

INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "E": NEW DELHI  
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER  
AND  
SHRI K.N.CHARY, JUDICIAL MEMBER

ITA No. 4203/ Del/2016  
(Assessment Year: 2009-10)

Mohd. Tayyab A-130 DDA LIG Flats Moti Khan Paharganj New Delhi 55  PAN: ACMPT7967K  (Appellant)	Vs.	The Income Tax officer Ward 46 (4) New Delhi       (Respondent)
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Assessee by :	Mr. Safique Khan Adv
Revenue by:	Smt Rinku Singh , Sr. DR
Date of Hearing	29/08/2019
Date of pronouncement	27/11/2019

ORDER

PER PRASHANT MAHARISHI, A. M.

01 This appeal is filed by assessee appellant against the order of Commissioner of income tax (appeals) – 16, New Delhi 2 dated 16<sup>th</sup>/file/2016 wherein appeal filed by the assessee is partly allowed. The only grievance that the learned CIT – A has applied the peak theory approach in determining the assessable income of the assessee on the issue of cash

deposited in the bank account where the assessee was found to be carrying on business.

- 02 Briefly stated the fact shows that assessee is engaged in the business of retail trading of footwear a sole proprietor, filed his return of income on 15/10/2010 declaring income of INR 1 81750/-. The case of the assessee was selected for scrutiny and assessment u/s 143 (3) of the income tax act was passed on 27/12/2011 wherein the addition of INR 9 84332/- considering the net income at the rate of 15% on surrendered sales amount of INR 6 562213/- was added. The facts relating to the surrendered sale amount was that cash deposit of INR 4 707570/- was deposited with excess bank, cash deposit of INR 1 005643 and the cheque of INR 8 50000/- worth HS by bank Ltd was considered as undisclosed sales. Accordingly the assessment order determined the taxable income of INR 1 166082/-. Subsequently the learned Commissioner of income tax New Delhi assumed jurisdiction u/s 263 of the income tax act and set aside the assessment order back to the file of the learned assessing officer on 29/3/2014. The learned CIT directed the assessing officer to re-examine the source of cash deposit in savings bank account and the source of investment in purchase of motor vehicle. He was further directed to pass a suitable order thereafter after granting assessee is reasonable opportunity of hearing. Subsequently the learned assessing officer are examined the issue passed an assessment order on 25/2/2015 and assess

the total taxable income at INR 7 095784/- by making a total addition of INR 6 914034/- by treating cash deposit in axis bank and HSBC Bank and also the payment towards credit card issued by inducing bank New Delhi as undisclosed income u/s 68 of the income tax act. The learned assessing officer made an addition of INR 6 562231//- on account of cash deposited treating the cash deposit of INR 4 707750 in axis bank, INR 1 005643 and the cheque of INR 8 50000/- in HSBC up bank amounting to INR 6 562213 as unexplained cash credit u/s 68 of the income tax act. The learned AO further made an addition of INR 3 51821 on account of repayment of credit card as unexplained income. Thus the total income of the assessee was assessed at INR 7 095784/-. The assessee preferred an appeal before the learned Commissioner of income tax. The CIT - A directed the assessing officer to work out/adopt the peak of the deposits in axis bank and HSBC Bank and bring the same to tax and also to verify the payment of credit card company. Therefore assessee is aggrieved with the order of the learned CIT - A in directing the assessing officer to consider the peak credit of deposits in axis bank and HSBC Bank.

- 03 The learned authorised representative noted that when it was found by the learned assessing officer initially that the appellant was engaged in the business activity outside the books of account and formed the opinion that assessee has undisclosed sales, which was taxed on presumptive basis, now

the revenue cannot take a U-turn and consider the above deposits as unexplained cash credit. He further submitted that all these receipts are business receipts and there is no other evidence available with the revenue that above cash deposit was on account of other than business income of the assessee. He submitted that if the above cash deposit is considered as the business income of the assessee, the same should be taxed on presumptive basis. He further submitted that the peak period theory is adopted in the present case by the learned CIT – A is not tenable since the business receipts can be taxed on profit basis and not on peak basis.

04 The learned departmental representative vehemently supported the order of the learned CIT – capital and submitted that when the assessee has deposited huge cash in his bank account without giving any proof of the unaccounted sales it is required to be taxed on peak basis only.

