

आयकर अपीलीय अधिकरण, अहमदाबाद खिायपीठ
**IN THE INCOME TAX APPELLATE TRIBUNAL,
RAJKOT BENCH, RAJKOT
(CONDUCTED THROUGH E-COURT AT AHMEDABAD)**

**BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.981/Rjt/2010
निधारण वर्ष/Asstt. Year: 2000-2001

Shri Babulal G. Chudasama, 6-Gunvant Complex, Nr.Gayatri Mandir, Kalawad Road, Rajkot. PAN: ABAPC3795M	Vs.	Income Tax Officer, Ward-4(1), Rajkot.
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(Applicant)		(Respondent)
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Assessee by :	Shri Vimal Desai, AR
Revenue by :	Shri Praveen Verma, Sr. DR

सुनवाई क तिारीख/**Date of Hearing** : 02/01/2019

घोषणा क तिारीख /**Date of Pronouncement**: 01/02/2019

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) ó III, Ahmedabad [Ld.CIT(A) in short] vide appeal no.CIT(A)-III/0039/03-04 dated 07/04/2010 arising in the matter of assessment order passed under s.143(3) r.w.s. of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 21/03/2003 relevant to the Assessment Year (AY) 2000-2001.

2. The assessee has raised the following grounds of appeal:

1. *The assessment order is bad in law.*
2. *The assessing officer erred in law as well as on facts in making addition of Rs.4,00,000/- u/s.69A. The "Ld.CIT(A) has erred in confirming the same.*
3. *The "Ld.CIT(A) erred in ignoring the fact that Shri Babulal G. Chudasama and Shri Avcharbhai Devshibhai Gangani have duly declared their respective shares of income from business in the returns filed by them in their individual capacity. Taxing the said income in the AOP status amounts to double taxation. The A.O. may be directed to avoid th double taxation.*

The appellant craves leave to add, alter, amend, delete or withdraw one or more grounds of appeal.

3. The solitary issue raised by the assessee is that Ld. CIT(A) erred in confirming the addition of Rs. 4,00,000/- u/s 69A of the Act.

4. Briefly stated facts are that the assessee in an individual and deriving his income from salary, construction, and sale of flats. The assessee in the year under consideration has sold four flats along with co-owner Shri Avcharbhai D Gangani to Shri Dineshkumar N. Pathak and his family members amounting to Rs. 2,00,000/- for each flat aggregating to Rs.8,00,000/- only. The assessee on the sale of such flats offered income of Rs. 32,000/- being 8% of Rs. 4,00,000/- (50 percent ownership of the assessee). However, the AO rejected the rate of profit applied by the assessee and accordingly worked out the profit of Rs. 80,000/- being 20% of Rs. 4,00,000/- after considering the comparable cases.

4.1 The assessee during the year has also purchased two tenements jointly with Shri Avcharbhai D Gangani from Shri Dineshkumar N. Pathak and his

family members amounting to Rs. 4,00,000/- each tenement aggregating to Rs. 8,00,000/- only.

5. The AO observed that the assessee on the purchase of these two tenements has made payment in cash amounting to Rs.8,00,000/- (50 percent by the assessee and 50 percent by the co-owner)

6. However, the assessee claimed that there was no exchange of cash against the sale and purchase of the properties with Shri Dineshkumar N. Pathak and his families. As such there was an exchange of properties between the assessee and Shri Dineshkumar N. Pathak and family members without involving any cash consideration.

6.1 The assessee also admitted that there was nothing in writing for the exchange of properties, but it was done as per verbal mutual understanding.

6.2 However, Shri Dineshkumar N. Pathak in the statement recorded u/s 131(1) dated 19/02/2003 admitted that there was cash paid and received for purchase and sale of the properties. Accordingly, the AO called the assessee for cross-examination of the statement of Shri Dineshkumar N. Pathak but the assessee denied to avail the same.

6.3 However, Shri Dineshkumar N. Pathak subsequently retracted from the earlier statement furnished on 19/02/2003 and filed a joint Affidavit with the assessee dated 05/03/2003 claiming that there was no exchange of the cash with the assessee for the purchase and sale of properties. Shri Dinesh Kumar N. Pathak further submitted that he could not recollect the whole fact at the

time of furnishing first statement u/s 131(1) of the Act, but collected all the facts of the case on a later day. Therefore the joint Affidavit was filed.

