

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

श्री डी. करुणाकरा राव, लेखा सदस्य एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

Sl. No.	ITA No./C.O. No.	Name of Appellant	Name of Respondent	Asst. Year
1-3	795/PUN/2012 796/PUN/2012 797/PUN/2012	Bhupendra S. Shah, 8/9, Gymkhana Shopping Centre, Shivaji Road, Nashik-422001. PAN: ADBPS3062J	CIT-1, Nashik.	2002-03 2003-04 2004-05
4-7	825/PUN/2012 826/PUN/2012 827/PUN/2012 828/PUN/2012	ITO, Central-1, Nashik.	Bhupendra S. Shah, 8/9, Gymkhana Shopping Centre, Shivaji Road, Nashik-422001. PAN: ADBPS3062J	2003-04 2005-06 2007-08 2008-09
8	C.O. No.101/PUN/2013	Bhupendra S. Shah, 8/9, Gymkhana Shopping Centre, Shivaji Road, Nashik-422001. PAN: ADBPS3062J	ITO, Central-1, Nashik.	2005-06

Assessee by : Shri V. L. Jain
Revenue by : Shri N. Ashok Babu

सुनवाई की तारीख / Date of Hearing : 01.08.2019
घोषणा की तारीख / Date of Pronouncement : 05.09.2019

आदेश / ORDER

PER D. KARUNAKARA RAO, AM:

There are **8 appeals** under consideration filed by the assessee as well as by the Revenue involving the assessment years 2002-03 to 2008-09 respectively. Out of 8 appeals, 3 appeals (ITA Nos.795 to 797/PUN/2012) filed by the assessee, 4 appeals (ITA Nos.825 to 828/PUN/2012) filed by the Revenue and 1 cross objection (C.O. No.101/PUN/2013) filed by the assessee.

2. Since the facts and issues in all the 8 appeals are almost common, therefore, the appeal of the assessee in ITA No.795/PUN/2012 for the assessment year 2002-03 taken as the lead for deciding the issue.

ITA No.795/PUN/2012 – A.Y. 2002-03 (By Assessee)

3. In this appeal, the assessee raised an **additional ground**, which is a legal ground which reads as under :-

“The learned CIT(A) erred in law in confirming the addition u/s 40A(3) of the Income Tax Act, 1961 of an amount of Rs.2,28,000/- in an unabated assessment, when there was no incriminating material found in the course of search.”

4. Briefly stated the relevant facts include that the assessee is a partner in M/s Chintamani Construction and is engaged in the business of real estate, trading & development. A search and seizure action u/s 132(1) of the Act was conducted at the residential and business premises of the assessee. A notice u/s 153A of the Act was issued on 30.05.2008 to the assessee. In response to the said notice u/s 153A of the Act, the assessee filed the return of income on 01.10.2008 declaring the total income of Rs.2,80,300/- which was the same as returned in the original return of income filed on 30.12.2001 for the assessment year 2002-03. In the assessment, the Assessing Officer made an addition of Ra.2,28,000/- u/s 40A(3) of the Act on account of instances of payment by bearer cheques found during the course of search action. The contents of para 5.3.1 to 5.3.3 of the assessment order are relevant in this regard.

5. Before the CIT(A), the assessee reiterated the submission as made before the Assessing Officer. However, the CIT(A) following its own decision in assessment year 2003-04 in assessee's own case confirmed the addition made by the Assessing Officer.

6. Aggrieved with the said decision of the CIT(A), the assessee is in appeal before us with the above extracted ground.

7. Before us, at the outset, ld. Counsel for the assessee submitted that the Assessing Officer does not refer to any search material. In fact, the Assessing Officer in para 5.3.1 of the assessment order refers to "*during the course of assessment proceedings*" meaning thereby stating the assessment records as the basis for addition. Ld. Counsel further submitted that the transactions of making payment by bearer cheques are part of the regular bank account and they are duly reflected in the bank statements. The said bank account is part of the regular accounts of the assessee as can be seen from the Balance Sheet reflecting the bank account at page 106 of the Paper Book. The ld. Counsel submitted that there was no incriminating material found during the course of search. In this regard, the ld. Counsel filed an affidavit of the assessee, copy of the same is placed on record and submitted that no bearer cheques were found as referred to in the assessment order for the purpose of making disallowance u/s 40A(3) of the Act. The contents of para 1 to 5 of the said affidavit are relevant in this regard.

8. The ld. Counsel for the assessee further placed reliance on the Jurisdictional High Court judgement in the cases of (i) CIT vs. AI Cargo Global Logistics Ltd., 374 ITR 645 and (ii) CIT vs. Deepak Kumar Agarwal, 398 ITR 586) and also the Hon'ble Gujarat High Court judgement in the case of PCIT vs. Dipak J. Panchal, 397 ITR 153, stating that there cannot be addition in search assessment proceedings which is not based on any incriminating material.

