

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE**

**BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT AND
SHRI JASON P BOAZ, ACCOUNTANT MEMBER**

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| ITA No.1123/Bang/2015 |
| Assessment year : 2009-10 |

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| Shri. R. S. Shekarappa, #475, Kenchamba Towers, College Road, Nituvalli New Extn., Davangere. PAN : AZEPS 8988 G | Vs. | Income Tax Officer, Ward – 1, Davangere. |
| APPELLANT | | RESPONDENT |

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| Assessee by | : | Shri. V. Srinivasan, Advocate |
| Revenue by | : | Dr. P. V. Pradeep Kumar, Addl.CIT(DR)(ITAT), Bengaluru. |

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| Date of hearing | : | 14.08.2019 |
| Date of Pronouncement | : | 04.09.2019 |

O R D E R

Per Jason P Boaz, A.M. :

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals), Davangere, dt.05.06.2015 for Assessment Year 2009-10.

2. Briefly stated, the facts of the case relevant for disposal of this appeal are as under:-

2.1 The assessee, an individual, filed his return of income for Assessment Year 2009-10 on 22.02.2010 declaring Nil Income. The Assessing Officer (AO) noticed that in the return of income, the assessee had shown Long Term Capital Gains (LTCG) of Rs.2,56,343/- which was entirely claimed as exempt under section 10(37) of the Income Tax Act, 1961 (in short 'the Act') in view of the compulsory acquisition of land by the National Highways Authority of India (NHAI). The case was selected for scrutiny for this Assessment Year and the assessment was concluded under section 143(3) of the Act vide order dated 29.12.2011, wherein the assessee's income was determined at Rs.52,62,338/- in view of the following additions to the returned income :-

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| (i) | Unproved sums payable | - | Rs.13,70,330/- |
| (ii) | Interest income not offered to tax | - | Rs. 14,208/- |
| (iii) | Rental income not offered to tax | - | Rs. 1,17,600/- |
| (iv) | Unexplained investment in Chit Fund | - | Rs. 1,17,200/- |
| (v) | Dividend income not offered to tax | - | Rs. 63,000/- |
| (vi) | Unexplained cash deposits | - | Rs.35,62,000/- |

2.2 The assessee, being aggrieved by the order of assessment dated 29.12.2011, preferred an appeal before the CIT(A) – Davangere challenging the above additions made in respect of :-

- a) unproved sums payable / liabilities of Rs.13,70,330/-
- b) unexplained cash deposits of Rs.35,62,000/-
- c) addition of dividend income of Rs. 63,000/-

The CIT(A) disposed off the appeal vide order dated 05.06.2015, allowing the assessee partial relief. He upheld the additions of Rs.35,62,000/- and Rs.63,000/- and sustained the addition on account of unproved liabilities to the extent of Rs.4,00,000/- out of the original addition of Rs.13,70,330/-.

3. Aggrieved by the order of the CIT(A), Davangere, dated 05.06.2015 for Assessment Year 2009-10, the assessee has preferred this appeal wherein he has raised the following grounds:-

1. *The orders of the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.*
2. *The learned CIT [A] is not justified in sustaining the following amounts aggregating to Rs. 4,00,000/- out of the original addition of Rs.13,70,330/-made as unproved creditors under the facts and in the circumstances of the appellant's case:-*

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| <i>[a]</i> | <i>Sri Hanumanthappa</i> | <i>Rs. 3,00,000/-</i> |
| <i>[b]</i> | <i>Sri R S Rakesh, S/o the appellant</i> | <i>Rs. 1,00,000/-</i> |
3. *The learned CIT[A] is not justified in sustaining the addition of Rs. 35,20,000/- considered as unexplained cash deposits made by the appellant under the facts and in the circumstances of the appellant's case.*
4. *Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies himself liable to be charged to interest u/s. 234-A, 234-B and 234-C of the Act, which under the facts and in the circumstances of the appellant's case deserves to be cancelled.*
5. *For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and*

the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.