6.4 The assessee also submitted that the properties were sold and purchased on the same day. Therefore no prudent businessperson will first pay money for the purchase of the property and again receive back the money on the sale of the property.

6.5 The assessee also claimed that the cash was mentioned in the sale deed for the purchase and sale of properties in a routine manner and the purpose of Stamp Duty Valuation.

6.6 However, the AO disregarded the contention of the assessee by observing as under:

1. In the deed of transfer of the property, it is clearly mentioned that cash has been paid.
2. Since assessee is a retired Dy. Mamlatdar, therefore it is not believable that he had not read the document carefully before signing and noticed the mistake after such a long period.
3. In any of the deeds, it is nowhere mentioned that the consideration for transfer is another property nor any evidence produced in support of this contention.
4. Both the parties admitted that no valuation was done to determine the exchange value.

5. Both the parties paid higher amount of stamp duty as stamp duty was paid on both the transaction. If the deed of exchange would have been prepared by the parties, then there would have been the cost of stamp duty only one time.

6. Shri Dinesh Kumar N. Pathak admitted that statement was given without any pressure, coercion, threat or undue influence and ample opportunity was provided to verify all the documents. Therefore, the joint affidavit is nothing but an afterthought. Since it was filed after 13 days of the first statement recorded the possibility of influencing him also cannot be ruled out.

In view of the above the AO treated the investment of Rs. 4,00,000.00 in the tenement as unexplained investment and added to the total income of the assessee.

7. The aggrieved assessee preferred an appeal to Ld.CIT (A). The assessee before the Ld.CIT (A) did not file any submission except the statement of the fact. Therefore, the Ld. CIT (A) after considering the statement of fact decided the issue against the assessee by observing that the assessee failed to explain the source of money invested in the tenement property. As per the Ld.CIT (A) the investment in the properties was not recorded in the books of accounts. Accordingly the Ld.CIT (A) confirmed the order of the AO.

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

9. The AR before us filed a paper book running from pages 1 to 78 and submitted as under:

**‘BEFORE THE HON'BLE INCOME TAX APPELLATE TRIBUNAL,
RAJKOT BENCH, RAJKOT**

IN THE MATTER OF

Babulal G. Chudasma

(ITA NO. 981 /RJT/2010 FOR A.Y. 2000-01 – assessee’s appeal)

Written Submission

1. *The appellant is an individual. The appellant filed its return of income for A.Y. 2000-01 on 18-10-2000 declaring total income at Rs. 69,160/-.*
2. *During the year under appeal, the appellant alongwith the co-owner Shri Avchar D. Gangani purchased two tenements for consideration of Rs. 8,00,000/- from Shri Dineshkumar N. Pathak and his family members. Simultaneously, the appellant and Shri Avchar D. Gangani sold four flats of their Ashutosh Apartment at Rs. 2,00,000/- each to Shri Dineshkumar N. Pathak and his family members. Thus, properties worth Rs. 8,00,000/- were simultaneously purchased and sold by same persons to one another. The details of such purchase and sale were as under:*

Sr. No.	Date	Purchase of tenements at Gujarat Housing Board.	Sale of flats at Ashutosh Apartment.
1.	03.03.2000	Rs. 4,00,000/- (vide registered deed no. 1006)	Two flats of Rs. 2,00,000/-each. (vide registered deed no. 1007 & 1008)
2.	09.03.2000	Rs. 4,00,000/- (vide registered deed no. 1108)	Two flats of Rs. 2,00,000/-each. (vide registered deed no. 1109 & 1110)

3. *The case of the appellant was that the properties of the same value were bought and sold by the same persons to one another on the same date and same time and accordingly, it was a case of exchange of the properties.*

4. *In the assessment proceedings, the A.O. rejected the contention of appellant or exchange of the properties and took the view that the appellant and Shri Avchar C. Gangani had made payment of Rs. 8,00,000/- out of the books and accordingly, relaxed 50% thereof (i.e. 4,00,000/-) in the hands of the appellant. The A.O. gave following reasons for making the addition:*
 - (i) *The clause no. 7 of registered sale deeds of tenements purchased by the appellant mentioned that cash was paid to the sellers by the appellant and co-owner Shri Avchar D. Gangani.*

 - (ii) *The seller Shri Dineshkumar N. Pathak, in his statement recorded by the A.O. on 19.02.2003, stated to have received cash for sale of tenements.*

5. *In respect of first contention of the A.O, it was explained in the course of assessment proceedings that the mention of receipt of Rs. 4,00,000/- in the sale deed of tenements was on account of routine drafting of sale deed by the document maker and the appellant and the co-owner signed them casually without properly reading it. However, the A.O disbelieved this explanation stating that the appellant was a retired deputy Mamlatdar and he worked for many years in revenue department*

wherein these documents were being filed and therefore, it was not acceptable that it was a case of routine drafting and casual signing.

