

IN THE INCOME TAX APPELLATE TRIBUNAL
"F" BENCH, MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI PAVAN KUMAR GADALE (JUDICIAL MEMBER)

I.T.A. No.7203 /Mum/2019
(Assessment year 2012-13)

J Builders Pvt Ltd Maneesha, 7, Anand Nagar Swami Nityanand Marg Andheri East, Mumbai-400 069 PAN : AABCJ0679G	vs	Income-tax Officer 10(2)(1), Mumbai
APPELLANT		RESPONDENT

Revenue represented by	Shri Anil Sathe
Assessee represented by	Shri S.N. Kabra

Date of hearing	05-01-2022
Date of pronouncement	20-01-2022

ORDER

Per O.P. Kant (AM) :

This appeal by the assessee is directed against order dated 30/09/2019 passed by the learned Commissioner of income-tax (Appeals)-21, Mumbai [in short the Ld. CIT(A)] for assessment year 2012-13, raising following grounds:

- "1. The Learned CIT (Appeals), erred in confirming the addition of Rs.91,98,000/- under section 68.
2. The Learned CIT (Appeals) erred in not appreciating that the entire cash deposits of Rs.81,98,000/- were either out of the existing cash balance in the books of account or out of

withdrawals from time to time and the source of deposits stood fully explained by the Appellant.

3. The Learned CIT (Appeals) erred in relying only on perception and the preponderance of probability for confirming the addition u/s 68 without appreciating that there was not even an iota of evidence to establish that the appellant had any source of income outside the books of account.
 4. The Learned CIT (Appeals) erred in observing that the addition could alternatively be sustained under section 69A when the basic requirements of the section had not been satisfied.”
2. Briefly stated facts of the case are that during the previous year relevant to the assessment year under consideration, the assessee was engaged in the business of construction of building and real estate development. For the year under consideration, the assessee filed return of income on 09/10/2012 declaring total loss of rupees (-) 76,746/-. The return filed by the assessee was selected for scrutiny and statutory notices under the Income tax Act, 1961 (in short the Act) were issued and complied with. The assessment under section 143(3) of the Act was completed on 31/03/2015, wherein the Assessing Officer made various additions including addition for unexplained cash deposits in bank accounts maintained by the assessee. The Ld. Assessing Officer also mentioned that no reply of the final show cause notice regarding source and nature of the deposits in bank accounts was filed by the assessee. On further appeal, the Ld. CIT(A), though allowed part relief in respect of other additions, however sustained the addition of unexplained cash deposits of Rs. 81.98 lakhs. Aggrieved, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

3. Before us the parties appeared through videoconference facility . The learned counsel of the assessee filed a paper book containing pages 1 to 62, which included copies of bank statements of the assessee.

4. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record including the order of the lower authorities and paper book filed by the assessee. In the case, the Assessing Officer noticed information from the database maintained by the Directorate of system of Income-tax department that cash amounting to Rs. 91.57 lakhs has been deposited in the bank accounts of the assessee maintained with 'Shri Mahalaxmi cooperative bank' and the 'HDFC bank'. The Assessing Officer however found that certain entries were recorded repeatedly in the information and after verification, he found the actual deposit of Rs. 50 .91 lakhs on various dates. In addition to above referred cash deposits, the Assessing Officer also found other instances of cash deposits on various dates in those bank accounts. The total cash deposits including the cash deposits referred in information available in database of the Income-tax department, has been determined by the Ld. Assessing Officer at Rs. 81.98 lakhs. The assessee furnished detailed explanation regarding source of each cash deposits. The assessee has mainly submitted that the cash has been deposited in one account out of withdrawal from another bank accounts, but the Assessing Officer observed that sufficient cash balance of around Rs. 10 lakhs was available in the cash book and therefore inspite of availability of cash in hand, withdrawal of cash from one bank account for deposit in another bank account was not logical. He asked the assessee to explain as for why the money was withdrawn from one bank account for deposit in another bank account despite availability of more than sufficient cash balance in cash book. No reply in this