05 We have carefully considered the rival contention and perused the orders of the lower authorities. Originally the information was received that the assessee has cash deposits of INR 4 707570 with excess bank Ltd and has purchased the motor vehicle INR 4 508174/-. The assessee explained before the AO that motor vehicle is financed by the HDFC bank loan. For the same assessee produced the loan agreement as well as the bank statement. Further it was also found during the course of assessment proceedings that assessee has another bank account with HSBC Bank where the cash deposit was found of INR 1 005643 and the cheque of INR 8 50000/- the assessee was asked to explain the source of this deposits. The assessee submitted its reply on 22/12/2001 and served surrendered an

amount of INR 6 562213 as undisclosed sales on which the profit was calculated at the rate of 15% by the assessee as the assessee has already opted for the provisions of section 44AF in declared profit at that rate. Thus the undisclosed sale of INR 6 562213/- was determined and 15% profit thereon of INR 9 84332/- was added to the taxable income of the assessee. Subsequently the order u/s 263 of the income tax act was passed by the Commissioner of income tax New Delhi on 29/03/2014. It was noted that as the turnover of assessee is more than INR 4,000,000 therefore, the provisions of section 44 AB are applicable and provisions of section 44AF do not apply in the present case. It was further held that the assessee has to prove that the deposits in the bank accounts are out of sales. The CIT was of the view that AO has not made adequate enquiry with respect to the above amount of cash deposited in the bank account and it is taxability whether on peak basis or the whole of the sum. Therefore on the assessment order passed u/s 143 (3) of the act read with section 263 of the income tax act the learned assessing officer held that assessee could not bring on record any cogent evidence which proves that the cash deposit of INR 6 562213/- are out of the sale proceeds. Moreover, it was added to the total income of the assessee. The learned CIT – A were shown the copies of cash memos which were rejected by him stating that the alleged bill has been made probably purposefully in very illegible handwriting to show that the cash deposited is sales proceeds. He further held that assessee has not been able to prove the existence of peril unaccounted business activity. He further held that it is more plausible that assessee has indulged in any business activity, which is not disclosed to the income tax Department. He further held that appellant did indulge in business activity outside the books of accounts. However, he directed the AO to treat the peak credit as the income of the assessee and to

make addition accordingly. When the learned CIT – A has accepted that assessee is indulging in any business activity, there is no need to tax the whole of the income of the assessee either or to tax him on the peak credit basis on the above sum, more so, when there is no evidence available with the revenue that assessee is depositing cash which has not been generated from the sales of the assessee. The CIT in the time of invoking provisions of section 263 has directed the lower authorities to look into the debit and credit both of the bank statement to know about the nature of activities carried on by the assessee. Neither the assessing officer nor the learned CIT – A has looked into the bank statement of the assessee. Before us at page number 36 onwards the assessee has shown the bank statement with the banks in which cash is deposited. On looking at the cashbook, it is apparent that cash is deposited in the bank account and substantial sum has gone to the assessee himself or for the purpose of withdrawal from ATM. Part of the withdrawal is also to public school fees. Part of the withdrawal has also gone into the deposit of the mutual funds. Thus looking at the bank statement of the assessee it is apparent that assessee is depositing cash in the bank account to discharge his payments for school fees and investment in mutual fund as well as withdrawal in cash through various automated teller machines. On perusal of the bank account, it is not found that assessee is depositing huge cash in his bank account and using that sum for giving some accommodation entries et cetera. The learned CIT – A has also reached at a conclusion that the amount of cash deposit in the bank account is out of sale proceeds, which is not disclosed, to the Department. When once it has been held by the revenue that the above sum is cash deposit because of undisclosed sales of the assessee, natural corollary would be to estimate profit thereon. The learned assessing officer has estimated the profit at the rate of 15% thereon in the earlier

assessment orders. It has not been held that the above net profit rate adopted by the assessee is lower or not on by the assessee in his recorded books of account sales. Thus, we are of the view that above cash deposit cannot be added in the hands of the assessee nor it can be added on the peak basis but only net profit ratio should be applied to the above sum, which can be added to the total income of the assessee. In view of this, we direct the learned assessing officer to treat 15% of the cash deposited in the bank account as income of the assessee. Accordingly, all the grounds of appeal raised by the assessee are allowed.

06 In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 27/11/2019.

Sd/-

(K.N.CHARY)  
JUDICIAL MEMBER

Sd/-

(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Dated: 27/11/2019  
A K Keot

Copy forwarded to

1. Applicant
  2. Respondent
  3. CIT
  4. CIT (A)
  5. DR:ITAT
- ASSISTANT REGISTRAR

ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating member	
Date on which the typed draft is placed before the other member	
Date on which the approved draft comes to the Sr. PS/ PS	
Date on which the fair order is placed before the dictating member for pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	
date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	