

**In the Income-Tax Appellate Tribunal,
Agra Bench, Agra**

**Before: Shri Sudhanshu Srivastava, Judicial Member
And
Dr. Mitha Lal Meena, Accountant Member**

**ITA No. 287/Agr/2017
Assessment Year: 2013-14**

Sh. Amit Jain, 17/4, Hanuman Road, Firozabad PAN – ACYPJ7566Q (Appellant)	vs.	Income-tax Officer, 2(2)(1), Firozabad. (Respondent)
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Appellant by	Sh. Anurag Sinha, Advocate
Respondent by	Sh. Waseem Arshad, Sr. DR

Date of Hearing	21.02.2019
Date of Pronouncement	22 .03.2019

ORDER

PER SUDHANSHU SRIVASTAVA J.M.:

This appeal is filed by the assessee against the order dated 10.03.2017 passed by the Ld. CIT (Appeals)-I, Agra {CIT (A) } for the assessment year 2013-14.

2.0 Brief facts of the case, as mentioned in the assessment order, are that the assessee, during the year under consideration, derived income from remuneration and interest from three partnership firms and also derived income from glass bangle business. The return of income was filed declaring income of Rs. 2,13,850/- . The case was subsequently selected for scrutiny under 'CASS'. During the course of assessment proceedings the Assessing Officer (AO) noted that the

assessee had deposited cash of Rs.8,45,000/ in Account No 0344104000025267 with ICICI Bank and Rs. 25,000/- in Account No 344104000005388 with IDBI Bank, aggregating to Rs. 8,70,000/-. The Assessing officer was of the opinion that the assessee had failed to prove that the above cash deposit represented his business turnover. An addition of Rs. 7,99,950/- was made under section 69 of the Income Tax Act, 1961 (hereinafter called 'the Act') after allowing credit of the business income of Rs. 70,050/- as shown by the assessee under section 44AD of the Act.

2.1 Aggrieved, the assessee filed appeal before the learned CIT (A). However, being unconvinced, the learned CIT (A) rejected all the contentions of the assessee and dismissed the appeal. Now, the assessee is before this Tribunal (ITAT) and has raised the following grounds of appeal:

"1. Because, upon due consideration of facts and in the overall circumstances of the case assessment order dated 14.01.2016 is void-ab-initio having been framed on the basis of illegal Notice under section 143(2) issued by ITO 44(1), Kolkata. The assessment therefore is void ab initio and a nullity.

2.1. Because, the authorities below were highly unjustified in making and sustaining addition of Rs. 8,70,000/- ignoring the facts and circumstances of the case and material evidences suggesting that the same represents turnover of the assessee from glass bangle business.

2.2. Because, the rejection of explanation is arbitrary based on no evidence brought on records, confronted to the assessee and the entire exercise is based on pure guess work.

2.3. Because, even if complete records up to the satisfaction of the Assessing Officer was not produced the natural and legal consequence would lead to best

judgment assessment under section 144 but certainly cannot be a ground for making addition in respect of entire deposits without giving benefit of withdrawals made from such account.

2.4. Because, the action of the authorities below is perverse, illegal and without any legal basis and due consideration of the past history of the assessee's own case.

2.5. Because, the Ld. CIT(A) was not justified in failing to consider the argument advanced by the assessee that after having allowed set-off of Rs.70,050/- from the impugned addition of Rs.8,70,000/- proves that the AO has accepted the source of receipts.

2.6. Because, observation of the Ld. CIT(A) that the set off of Rs.70,050/- was inadvertently allowed to be set-off from the amount added is without any evidence or even suggestion from the AO in this regard.

2.7. Because, the judgment of the Hon'ble Gujrat High court in the case of Sarwan Kumar Sharma (2014) 49 taxmann.com 101 (Guj) is on materially different grounds and has no application to the facts of the case before Ld CIT (A) and therefore, has been wrongly applied.

