess claim of Rs.95,312/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who granted partial relief to the assessee by observing as under :

> *"7.3 I have carefully considered the facts of the case, the submission of the appellant and the order of the Assessing Officer material available on records. From the details submitted by the appellant it is observed that all the payments made for cost of improvement is made in cash. This cannot be substantiated by any corroborating evidence. Considering the entire facts and circumstances of the case, the cost of improvement is restricted to Rs.2,00,000/-. The AO is directed to re-compute the Capital Gain accordingly.*
>
> *Ground is allowed in part."*

Aggrieved by the order of Ld.CIT(A), assessee is now in appeal.

11. Before me, Ld.A.R. reiterated the submissions made before AO and Ld.CIT(A) and further submitted that the cost of improvement was added to the fixed assets and is reflected in the assessee's Balance-Sheet for the period 31.03.2010 and in support of which he pointed to the Fixed Asset Schedule placed at page 31 of the paper book. He further submitted that the additions made in earlier years has been accepted by Revenue. He further submitted that the addition has been made on estimate basis without giving any reasons and therefore submitted that the addition be deleted. As an alternative contention, he submitted disallowance be restricted to a reasonable amount. Ld.D.R. on the other hand, supported the order of AO.

12. I have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to the disallowance of cost of improvement. I find that AO while disallowing the claim has noted that assessee had not produced any evidence to prove the genuineness of expenditure on improvement to the assets. I further find that Ld.CIT(A) though has noted that all the payments made towards the cost of improvement was incurred in cash and was not substantiated by any corroborative evidence but restricted the cost of improvement to Rs.2 lacs. Considering the fact that the cost of improvement

has been accepted by the Revenue in earlier years and Revenue has not doubted the incurring of cost of improvement, I am of the view that the cost of improvement be allowed to the extent of Rs.3 lacs. I direct accordingly. Thus, the ground of the assessee is partly allowed.

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

Order pronounced on the 11th day of January, 2019.

Sd/-
(**ANIL CHATURVEDI**)
लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 11th January, 2019.
Yamini

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(A)-1, Nashik.
4. Pr. CIT-1, Nashik.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "एक सदस्य" / DR, ITAT, "SMC" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER

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वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.