6. *Here, the A.O failed to appreciate that inadvertent mistake can be committed by anyone and therefore, it was not unusual or improbable that the appellant and the co-owner made this mistake. Merely because the appellant worked in a revenue department in the past, it does not mean that he cannot commit any mistake while executing sale deed of any property. This contention of the A.O is in the nature of conjecture and surmises.*
7. *In respect of second contention, it is submitted that in respect of opportunity of cross examination granted by the A.O., the appellant and Shri Dineshkumar N. Pathak submitted a joint affidavit stating that they exchanged their properties, there was no payment of cash involved and that the mention of cash in sale deed was on account of routine drafting.*
8. *It was also explained by Shri Dineshkumar N. Pathak in the re-examination by the A.O. that his earlier statement was erroneous and that he recollected the facts thereafter and executed affidavit jointly with the appellant. Thus, Shri Dineshkumar N. Pathak virtually withdrew his earlier statement dated 19.02.2003O/ recorded by the A.O. Please refer para vii) on page 7 of the assessment order.*
9. *However, the A.O. stuck to the original statement of Shri Dineshkumar N. Pathak dated 19.02.2003 and rejected the joint affidavit as afterthought contending that the statement of Shri Dineshkumar N. Pathak dated 19.02.2003 was without any pressure, coercion or threat*

and it was possible that the appellant would have influenced the witness after the said statement to execute joint affidavit.

10. *It is submitted that the A.O. was not justified in sticking to the withdrawn statement of witness (Shri Dineshkumar N. Pathak) when the witness himself stated that the original statement was not representing the correct state of affairs. Under the law, a withdrawn statement of a witness cannot be thrust upon the assessee.*
11. *Moreover, in the financial statements of the appellant, no receipt of money was shown by the appellant for sale of four flats. The A.O. has also not questioned this aspect. Had it not been the case of exchange of properties, the sale proceeds of four flats in money would have been reflected in the accounts. The A.O. has failed to understand this aspect.*
12. *In the factual scenario of the appellant's case, the A.O. failed to appreciate the crux of the matter and gave undue weightage to the drafting of sale deed and withdrawn/retracted statement of Shri Dineshkumar N. Pathak. The most important point in the appellant's case was that the purchase and sale was entered into by the same parties, on the same date and time, the documents were registered simultaneously and that the consideration for purchase and sale was same. **In such a situation, why a person would first pay unaccounted cash to other person for purchase of disclosed properties and simultaneously receive the same amount for sale of disclosed properties to him?***
13. *If the principle of human probability as propounded by Hon'ble Supreme Court in case of Sumati Dayal (214 ITR 801) is applied to the above*

situation, it clearly leads to believe that the aforesaid explanation of the appellant is true and also that the assumption of the A.O. is illogical. The submission of the appellant deserves to be accepted from the angle of course of action normally adopted by a person with prudent sense. No wise man would first pay the unaccounted cash and at the same time receive the same cash back from the same person for purchase and sale of disclosed properties.

14. In view of the above, it is submitted that the addition of Rs. 4,00,000/- made by the A.O. is illogical and improper. The Id. CIT(A) has confirmed the addition merely on the basis of observations of the A.O. and without appreciating the -"actual and legal aspects as explained hereinabove.

15. It is therefore prayed that the addition of Rs. 4,00,000/- made by the A.O. and sustained by CIT(A) may please be deleted.''

10. The Ld. DR vehemently supported the order of the authorities below:

11. We have heard the rival contentions and perused the materials available on record. The assessee in the instant case has purchased two tenements along with the co-owner Shri Avchar D Gangani from Shri Dineshkumar N. Pathak and his family members amounting to 8,00,000/-. As per the sale deed, it was found that the assessee has paid cash for the purchase of such property. The assessee failed to explain the source of such cash invested in the property. Therefore, the AO treated the same as unexplained investment under section 69A of the Act for Rs. 4,00,000/- being 50% share of the assessee.