2.8. Because, in any view of the matter action of the Ld CIT(A) was not bonafide when he transgressed his jurisdiction in giving findings in para 7.3.3 observing that the assessee is guilty for the charges provided under section 271(1)(c) and thereby directing the AO for imposition of penalty under section 271(1)(c). Thus, the CIT (A) exceeded his jurisdiction in adjudicating the issue of penalty under section 271(1)(c) causing prejudice and taking away the right of the assessee to raise the issue in first appeal as and when penalty is levied.

3. Because, while making the assessment the 'AO' and while sustaining addition Ld. 'CIT(A)' made various observations/conclusions which are contrary to facts available on records.

4. Because the appellant denies liability of interest under section 234B of the Act.

5. *Because, the order appealed against is contrary to the facts, law and principles of natural justice and in any view of the matter deserves to be quashed."*

3.0 Shri Anurag Sinha, the learned Authorised Representative (AR) for the assessee submitted that ground No.1 is not being pressed and the same be treated as withdrawn.

3.1 With regard to ground Nos. 2.1 to 3 the Ld. AR submitted that the addition had wrongly been made and wrongly been sustained by the authorities below ignoring the fact that identical similar issue had been raised by the Department in AY 2011-12 and identical addition had been made by the AO but, on appeal, the learned CIT (A) had sustained the addition by applying Net Profit rate of 5%. It was further submitted that the Department went into appeal against the order of the Ld. CIT (A) but the department's appeal was dismissed by the ITAT in ITA No. 271/Agr/2016 vide order dated 01.05.2018.

3.2 The Ld. AR further submitted that without prejudice to the above no addition could be legally made by treating the entire bank deposits as the income of the assessee ignoring the fact of withdrawals made from the bank account/s. He placed reliance to the Judgment of the Hon'ble Gujarat High Court in the case of CIT Vs Pradeep Shati Lal Patel (2014) 42 taxman.com 2 (Guj.) and submitted that in the

subsequent Judgment of Sarwan Kumar Sharma (2014) 49 taxman.com 101, as relied by upon by the learned CIT (A) in the impugned order, the Hon'ble Gujarat High Court had not taken note of its earlier Judgment in the case of Pradeep Shanti Lal Patel (supra). It was submitted that the subsequent judgment in the case of Sarwan Kumar Sharma (supra) was *per incuriam* and, therefore, the same could not be followed.

4.0 Per contra, the Learned Senior Departmental Representative (Sr. DR) Shri Waseem Arshad submitted that the addition has rightly sustained by the learned CIT (A). The Ld. Sr. DR, placing reliance to the findings of Learned CIT (A), submitted that: (a) no books of account have been maintained by the assessee even though his Partnership Firms, from where he is deriving income do so and even such books are audited; (b) all transactions related to the assessee's business have been made in cash for no apparent reason; (c) no formal or informal record of the business was produced by the assessee either during the assessment proceedings or during the first appellate proceedings; (d) it is very relevant to note that no confirmation/s from any customer/s or transporter/s have been produced by the assessee in support of his contention that the cash deposits in his saving bank accounts were indeed sale proceeds from his own genuine business activities. It was further submitted that the purchase bills submitted were not backed by any banking transactions and provide little strength to the assessee's submissions; (e) the sale

bills produced by the assessee, when considered along with the entries of cash deposits in the assessee's two bank accounts, conclusively establish that the explanation of the assessee is false.

4.1 The Ld. Sr. DR also submitted that the case for A.Y 2011-12, as decided by the learned CIT(A), is distinguishable as in that year the assessee had claimed that the turnover in A.Y 2011-12 was represented by sale of bangles out of which he used to earn commission income @ 0.3% to 0.4% . Though, as noted in the present order the then learned CIT (A) in A.Y 2011-12 also found the explanation of the assessee to be untrue and held that the cash deposited in the bank accounts aggregating to Rs. 97,15,747/- was the turnover of the assessee. The Learned Sr. D.R also placed reliance upon the judgment of Hon'ble Gujarat High Court in the case of Sarwan Kumar Sharma (supra) as was relied upon by the learned CIT (A) in the impugned order.

