

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

BEFORE SHRI R.S.SYAL, VP AND
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA No. 2226, 1520, 1521, 1853/PUN/2016
and ITA No.153/PUN/2017

निर्धारण वर्ष / Assessment Years: 2011-12, 2012-13 & 2013-14

Shri Narendra P. Musale,
1st Floor, Ganesh Apartment,
Near Bus Stand, Satpur,
Nashik-422 007
PAN : AFFPM7810N

.....अपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer,
Ward-1(4), Nashik.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Sanket Joshi
Revenue by : Shri Sudhendu Das.

सुनवाई की तारीख / Date of Hearing : 25.03.2019

घोषणा की तारीख / Date of Pronouncement : 27.03.2019

आदेश / ORDER

PER BENCH :

These bunch of appeals preferred by the assessee emanates from the different orders of the Ld. CIT(Appeals) for separate assessment years as per grounds of appeal on record.

These cases were heard together. Since facts are similar and issues are common, these appeals are being disposed of vide this consolidated order. We would first take the appeal in ITA No.2226/PUN/2016.

ITA No.2226/PUN/2016
A.Y.2011-12

2. The grounds raised by the assessee in ITA No.2226/PUN/2016 reads as under:

“1) In the facts and in law the CIT(A) has erred in confirming addition of Rs.53,63,000/- on account of unexplained cash deposits in bank accounts.

2) On the facts and in law the CIT(A) has erred in not appreciating the fact that the amount of Rs.53,43,000/- has been deposited out of advance received in respect of agreement to sale of ancestral land at village mauje Vakhari Tal. Deola Dist. Nashik. The CIT(A) has erred in not appreciating the fact that there is also cash withdrawal of Rs. 40,50,000/- in the said bank accounts and the closing balance is not much.

3) On the facts and in law the CIT(A) has erred in considering the cash deposits at Rs.53.63,000/- as against Rs.53,43,000/- due to calculation mistake.

4) On the facts and in law the CIT(A) has erred in making addition of Rs.25,200/- on account of deemed value of the flat which has been used mainly for the purpose of business.

5) On the facts and in law the CIT(A) has erred in making enhancement of income by Rs.64,36,209/- in respect of alleged unexplained deposits in Bank of Baroda, which were already assessed by the A.O. u/s. 143(3) r.w.s. 147 of the Act and the above fact was pointed out to the CIT(A) in written submission filed.

6) On the facts and in law the CIT(A) and A.O. have erred in considering the total deposits in bank as income of the appellant without considering the fact that cheques deposited were dishonored.

7) On the facts and in law the CIT(A) has erred in not accepting the fact that the undisclosed deposits in bank accounts represent sale proceeds of the goods traded and hence only profit @ 11 % should be added as income and not entire deposits in banks.

8) On the facts and in law the CIT(A) should have at the most confirmed the addition of peak deposits i.e. peak balance in the bank accounts not disclosed in the books of accounts after reducing the peak balance in undisclosed bank accounts to be taxed in preceding years and income offered to tax in the preceding years and current year.

9) Your appellant craves leave to add, alter above or any other ground/s of appeal.”

3. At the very outset, we observe that there is delay of 72 days. The assessee has filed affidavit along with petition regarding condonation of delay.

We have perused the documents and are convinced with the reasons

submitted before us. The Ld. DR has also conceded to condonation of the delay. We, therefore, in view of the relevant documents placed before us and the justified reasons therein and the submissions of the parties condone the delay and admit the appeal for hearing on merits.

4. That with regard to the ground Nos. 1, 2 and 3, the facts on record are that as per AIR information received the assessee has deposited cash in three saving bank account with Vishwas Co-operative bank. Information u/s.133(6) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') was requisitioned from the bank and the same is as under:

<i>Account No.</i>	<i>Total receipts</i>
<i>23/2259</i>	<i>Rs.20,62,071/-</i>
<i>23/6/30</i>	<i>Rs.10,31,867/-</i>
<i>23/2322</i>	<i>Rs.33,58,992/-</i>