9. On the other hand, ld. DR for the Revenue relied heavily on the orders of the Assessing Officer and the CIT(A).

10. We heard both the sides on this legal issue, perused the orders of the revenue authorities and the judicial precedents filed by the assessee on this issue and also the affidavit filed by the assessee. First, we find relevant to extract relevant para 1 to 5 of the **affidavit** filed by the assessee and the same are extracted hereunder :-

- “1. A search action was carried out at my premises on 08.02.2008.
2. Assessments were framed for, among other years, for A.Y. 2003-04, which were agitated in appeal before CIT(A).
3. The CIT(A) in his order passed for A.Y. 03-04 has in para 6.2.2 made the following observation :

“During the course of search certain incriminating documents indicating receipts and payments of cash through bearer cheques, otherwise than an account payee cheque drawn on bank or account payee bank draft were found and seized. Two such notable set of documents are in the loose bundles containing page Nos.1 to 166 of Annexure A-3 and pages 1 to 195 seized at Annexure A-5 to the Panchnama.”
4. It is in this connection that this affidavit is being made to affirm the fact that the aforesaid search material seized did not contain any bearer cheques issued by me.
5. This affidavit is being made to assert this factual position in the ongoing appeal proceedings before the Hon. ITAT, Pune.”

11. From the above, it is evident that the addition made by the Assessing Officer on account of some bearer cheque found during the course of search. However, the assessee submitted that the said cheques were never found seized from the premises. We find that the revenue did not demonstrate anything contrary on this finding. In effect, the addition has no strength of the incriminating material.

12. Further, we perused the Jurisdictional High Court judgement in the case of Deepak Kumar Agarwal & Ors. (supra) and find that the Hon'ble High Court in the said judgment held that the assessment u/s 153A of the Act could not be made only on the basis of incriminating material found in search.

13. Further, perusing the another judgement of the Hon'ble Gujarat High Court in the case of Dipak J. Panchal (supra), we find that the Hon'ble High Court in the said judgement held that where no incriminating material is found during the course of search, no addition u/s. 153(a) of the Act required to be made against the assessee.

14. On hearing both sides and considering the above referred binding judgments on this legal issue, we are of the opinion that the order of the CIT(A) is to be set-aside and directed the Assessing Officer to delete the entire addition made u/s 40A(3) of the Act. Thus, the additional ground raised by the assessee on the legal issue is allowed.

**ITA Nos.796 & 797/PUN/2012 – A.Ys. 2003-04 & 2004-05 –
- By the Assessee**

15. Since the ground raised by the assessee in rest of two appeals is identical to ground raised in ITA No.795/PUN/2012 for the assessment year 2002-03, therefore, our decision in ITA No.795/PUN/2012 shall apply *mutatis mutandis* to rest of these two appeals of the assessee. Accordingly, the ground raised by the assessee in rest of two appeals is allowed.

16. In the result, all the three appeals (i.e. ITA Nos.795 to 797/PUN/2012) of the assessee are **allowed**.

17. Now, we shall take up the revenue's appeals for adjudication in the following manner.

**ITA Nos.825 to 828/PUN/2012 –
A.Ys. 2003-04, 2005-06, 2007-08 & 2008-09
- By the Revenue**

18. Since the appeals of the assessee are allowed on the legal issue, therefore, we are of the opinion that the adjudication of the cross-appeals filed by the **Revenue** are required to be dismissed as the same becomes infructuous. Therefore, all the four appeals of the Revenue (i.e. ITA Nos.825 to 828/PUN/2012) are dismissed as infructuous.

19. In the result, all the four appeals of the Revenue are **dismissed**.

20. Now, coming to the Cross Object filed by the assessee.

**C.O. No.101/PUN/2013 – A.Y. 2005-06
- By the Assessee**

21. This cross objection filed by the assessee against the appeal of the Revenue in ITA No.826/PUN/2012 for the assessment year 2005-06.

Since the appeal of the Revenue for the assessment year 2005-06 is dismissed, therefore, the adjudication of the cross objection for this year i.e. A.Y. 2005-06 becomes academic exercise only. Therefore, the cross objection filed by the assessee is dismissed as academic.

22. In the result, the cross objection of the assessee is **dismissed**.

23. To sum up, all the 3 appeals (ITA Nos.795 to 797/PUN/2012) filed by the assessee are allowed, 4 appeals (ITA Nos.825 to 828/PUN/2012) filed by the Revenue are dismissed and 1 cross objection (C.O. No.101/PUN/2013) filed by the assessee is dismissed.

Order pronounced on 05th day of September, 2019.

Sd/-
(विकास अवस्थी /**VIKAS AWASTHY**)
न्यायिक सदस्य/**JUDICIAL MEMBER**

Sd/-
(डी. करुणाकरा राव/**D. KARUNAKARA RAO**)
लेखा सदस्य/**ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 05th September, 2019.
Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-I, Nashik.
4. The CIT (Central), Nagpur.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.