5.0 We have heard the rival submissions, carefully perused the material on record and have also considered the case laws relied upon by both the parties. It is seen that the learned CIT (A) has held that case of the of the assessee was distinguishable from Assessment Year (AY) 2011-12 for the reasons as noted in his order that in A.Y 2011-12, though the explanation furnished by the assessee regarding the bank deposits to be part of business turnover was found to be untrue, yet the learned CIT

(A) in A.Y 2011-12, had chosen to hold cash deposits as sale consideration of glass trading business. These findings of the learned CIT (A) advances the case of the assessee because in the case on hand even if the explanation of business is found to be untrue , following the findings for A.Y 2011-12, net profit rate was to be applied. Thus, the attempt made by the learned CIT (A) to distinguish the order passed by his predecessor in A.Y 2011-12 was a feeble attempt on his part. We have also gone through the order passed by the ITAT, in the case of the assessee for A.Y 2011-12 wherein the revenue had challenged the order passed by the learned CIT (A) on the ground that no evidence of business was furnished by the assessee and, thus, the learned CIT (A) had committed an error in holding bank deposits to be the turnover of the assessee and directing that on such deposits net profit @5% be applied by the Assessing officer. Since, the order of the ITAT was passed on 10.05.2018, whereas the impugned order was passed on 10.03.2017, therefore, the learned CIT (A) did not have the advantage of ITAT order passed in the case of the assessee wherein an identical addition was made by the Assessing officer.

5.1 The ITAT, vide para-6, has held as under:

“6. We have heard the rival submission of the parties and carefully considered the material available on records, including the impugned order and case laws relied by the parties and we find no justification to interfere with the impugned order. The records reveals that before the Ld

CIT(A) assessee made due representation, furnished written submission along with sworn affidavits of four of its customers to whom he supplied the glass bangles and all of them have confirmed business transaction with the assessee. The assessee has supported his contention of doing business by referring to the pattern of deposit and withdrawals made through the said bank accounts wherein the customers to whom sales were made, located in different parts of the country, were allowed to deposit cash and the said amounts were withdrawn from banks for the purpose of making payments to dealers of glass bangles business of firms namely M/s Raja Enterprises, M/s Biharji Decorators and M/s Raja Bangles Stores where assessee is one of the partners, their ITR's and Balance Sheets were also brought on records along with Computation of Income filed before the AO showing income from trading of glass bangles. This further fortifies the claim of the assessee that the deposits in the bank accounts had accrued to the assessee from business activity of glass bangles trading. In the light of peculiar facts of the case and in view of the evidences brought on records by the assessee, particularly the Affidavits by four of its customer, the action of the Ld CIT(A) in holding bank Deposits to be from the business activities of glass bangle trading business cannot be said to be unjustified. Moreover, no other source of income is demonstration by the Assessing Officer either from the attending facts of the present case or as a result of scrutiny of bank accounts.

7. *The stand on behalf of the Department has also been that the action of the Ld. CIT(A) deserves no approval in the light of the enquiry undertaken by the AO by Issuing Notice under section 133(6) to one of ,assessee's customer from whom assessee had claimed to have made*

purchase, but he denied transaction with the assessee. In this context, we have examined the remand report submitted by the AO and objections of time assessee thereon. The Remand Report dated 01.03.2016 furnished by the AO to the Ld. CIT(A) is reproduced in the appellate order on Page-7, Para-9, which was objected by the assessee that the enquiry conducted was for A.Y 2013-14, whereas case of the assessee pertains A.Y 2012-13; that even the reply by M/s Shiv Charan Lal Ambika Prasad was incorrectly understood, in as much as, the said customer had replied that it has made no sale by the name of the assessee or no credit; .and -that it was further told by him that he has no ledger account in the name of the assessee, This objection of the Ld DR, when examined in' the light of reply furnished by the assessee in its rejoinder dated 22.03.2016, it is found that the assessee was making cash purchase from the said Firm and assessee had also filed duly verified cash purchase bills from the above Firm before Id CIT(A). In such state of affairs, when the said party was making sales to the assessee on cash basis i.e after realizing cash against the sales, there was no reason for him either to maintain the Ledger Account of the assessee or to issue bills in his name. Moreover, the bills of the said party, furnished by the assessee, were cash purchase bills only, duly verified, the authenticity of which has nowhere been doubted by the Assessing Officer. In such view of the matter, the adverse inference drawn by the AO on this count, in our opinion, is not tenable.