In the third account the Assessing Officer has stated that Rs.10,51,207/- are transferred from the first and second account. Therefore the Assessing Officer has inferred that, deleting the amount total of the receipts comes to Rs.54,01,723/-. Out of the amount Rs.57,930/- is the interest paid to the assessee. Hence, the Assessing Officer has taken total cash deposit at Rs.53,63,000/- and has added it to the total income under section 69 of the Act. The assessee stated that the cash deposit in the bank account was out of the transaction from sale of land that he entered with Girish Popat Musale for Gat No.1362, 274, 278, 339 at Pimplegaon, Vakhari for 68 Lacs. Shri Girish Musale paid 59 Lacs in cash. The Saate Khat was executed on 3.05.2010. This transaction was not registered. At the time of remand proceedings on examination by the Assessing Officer Shri Girish Popat Musale admitted that he has paid cash of Rs.59 Lacs to the assessee

sourced out of his agricultural income and pensionary benefit of his father. However, no evidences were produced before the Assessing Officer to substantiate its statement. Shri Girish Popat Musale is neither assessed to tax nor files his return of income. The Assessing Officer in the remand proceedings came to the conclusion that after going through the Sathe khat, Gat No.1362, 274, 278 & 339 are the same Gat Nos. which was yet to be purchased by Shri Girish Popat Musale and therefore, the sources stated by Shri Girish Popat Musale are ambiguous.

5. The assessee filed rejoinder regarding remand report of the Assessing Officer. The Ld. CIT(Appeals) observed that the entire transaction is carried out in cash. He further observed that in the instant case no document has been placed in respect of sale of agricultural produce. No documentary evidence has been produced during the course of any proceeding before the Assessing Officer or before him to explain the availability of cash with Shri Girish Popat Musale and belongs to assessee's extended family. There was no direct evidence produced before the Ld. CIT(Appeals) to substantiate the genuineness of transaction of sale of land to Shri Girish Popat Musale from whom he has allegedly received advance for sale of co-percenary land. Shri Girish Popat Musale is neither assessed to tax nor files his return of income. The Ld. CIT(Appeals) after analysing the entire facts of the case came to the conclusion that the source of cash alleged to have been given to the assessee by Shri Girish Popat Musale was not convincingly answered and that the genuineness of transaction is not proved and therefore, it is clear case of unexplained cash deposits. The Ld. CIT(Appeals) in his elaborate order, thereafter, goes on to refer various judicial pronouncements on the subject and ultimately has upheld the addition u/s.69 of the Act made by the Assessing Officer.

6. We have perused the case records and analysed the facts and circumstances in this case and have given considerable thought to the findings of the Ld. CIT(Appeals). The facts reveal that the assessee is doing regular deposits in the aforesaid accounts without disclosing them in his return of income and thus evading tax. It was first through the AIR information that he was taken into task in 2011-12 and thereafter, he has executed Saate Khat with his relative which was also not registered and was later cancelled. The entire transaction was carried in cash so that any trail of money cannot be established. For the cash deposit in same account during 147 proceedings and in preceding year and in succeeding year the assessee has stated that the deposits are result of its unaccounted purchase and sales and has offered it for taxation under section 44AD of the Act. These are some of the facts which comes from the findings of the Ld. CIT(Appeals). In consideration of the totality of facts and circumstances, we do not find any infirmity with the findings of the Ld. CIT(Appeals) in respect of these grounds and the same is therefore, upheld. Thus, **ground Nos. 1, 2 and 3 raised in appeal by the assessee are dismissed.**

7. The Ld. AR of the assessee has not pressed ground No.4 and hence, **ground No.4 is dismissed as 'not pressed'.**

8. With regard to ground Nos. 5 to 8, the Ld. AR of the assessee placed before us in the paper book, the copy of order passed by the Pune Bench of the Tribunal in ITA Nos.1517 to 1519/PUN/2016 for the assessment years 2008-09 to 2010-11 in assessee's own case wherein on the same issue, the Co-ordinate Bench of the Tribunal has applied GP rate @15% with regard to the additional income in the hands of the assessee. The Ld. AR of the assessee prayed that this decision may be followed in the interest of justice.