11.1 The Id. CIT (A) subsequently confirmed the view taken by the AO.

11.2 From the preceding discussion we note that the assessee also claimed to have sold four flats located at Ashutosh apartment for 2,00,000/- per flat aggregating to 8,00,000/- to Shri Dineshkumar N. Pathak and his family members.

11.3 The assessee claimed that there was no exchange of cash between the assessee and Shri Dineshkumar N. Pathak, but there was the exchange of the properties only. However, the claim of the assessee was disbelieved by the authorities below.

11.4 The assessee alternatively also submitted that the property was sold in cash to Shri Dineshkumar N. Pathak on the same day when the property was purchased from Shri Dineshkumar N. Pathak in cash. Therefore, the sale proceeds from the flats were available with him for investing in the tenements as discussed above.

11.5 Now the controversy before us arises whether the assessee has made any unexplained investment under section 69A of the Act in the given facts and circumstances.

11.6 From the sale deed executed by the assessee, we find that there was no mention about the cash received by the assessee on the sale deed of properties from Shri Dinesh Kumar N. Pathak. Thus, the availability of cash in the hands of the assessee remains in doubt in the absence of necessary documents.

11.7 There was the only joint affidavit of the parties under section 131(1) of the Act where it was stated that there was the exchange of the property. But we disagree with the same as it was not supported by the exchange deed or any other document. Therefore, the argument of the assessee that there was the only exchange of the property without any monetary consideration cannot be believed.

11.8 Thus if the argument of the assessee that there was the exchange of the properties is not believed, then the availability of the cash in the hands of the assessee needs to be justified on the basis of documentary evidence.

11.9 We also note that when the first time the statement recorded under section 131(1) of the Act of Shri Dinesh Kumar N. Pathak, it was clearly admitted by him that it has received cash and paid cash for both the transactions separately. But the subsequent retraction of the statement of Shri Dinesh Kumar N. Pathak dated 19th February 2003 changed the situation. Therefore, the availability of cash in the hands of the assessee is in doubt.

11.10 We also note that the AO provided an opportunity to the assessee for the cross-examination of the statement furnished under section 131(1) of the Act by Shri Dinesh Kumar N. Pathak first time. But the assessee denied availing the same. The act of the assessee creates suspicion in the transactions for the purchase and sale of properties as discussed above.

11.11 We also note that the statement furnished by Shri Dinesh Kumar N. Pathak cannot be relied upon because he is the double speaking person and changing his statement. Therefore, we are reluctant to consider the statement furnished by Shri Dinesh Kumar N. Pathak. In this regard we find the

Calcutta High Court in the case of CIT v. Eastern Commercial Enterprises [1994] [210 ITR 103](#) has held that a man indulging in double speaking cannot be said, by any means, a truthful man at any stage and no Court can decide on which occasion he was truthful. The

In view of the above, we are reluctant to consider the statement furnished by the assessee and the Shri Dinesh Kumar N. Pathak.

12. The argument of the learned counsel for the assessee that there was no cash receipt shown by the assessee in his books of accounts on the sale of properties is far from reality. It is because the AO rejected the books of accounts of the assessee. Therefore, we are reluctant to place our reliance on the books of accounts referred by the learned counsel for the assessee. It is also important to note that there was no ground of appeal filed by the assessee against the rejection of the books of accounts which means that the assessee has admitted the rejection of the books of accounts.

12.1 The question of human probability arises in the absence of necessary documents. In the instant case, there is no ambiguity that the assessee has not received any cash on the sale of properties whereas it has made the cash payment on the purchase of the properties as discussed above. This fact can be verified from the documents for the sale of the properties which are available in the paper book. Thus the principles laid down by the Honøble Supreme Court in the case of Sumati Dayal (214 ITR 801) are not applicable to the facts of the case on hand.

In view of the above, we hold that the assessee failed to justify the availability of cash in hand for investing in the property as discussed above.

Therefore, we do not find any reason to disturb the finding of the lower authorities. Hence the ground of appeal of the assessee is dismissed.

13. In the result, the appeal of the assessee is dismissed.

Order pronounced in the Court on 01/02/2019 at Ahmedabad.

**-Sd-
(MAHAVIR PRASAD)
JUDICIAL MEMBER**

**-Sd-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 01/02/2019

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आदेश क० त०/ल०/प०/त०/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)
5. व्रभागीय प्रत्यक्ष, आयकर अपील अथकरण / DR, ITAT,
6. गार्डफाईल / Guard file.

आदेशानुसार/BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपील अथकरण, अहमदाबाद / ITAT, Ahmedabad