8. The other objection made by the AO in the remand report was that the assessee did not produce the customer diary before the AO at the stage of assessment and remand proceedings containing the memoranda of the business transaction. In this regard, it is seen that assessee while filing

Rejoinder dated 22.03.2006 objected to the above assertion of the AO made in the Remand Report dated 01.03.2016, stating that photocopy of the business dairies amongst other evidences, showing deposits to be the business receipts, were furnished before the AO. The AO has nowhere raised any objection as to the non-production of photocopies of said dairies or the veracity of their contents. It is also not evident from record that the AO ever demanded original customer dairies to verify the contents of it photocopies. Hence, this objection of the AO also does not hold good.

9. The decision of the Hon'ble Allahabad High Court in the case of Bhaiya Lal Shyam Behari (supra) relied by the Id. D.R , in our opinion, does not render any aid to the Revenue, being based on different set of facts. In that case various cash credits appearing in the name of various persons were added under section 68 of the Act by the AO. Before the ITAT assessee took an alternative plea that in the event deposits/ cash credits are treated to be unexplained then only peak credit be added. The Tribunal rejected this alternative plea of the assessee, which was approved by the jurisdictional High Court on the ground that for seeking benefit of peak credit, foundation has to be laid down by the assessee and assessee has to accept that all credits shown as cash credits belongs to the assessee and question of peak credit can be raised thereafter. The Hon'ble High Court further held that in the case before them assessee all along was contending credits standing in the name of different persons were genuine deposits and withdrawals/payments of the amount to different set of persons would not at all entitle assessee to claim benefit of peak credit. Nowhere are these facts involved here in the case at hand. In the instant case, the

assessee has raised no plea before us for being assessed on peak basis, rather CIT(A) on page 16 of its order has specifically observed that assessee's case is not a case for being assessed at peak balance and moreover assessee has owned the credits to be its turnover from business transaction. Therefore, the decision relied on by the Id. DR does not render any help to the case of Revenue.

10. On the other hand, the facts attending to the decision of the Hon'ble Gujarat High Court in the case of Pradeep Shanti Lai Patel (supra) relied on by the assessee, are as under:

"2.1. The assessee filed his return of income for the assessment year 2007-08 declaring total income of Rs.90,000/-, The said return was processed under Section 143(1) of the I.T. Act. The case was selected for scrutiny under CASS and hence notice u/s. 143(2) was issued on 21.07.2008 which was served upon the assessee. Thereafter, notice u/s 142(1) alongwith a questionnaire was issued on 16.01.2009, which was served on the assessee. From the ITS data available, it was found that the assessee has made cash deposit of Rs.22,49,410/- in the S/B Account of Amarnath Co. Operative Bank Ltd. Therefore, the assessee was required to explain the source of same with supporting evidence. The assessee furnished a copy of detailed bank statement in respect of S/B account with Amarnath Co. Op. Bank Ltd, On verification of the same it was noticed by the Assessing Officer that the actual cash deposits in the S/B Account No.2831 was of Rs.35,33,414/-. Therefore, another show cause notice was issued on 19.06,2009 requiring the assessee to explain the source of the said deposits with supporting evidence. The assessee tried to explain by submitting that the said bank account is HUF. The Assessing Officer was not satisfied with the explanation and therefore by passing the order of assessment he added the aforesaid

amount of Rs.35,33,414/- as a total income of the assessee by treating the income from undisclosed source."