respect was furnished by the assessee. Before the Ld. CIT(A), the assessee filed additional evidences which were forwarded to the Assessing Officer. The comment of the Assessing Officer on said evidences has been reproduced by the Ld. CIT(A) in the impugned order. The learned Assessing Officer in the remand proceeding has mentioned that the assessee despite having sufficient cash in hand, which is on an average running between Rs. 10 lakhs to 29 lakhs, on each date of cash withdrawal, no probability existed which inclined an individual to withdraw an amount which runs around Rs. 1 lakh to 5 lakhs, that too, where the business of the assessee was operated from a major city i.e. Pune. Before him the assessee explained that there could be number of causes and reasons for such a situation of withdrawal of the money. The learned Assessing Officer rejected the said contention and observed that despite exhausting the opportunity, the assessee failed to produce any evidence for the circumstances which inclined assessee to withdraw cash and deposit the same in bank despite availability of sufficient cash.

5. After considering the submission of the assessee and comments of the Assessing Officer in remand report, the Ld. CIT(A) upheld the addition of observing as under:

4.2.2 The AR of the appellant company has filed its comment on remand report related to cash deposits of Rs.81.98 lakhs. It is submitted that the addition made by the AO is based on preponderance of probability. With respect to Rs.51.65 lakhs it is submitted that the AO has accepted that this amount relates to transfer of fund through banking channels by the managing director.

From the above factual matrix it is clear that the only argument in respect of Rs.81.98 lakhs is claim of recycling of cash out of cash withdrawal. The explanation is devoid of any cash flow statement where nexus of cash withdrawal with cash deposit is established. It would have been justified on the part of the appellant to submit a detailed cash flow indicating recycling of money and claiming that the addition should have been limited to peak credit theory.

Scrutiny of bank account clearly indicate number of inconsistency, infirmity and improbability in the argument based on recycling theory. The pattern of cash withdrawal which has been elaborately analyzed by the AO does not still confidence in the theory of recycling. The factual analysis given by the AO clearly nails the argument of recycling by the appellant company. The claim like cash withdrawal was kept in hand for more than 2 months, withdrawal of cash inspite of having enough cash in hand as per cash book, no justification/explanation of cash withdrawals, complete absence of supporting evidences of cash withdrawal etc. negate the theory of recycling.

4.2.3 The factual matrix of this case is tested on the concept of human probability. Hon'ble Supreme Court's observation, in the case of CIT v. Durga Prasad More (1971) 82 ITR 540, to the effect that "Science has not yet invented any instrument to test the reliability of the evidence placed before a court or tribunal. Therefore, the courts and Tribunals have to judge the evidence before them by applying the test of human probabilities". Similarly, in a later decision in the case of Sumati Dayal v. CIT (1995) 214 ITR 801/80 Taxman 89 (SC), Hon'ble Supreme Court rejected the theory that it is for allegor to prove that the apparent and not , and observed that, "This, in our opinion, is a superficial approach to the problem. The matter has to be considered in the light of human probabilities".

.....Similarly the observation
that if it is alleged that these tickets were obtained through fraudulent means, it is upon the allegor to prove that it so, ignores the reality. The transaction about purchase of winning ticket takes place in secret and direct evidence about such purchase would be rarely available
In our opinion, the majority opinion after considering surrounding circumstances and applying the test of human probabilities has rightly concluded that the appellant's claim about the amount being her winning from races is not genuine. It cannot be said that the explanation offered by the appellant in respect of the said amounts has been rejected unreasonably. "/ will be superficial in my approach in case I do not examine the claim of the assessee on the basis of documents and affidavits filed by the assessee and overlook clear the unusual pattern in the documents filed by the assessee and pretend to be oblivious of the ground realities. As Hon'ble Supreme Court has observed, in the case of Durga Prasad More(supra) "it is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents". Genuineness is a matter of perception but essentially a call on genuineness of a transaction is to be taken in the light of well settled legal principles. There may be difference in subjective perception on such issues, on the same set of facts, but that cannot

be a reason enough for the fact finding authorities to avoid taking subjective calls on these aspects, and remain confined to the findings on the basis of irrefutable evidences. The Hon'ble Supreme Court has, in the case of Durga Prasad More (supra), observed that "human minds may differ as to the reliability of a piece of evidence but in that sphere the decision of the final fact finding authority is made conclusive by law."