4. **Ground Nos.1 and 5 (supra)**, being general in nature and not urged before us are dismissed as infructuous.

5. **Ground No.4 – Charging of interest under section 234A, 234B and 234C of the Act**

5.1 In this ground (supra), the assessee denies himself liable to be charged interest u/s 234A, 234B and 234C of the Act. The charging of interest is consequential and mandatory and the AO has no discretion in the matter. This proposition has been upheld by the Hon'ble Apex Court in the case of Anjum H. Ghaswala (252 ITR 1) (SC) and we, therefore, uphold the action of the AO in charging the assessee the aforesaid interest u/s 234A, 234B and 234C of the Act. The AO is, however, directed to re-compute the interest chargeable u/s 234A, 234B and 234C of the Act, if any, while giving effect of this order.

6. **Ground No.2 – Unproved Liabilities / Creditors**

6.1.1 In this ground (supra), the assessee assails the order of the CIT(A) in sustaining the following amounts aggregating to Rs.4,00,000/- as unproved creditors:-

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| [a] | Sri Hanumanthappa | Rs. | 3,00,000/- |
| [b] | Sri R S Rakesh, S/o the appellant | Rs. | 1,00,000/- |

6.1.2 In respect of this ground, the learned AR of the assessee submitted that an amount of Rs.8,00,000/- was received from Shri. Hanumanthappa by account payee cheque No.10859 of Canara Bank which was encashed on 28.03.2009. The said amount was received as advance towards sale of site and since the intended purchaser backed out from the deal, the said amount was to be returned to him; out of which a sum of Rs.4,00,000/- was repaid on 29.03.2009 and a sum of Rs.1,00,000/- was repaid on 30.03.2009 by cash. The balance of Rs.3,00,000/- payable was genuine and the identity of the party was established.

6.1.3 With regard to the amount of Rs.1,00,000/- payable to Shri. R. S. Rakesh, S/o the assessee, the learned AR submitted that the said amount was received by way of an account payee cheque and his PAN furnished and therefore this credit cannot be disbelieved.

6.2 Per contra, the learned DR argued that the assessee has failed to prove the identity, creditworthiness and capacity of these two creditors. The mere receipt of these funds by way of account payee cheques does not further the case of the assessee to prove the genuineness of the transaction in order to establish that the aforesaid essential ingredients under section 68 of the Act are fulfilled. The learned DR submitted that the CIT(A) was justified in upholding the addition of Rs.4,00,000/-.

6.3.1 After considering the rival submissions and perusing the material on record, we are of the view that the assessee has not discharged the onus cast upon him under section 68 of the Act. The mere receipt of the amounts by account payee cheque does not mean that the credit is genuine. The assessee has to establish the identity of the creditor, the capacity of the creditor to

advance the amount in question and prove the genuineness of the transaction. As seen from the order of the CIT(A), the assessee has failed to produce any of these details, leading him to observe that the assessee has not produced any details and supporting evidence of ledger account, supporting entries of the respective balance sheet of the parties, etc. In the absence of any clinching evidence, it cannot be said that the assessee has discharged the onus under section 68 of the Act. In this factual matrix of the case, as discussed above, we find no reason to interfere with or deviate from the findings rendered by the CIT(A) and consequently dismiss ground No.2 raised by the assessee.

7. Ground No.3 – Cash Deposits – Rs.35,20,000/-

7.1 In this ground (supra), the assessee contends that the CIT(A) is not justified in sustaining the addition of Rs.35.20 lakhs made by the assessee. In this regard, the learned AR for the assessee submitted that the AO noticed that there were cash deposits in the assessee's bank account in the year under consideration. On being queried in this regard, the AR of the assessee agreed for an addition of Rs.32,50,000/- in respect of the aggregate of cash deposits made. Subsequently, before the CIT(A), the assessee retracted the aforesaid admission of un-explained cash deposits as being erroneous and claimed that the said cash deposits were out of earlier withdrawals from the bank account. The CIT(A) rejected this explanation put forth by the assessee on the ground that proper details were not filed in support of the claim. According to the learned AR, the withdrawals from the bank account are apparent from the bank statement itself and in the event the assessee could not explain the sources of the cash deposits, only peak credit should have been added / considered for addition and not the entire cash deposits. The learned AR submits that the peak

credits works out to Rs.10,70,000/- as per working filed. In support of the assessee's contentions, the learned AR placed reliance on the decision of the Co-ordinate Bench of this Tribunal in the case of Shri. Jaganatha S. Shetty in ITA No.1220/Bang/2008 dated 19.06.2009.