11. *The learned CIT(A) partly allowed the appeal filed by the assessee in that case by restricting the addition of Rs.35,33,414/- to Rs.1.80 lacs under Section 44AF of the I.T. Act and the appeal filed by the Revenue before the Tribunal against the order of Id. CIT(A) stood dismissed. The Revenue, therefore, filed appeal before Hon'ble Gujrat High Court raising following question of law:*

"Whether on the facts and circumstances of the case, the Hon'ble ITAT was right in considering in law, the deposits in the saving bank account of the assessee as "Trading Receipts" without any evidence of the existence of business on record?"

"Whether on the facts and circumstances of the case, the ITAT was right in restricting the addition from Rs.35,33,414/- to Rs.1.80 lacs by way of business income from retail trade u/s. 44AF of the Act where the assessee failed to furnish name and addresses of the suppliers?"

12. *While deciding the aforesaid questions, Hon'ble Gujrat High Court Confirmed the view taken by the Id. CIT(A) and the Tribunal holding that no substantial question of law arises in the present appeal. The facts of this case, in our opinion, rather stand on parity of those attending to the case at hand. It is seen that in the present case, assessee before LdCIT(A) had furnished affidavit of the assessee, affidavits of few of its customers, confirmation from few customers; that the adverse enquiry elicited from one of its customer under section 133(6) was wrongly inferred by the AO; that the memoranda of business was maintain in the shape of customer diary and assessee has also detailed out its role and place in the process of*

glass manufacturing business. In the light of overwhelming evidences on records, uncontroverted testimony of the assessee on oath and its customers, the view adopted by the Ld CIT(A), in our opinion, cannot be faulted with.

13. *We further find that the ld. CIT(A) has supported his conclusions by various decisions of coordinate Bench of Tribunal as reproduced in the impugned order and the Id. DR has failed to adduce any counter decision so as to support the case of Revenue. In the case of ITO, 6(4), Lucknow Vs Shri VishanLal relied by the ld. CIT(A), bank deposits of Rs. 15,68,500/- were added under section 69A by the AO which in first appeal, based on the statement recorded by the AO at the stage of assessment, was adopted by ld CIT(A) as turnover from retail trade of cloth business after perusal of pattern of deposits and withdrawals apparent from the perusal of bank account and on the ground that appellant therein was a partner in firm named as M/s Namaskar Textiles doing business of purchase and sale of clothes.*

14. *In view of above discussion, we do not find any infirmity in the order of the Id. CIT(A). Consequently, the same is affirmed and the appeal of the Revenue is deserves to be dismissed.*

In the result, the appeal is dismissed”

5.2 The facts of the case being identical, therefore, finding our self in agreement with the view adopted by the co-ordinate Bench in assessee's own case (supra), we allow the appeal filed by the assessee and directsthe Assessing officer to apply net profit rate of 5% on bank deposits of Rs.8,70,000/- which works out to Rs.43,500/-

giving credit to the income of Rs.70,050/- already shown under section 44AD of the Act, credit of which was rightly allowed by the Assessing officer. In effect no addition over and above the returned income would be warranted. Ground Nos. 2.1 to 2.7, accordingly, stand allowed.

5.3 In view of our allowing the assessee's ground on the substantive addition and the concurrence of the Ld. AR in not pressing the other grounds, the remaining grounds are dismissed as not pressed.

6.0 In the final result, the appeal of the assessee stands partly allowed.

Sd/-
(Dr. Mitha Lal Meena)
Accountant Member

Sd/-
(Sudhanshu Srivastava)
Judicial member

Dated: 22.03.1019

Copy of order forwarded to:

(1)	<i>The appellant</i>	(2)	<i>The respondent</i>
(3)	<i>Commissioner</i>	(4)	<i>CIT(A)</i>
(5)	<i>Departmental Representative</i>	(6)	<i>Guard File</i>

By order

Assistant Registrar
Income Tax Appellate Tribunal
Agra Bench, Agra