9. We have perused the case records and heard the rival contentions. We find that on the similar issue, the Pune Bench of the Tribunal in assessee's own case has observed and held as under:

"9. On perusal of the record and after hearing rival contentions, the issue which is raised for adjudication is on account of credits in the bank accounts maintained by the assessee, but undisclosed in the return of income. The assessee explained the nature of credits and debits of the said bank accounts and claimed that the same related to his business of sale and purchase of hardware items. Undisputedly, the said bank account with Bank of Baroda was undisclosed bank account and the said receipts need to be included in the total receipts declared for the year under consideration. The assessee in response to the notice issued u/s 148 of the Act, had declared gross profit on the said receipts and had filed additional income in this regard. In the assessment year 2008-09, the GP declared in the books of account was 9.03% and on the additional sales, assessee declared GP of 8%. Similarly, in assessment year 2009-10, the GP originally declared by the assessee on account of sales was 9.40% and in assessment year 2010-11, it was 9.38%. However, the GP declared on the additional sales in both these assessment years was at the rate of 11%. The assessee has filed the copy of bank statements at page No. 26-39 of the paper book. On perusal of the said bank statement reflects that against the credits on different dates, there were withdrawals also from said bank account on day to day basis. Some of the withdrawals were in cheques issued to different parties and some of the withdrawals were on account of cash withdrawal. The assessee systematically followed this procedure from month to month and year to year. In the totality of the above said facts and circumstances, there is merit in the plea of the assessee that said bank account i.e Bank of Baroda was used for both unaccounted sales and purchases. Accordingly, credit of purchases made from that account is to be allowed in the hands of the assessee. However, since complete details were not available, the income in the hands of the assessee on accounts of said unaccounted business needs to be estimated.

10. The assessee in the different years under appeal had declared GP rate of 9.03% to 9.40%. On the additional income, the assessee had also declared varying rates of GP i.e 8% to 11% and offered the same in the revised return of income. However, in fairness GP rate of 15% needs to be applied to work out the additional income in the hands of the assessee."

Respectfully following the aforesaid decision in respect of unexplained deposit in Bank of Baroda, we direct the Assessing Officer to apply GP rate at 15% to work out additional income in the hands of the assessee. Thus, **ground Nos. 5 to 8 raised in appeal by the assessee are partly allowed.**

10. Ground No.9 is general in nature and hence, no adjudication is required.

11. In the result, appeal of the assessee in ITA No.2226/PUN/2016 is partly allowed.

ITA No.1520/PUN/2016
A.Y.2011-12

12. Now coming to ITA No.1520/PUN/2016, therein assessment was completed u/s.143(3) r.w.s.147 of the Act wherein same additions are made as in ITA No. 2226/PUN/2016. That even, the enhancement and the additions upheld by the Ld. CIT(Appeals) are also same. That for the same grievance, no two appeals can be preferred before this August Forum. That since we have already decided the issue in ITA No.2226/PUN/2016, therefore, on the same additions in ITA No.1520/PUN/2016 becomes infructuous and hence, is dismissed.

13. In the result, appeal of the assessee in ITA No.1520/PUN/2016 is dismissed.

ITA No.1521/PUN/2016
ITA No.153/PUN/2017
A.Ys. 2012-13 & 2013-14

14. At the very outset, in ITA No.153/PUN/2017, we observe that there is a delay of 20 days. The assessee has filed affidavit along with petition regarding condonation of delay. We have perused the documents and are convinced with the reasons submitted before us. The Ld. DR has also conceded to condonation of the delay. We, therefore, in view of the relevant documents placed before us and the justified reasons therein and the submissions of the parties condone the delay and admit the appeal for hearing on merits.

15. The Ld. AR of the assessee submitted that the Ld. CIT(Appeals) has passed an ex-parte order. With respect to the additions, though written submissions were filed, it was only statement on facts that were considered and there was no separate written submissions filed before the Ld.

CIT(Appeals). Therefore, rights and liabilities of the parties were yet to be decided on merits by the First Appellate Authority. The Ld.AR of the assessee prayed that one final opportunity may be provided to the assessee so that he can represent the case on merits before the Ld.CIT(Appeals) with requisite documentary evidences and details.

16. The Ld. DR fairly conceded to the request of the Ld. AR.

17. We have perused the appellate orders of the First Appellate Authority in ITA No.1521/PUN/2016 and ITA No.153/PUN/2017. We find that the Ld. CIT(Appeals) passed an ex-parte order wherein rights and liabilities of the parties herein are yet to be determined. That after hearing both the parties and in the interest of justice, we set aside the orders of the Ld. CIT(Appeals) in both the appeals in ITA No. 1521/PUN/2016 and ITA No.153/PUN/2017 and restore the same to the file of the Ld. CIT(Appeals) for readjudication after complying with the principles of natural justice.