7.2 The learned DR for Revenue objected to the above ground raised by the assessee. According to the learned DR, it was an agreed addition of unexplained cash credits amounting to Rs.35,20,000/- made in the assessee's bank account and therefore the assessee cannot now challenge the same. In this regard, the learned DR placed reliance on the decisions of the Hon'ble Apex Court in the case of B. Kishore Kumar Vs. DCIT reported in (2015) 62 taxmann.com 215 (SC) and of the Hon'ble Kerala High Court in the case of Jayasree Chit Funds & Services Pvt. Ltd., Vs. CIT reported in 127 ITR 740 (Ker).

7.3 In rejoinder, the learned AR for the assessee submitted that mere consent alone cannot confer jurisdiction to assessee. According to the learned AR, the decision of the Hon'ble Kerala High Court in the case of Jayasree Chit Funds & Services (P) Ltd., (supra), turns on its own facts and the same does not apply to the case on hand. It is further submitted that the decision of the Hon'ble Apex Court in B. Kishore Kumar (supra), relied on by the learned DR, is also not applicable to the facts of the case on hand as it was rendered in the context of admission in a sworn statement given by the assessee in the course of search conducted under section 132 of the Act. The learned AR argued that the aggregate cash deposits can never be taxed as income when the source of these deposits are not properly explained and that in such circumstances, it is only the peak credit thereof that can be brought to tax. The learned AR pleaded that in

these circumstances, only the peak credit of the cash deposits in the assessee's bank account for the period under consideration be brought to tax.

7.4 We have considered the rival contentions and perused the material on record. Admittedly, the assessee vide letter dated 09.12.2011 filed before the AO agreed for addition of Rs.35,20,000/- in respect of cash deposits in his bank account submitting that he is not able to match the withdrawals with the deposits. Subsequently, before the CIT(A), the assessee contended that the cash deposits in the bank account can be explained out of withdrawals and the same is entered in the cash book. The CIT(A), however, did not accept this contention of the assessee on the ground that no documentary evidence or proof has been furnished to substantiate the claim. In this context, we observe that the CIT(A) has not rendered any view that the assessee cannot raise a grievance against the agreed addition and he has adjudicated the issue on merits. In any case, we are of the view that mere consent alone cannot confer jurisdiction to make an assessment. The additions made should be based on corroborative material evidence and cannot be made merely on the concession by the assessee. In this view of the matter, we are inclined to accept the contentions of the assessee that the addition in respect of cash deposits made in the assessee's bank account in the year under consideration should be based on peak credit method. The assessee has furnished the working of peak credit before us showing the peak credit of Rs.10,70,000/-; but this has not been examined by the authorities below. We, therefore, are of the view that the matter be restored to the file of the AO with a direction to verify the computation of peak credit filed and thereafter to restrict the addition in respect of unexplained cash deposits in the assessee's bank account to the peak credit. We hold and direct accordingly.

8. In the result, the assessee's appeal for Assessment Year 2009-10 is partly allowed.

Order pronounced in the open court on 4th September, 2019.

Sd/-
(N. V. VASUDEVAN)
Vice President

Sd/-
(JASON P BOAZ)
Accountant Member

Bangalore,
Dt. 04.09.2019.
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| 1 | Appellant | 4 | CIT(A) |
| 2 | Respondent | 5 | DR. ITAT, Bangalore |
| 3 | CIT | 6 | Guard File |

Asst. Registrar
Income Tax Appellate Tribunal
Bangalore.