*4.2.4 On the issue of cash deposit, the judgement of Hon'ble Bombay High Court in Arunkumar J Muchhala v CIT 85 taxmann.com 306 (Bombay) and judgement of Punjab & Haryana High Court in case of Krishan Kumar v. Income Tax Officer, Patiala (2019) 107 taxmann.com 463 (Punj. & Har.) which has been upheld by Supreme Court, are very relevant. Wherever there is a cash deposit, the onus is exclusively on the assessee to explain the three ingredients of Section 68 with credible evidence which in this case has not been done. Thus, In view of the factual matrix given by the AO, discussion in Remand Report and relevant case laws the addition made by the AO to the extent of Rs.81.98 lakhs as unexplained cash credit u/s.68 is **upheld**. Alternately the amount can also be taxed u/s.69A of the Act."*

6. Thus we find that Ld. CIT(A) has mainly sustained the addition on the ground that the assessee failed to explain the deposits by way of cash flow indicating recycling of the money. The Id. CIT(A) has also referred to inconsistencies in deposits and cash book which were pointed out by the Assessing Officer in the assessment order as under:

"5. As per cash book (copy) provided by the assessee with letter dated 09.02.2015 some amounts were debited in cash book on particular dates but the same are not reflecting as withdrawn from respective banks on respective dates. The details of such entries are tabulated as under:-

<i>Date</i>	<i>Cash book particulars</i>	<i>Amount</i>
<i>17.5.2011</i>	<i>The Cosmos Co-op Bank (Ac 1229)</i>	<i>100000/-</i>
<i>19.05.2011</i>	<i>Mahalaxmi Co-op Bank (101/482)</i>	<i>150000/-</i>
<i>05.07.2011</i>	<i>Cosmos Co-op Bank (Ac 1229)</i>	<i>50000/-</i>
<i>15.07.2011</i>	<i>Cosmos Co-op Bank (Ac 1229)</i>	<i>50000/-</i>
<i>23.08.2011</i>	<i>Cosmos Co-op Bank (Ac 1229)</i>	<i>120000/-</i>

None of the above amounts is reflecting in Bank Statement. Assessee was, vide show-cause notice dated 23.03.2015 asked to explain the same but assessee did not submit anything on the issue. In the absence of details and presence of the above tabulated facts,

it is crystal clear that the assessee has manipulated the entries to route his unaccounted cash. If some amount exist in cash book and the same does not exist in Bank Statement as is the situation in the instant case, it means there must be some undisclosed source of income. So, the source of cash credit remained unexplained and undisclosed”

7. The LD DR contended that purpose of withdrawal of money from one bank for deposit in other bank has not been explained by the assessee, therefore, no benefit of withdrawal should be given for explaining the corresponding deposit. We don't agree with above contention of Ld DR as there is no such prohibition in law for withdrawing money from one bank for the deposit into other bank. The said deposits in bank account of the assessee cannot be considered as unexplained unless the department is in position to substantiate that money withdrawal from bank account was used somewhere else and cash deposited in bank account represented undisclosed income of money or money acquired from undisclosed sources, which warrants addition.

8. Before us the Learned Counsel of the assessee agreed for producing the details asked for by the Ld. CIT(A) in impugned order and has also given undertaking that if matter is restored back to the lower authorities , the assessee is willing to produce relevant documentary evidence for justification of source of cash deposits including cash flow statement of recycling of money. In view of the undertaking given by the Learned Counsel of the assessee and in the interest of the substantial justice, we feel it appropriate to restore this issue back to the file of the Ld. CIT(A) for deciding afresh after taking into consideration documentary evidences, which the Learned Counsel has agreed to file before him. It is needless to mention that both the Assessing Officer and assessee shall be afforded

adequate opportunity of being heard. Accordingly, the grounds raised by the assessee are allowed, for statistical purposes.

9. In the result, the appeal of the assessee allowed for statistical purposes.

Order pronounced on 20/01/2022.

Sd/-

sd/-

(PAVAN KUMAR GADALE)	(OM PRAKASH KANT)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 20/01/2022

Pavanan

Copy to :

1. Appellant
2. Respondent
3. The CIT concerned
4. The CIT(A)
5. The DR, ITAT, Mumbai
6. Guard File

/True copy/

By Order

Asstt. Registrar, ITAT, Mumbai