18. In the result, appeal of the assessee in ITA No.1521/PUN/2016 and ITA No.153/PUN/2017 are allowed for statistical purposes.

ITA No.1853/PUN/2016
A.Y.2011-12

19. At the time of hearing, the Ld. AR of the assessee vehemently argued that while initiating penalty proceedings u/s.271(1)(c) of the Act, the Assessing Officer mentioned that penalty proceedings u/s.271(1)(c) are initiated for concealment of income. However, in the penalty order, the Assessing Officer mentioned both the limbs of section 271(1)(c) of the Act i.e. 'concealment of income' and 'furnishing of inaccurate particulars of income'. The Ld. AR contended that it is settled principle of law if the charge is not specific then the penalty u/s.271(1)(c) of the Act cannot be levied. That in support of his contentions, the Ld. AR of the assessee relied on the decision of

Hon'ble Jurisdictional High Court in the case of CIT Vs. Samson Perinchery in ITA No.1154 of 2014 and the decision of Hon'ble Karnataka High Court in the case of CIT Vs. Manjunath Cotton and Ginning Factory reported as 359 ITR 565 wherein it has been held that the satisfaction of the Assessing Officer with regard to only one of the two breaches u/s.271(1)(c) of the Act for initiation of penalty proceedings would not permit penalty being imposed for the other breach. Thus, the order imposing penalty was to be made only on the ground on which the penalty proceedings were initiated and it could not be a fresh ground of which the assessee had no notice.

20. We have perused the case records and considered the judicial pronouncement placed before us. The facts reveal that initiation of penalty proceedings u/s. 271(1)(c) of the Act as well as penalty order, the charge for which penalty u/s.271(1) (c) of the Act has been levied, is not specific. It appears that while initiating penalty proceedings, the Assessing Officer mentioned one limb i.e. concealment of income but at the time of levying penalty, he mentioned both the limbs i.e. 'concealment of income' and 'furnishing of inaccurate particulars of income'. It is apparent that there is ambiguity in the mind of Assessing Officer as to which limb/charge, penalty is to be levied.

That taking guidance from the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Samson Perinchery (supra.) wherein the Hon'ble Bombay High Court has considered the decision of Hon'ble Karnataka High Court in the case of CIT Vs. Manjunath Cotton and Ginning Factory (supra.), the legal proposition that comes out and which is binding in nature is that the Assessing Officer should be clear as to which of the two limbs under which penalty is imposable, has been contravened or indicate that both have been contravened while initiating penalty proceedings. It cannot be that the initiation would be only on one limb i.e. for furnishing inaccurate particulars

of income while imposition of penalty on the other limb i.e. concealment of income.

21. The sanctity in terms of natural justice with regard to this proposition is that the assessee under the scheme of welfare legislation which is embedded in the Income Tax Act, 1961 should get an opportunity to prepare himself for the defense as regards to the exact charge on which penalty is imposed upon him u/s. 271(1)(c) of the Act. In the instant case, the charge is vague and therefore, levy of penalty is not warranted. Taking totality of facts and legal scenario into consideration, we set aside the order of the Ld. CIT(Appeals) and direct the Assessing Officer to delete the penalty from the hands of the assessee.

22. In the result, appeal of the assessee in ITA No.1853/PUN/2016 is allowed.

23. To sum up,

ITA 2226/PUN/2016	Partly allowed
ITA 1520/PUN/2016	Dismissed
ITA 1521/PUN/2016	Allowed for statistical purpose.
ITA 153/PUN/2017	Allowed for statistical purpose
ITA 1853/PUN/2016	Allowed

Order pronounced on 27th day of March, 2019.

Sd/-
R.S.SYAL
VICE PRESIDENT

Sd/-
PARTHA SARATHI CHAUDHURY
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 27th March, 2019.

SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-1, Nashik.
4. The Pr. CIT-1, Nashik.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

// True Copy //

आदेशानुसार / BY ORDER,

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

		Date	
1	Draft dictated on	25.03.2019	Sr.PS/PS
2	Draft placed before author	26.03.2019	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		