

**IN THE INCOME TAX APPELLATE TRIBUNAL  
CIRCUIT 'SMC' BENCH, VARANASI**

**BEFORE SHRI.VIJAY PAL RAO, JUDICIAL MEMBER**

**ITA No.125/VNS/2020  
Assessment Year: 2010-11**

Shri Abhay Kumar Shahi, Prop. Shahi Brick Field, Salempur, Deoria, U.P. PAN-BIPPS5693R	v.	Income Tax Officer, Ward-3(4), Deoria
(Appellant)		(Respondent)

Appellant by:	Sh. Subhash Chand & Sh. Ashutosh Bhardwaj, Advocates
Respondent by:	Sh. A.K. Singh, Sr. D.R.
Date of hearing:	23.03.2022
Date of pronouncement:	23.03.2022

**ORDER**

**SHRI VIJAY PAL RAO, JUDICIAL MEMBER:**

This appeal by the assessee is directed against the order dated 11.6.2019 of CIT(A), Gorakhpur for the assessment year 2010-11. The assessee has raised the following grounds:-

*"1. Because it is fully explained that the assessee had been engaged in carrying out the business of brick klin and the sale proceeds have been deposited in this bank account.*

*The ld. Assessing Officer has erred and acted illegally in adding back Rs. 15,61,800/-, the total deposit in saving bank account as income under section 68 of the Act.*

*The ld. CIT(A) has erred and acted illegally in confirming the same.*

*2. Because the income of the assessee was to be decided as per section 44AD of the I.T. Act, 1961.*

*The Ld. CIT(A) has erred and acted illegally in confirming the same.*

*3. Because the income based on deposit is subject to peak deposit. The ld. Assessing Officer has erred and acted illegally in not applying this formula. The ld. CIT(A) has erred and acted illegally in confirming the same.*

*4. Because it is well explained that any notice either 147 or 142(1) has never been served upon the assessee. Consequently, the assessment under section 144 is ab initio void.*

*The ld. CIT(A) has erred and acted illegally in not taking into account to this aspect of fact.*

5. *Because the assessment order is bad both on facts and law and not maintainable."*

2. The learned AR of the assessee has submitted that the assessment order was passed under sections 144 r.w.s. 147, whereby the Assessing Officer has made the addition of the entire deposits in the bank account of the assessee. He has pointed out that the notices issued by the Assessing Officer under section 148 as well as under section 142(1) were not served upon the assessee due to the reason that the same were sent at incomplete address of the assessee as given in the assessment order. He has further submitted that the CIT(A) has also passed an *ex parte* order without giving sufficient opportunity of hearing to the assessee. Accordingly, the learned AR has submitted that instead of making the additions of entire deposits, only peak credit may be considered for the purpose of estimation of the income by applying some reasonable rate of net profit. He has further submitted that the assessee is in the business of ceramic building bricks floor blocks etc., and registered under the VAT as per the certificate placed at page 1 and 1A of the paper book.

3. On the other hand, the learned DR has submitted that the assessee has not made compliance of the notices issued by the Assessing Officer. The assessee has not filed any details or evidence to show that the deposits made in the bank account are out of the sale proceeds so that only profit component can be assessed as income of the assessee. He has relied upon the orders of the authorities below.

4. I have considered the rival submissions as well as relevant material on record. The Assessing Officer has passed the assessment order under sections 144 r.w.s. 147, when the assessee has not responded to the notices issued under section 148 as well as under section 142(1) of the Income Tax Act. The learned AR has pointed out that the Assessing Officer has given incomplete address of the assessee in the assessment order and therefore, the notices were not served upon

the assessee. The possibility of notice being not served on the assessee cannot be ruled out when the address given in the assessment order is incomplete. The CIT(A) has also passed an *ex parte* order when the assessee has not attended the proceedings. Further the CIT(A) has dismissed the appeal of the assessee for want of prosecution and not decided the same on merits. The relevant part of the order of the CIT(A) in para 4 and 5 reads as under:-

*"In appellate proceedings several opportunities were allowed to the appellant. Notices were issued to the appellant fixing the appeal for hearing as per provisions of section 250 of the I.T. Act, 1961. There was no compliance on part of the appellant till date. The details of opportunities provided to the appellant in the case are tabulated as under:-*

<i>Date of Notices issued</i>	<i>Date of hearing fixed</i>	<i>Remarks</i>
<i>04.06.2018</i>	<i>26.06.2018</i>	<i>None attended</i>
<i>25.10.2018</i>	<i>14.11.2018</i>	<i>None attended</i>
<i>15.11.2018</i>	<i>12.12.2018</i>	<i>None attended</i>
<i>20.12.2018</i>	<i>23.01.2019</i>	<i>None attended</i>
<i>06.05.2019</i>	<i>21.05.2019</i>	<i>None attended</i>

*The aforesaid non-compliance on part of appellant reveals beyond doubt that the appellant has nothing to say in the matter of this appeal. It can be concluded that appellant is not interest in prosecution of the present appeal and same is liable to be dismissed on this ground itself. The law assists those who are vigilant and not those who sleep over their rights. This principle is embodied in well known dictum "VIGILANTIBUS, NON DORMENTIBUS, JURA SUBVENIUNT". In view of the above mentioned facts and by placing reliance on decision of Hon'ble ITAT, Delhi Bench in case of CIT vs. Multiplan India Ltd., reported in 38 ITD 320 and decision of Hon'ble M.P. High Court in case of Estate of Late Tukoji Rao Holkar vs. CWT (1977) reported in 223 ITR 480 the present appeal to be dismissed."*

5. Since, the CIT(A) has dismissed the appeal of the assessee in limine for want of prosecution therefore, the same is not in accordance with the provisions of section 250 of the Income Tax Act. The assessee has now filed the relevant document in support of the claim that the deposit made in the bank account are representing with the business receipts and consequentially the only profit element on this amount can be assessed as income. The learned AR has also pleaded that only the peak credit in the bank account can be taken in for this

purpose excluding the withdrawals made by the assessee prior to the subsequent deposits. In support of his contentions, he has relied upon various decisions. However, at the outset, when the CIT(A) has not decided the appeal of the assessee on merits and the document now filed by the assessee were not subjected to verification by any of the authorities below, then in the interest of justice, the matter is set aside to the record of the Assessing Officer for proper verification and fresh adjudication after giving one more opportunity of hearing to the assessee.

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

Order pronounced in the open Court after conclusion of hearing on 23.03.2022.

*Sd/-*

**[VIJAY PAL RAO]  
JUDICIAL MEMBER**

DATED: 23/03/2022

Varanasi

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Copy forwarded to:

1. Appellant- Abhay Kumar Shahi
2. Respondent- Income Tax Officer
3. CIT(A), Varanasi
4. CIT
5. DR

By order  
Assistant Registrar