

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, PUNE

**BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER**

ITA No. 1373/PUN/2016
(Assessment Year: 2010-11)

Mahavir Fleet Operators Pvt. Ltd.,
Gat No. 1349, Khandvenagar,
Wagholi, Pune – 412307

Assistant Commissioner
of Income Tax,
Circle – 11(2), Pune
Vs.

PAN : AAFCM9834N

Appellant

Respondent

Appellant by: Shri Pratik Sandbhor
Respondent by: Shri S.P. Walimbe

Date of Hearing: 29.04.2022
Date of Pronouncement: 12.05.2022

ORDER

Per S.S. Godara, JM

This assessee's appeal for AY 2010-11 is against the CIT(A)-7, Pune's order dated 02.05.2016 passed in case No. PN/CIT(A)-7/ACIT, Cir-11(2)/26/2014-15 involving proceedings under Section 143(3) of the Income Tax Act, 1961 in short "the Act".

Heard both the parties. Case file perused.

2. The assessee's first and foremost substantive grievance raised in the instant appeal challenges correctness of both the lower authorities' action treating share capital of Rs.46,00,000/- as unexplained cash credits u/s. 68 in the course of assessment dated 22.03.2013 as upheld in the CIT(A)'s order. Lower appellate dismissing qua the instant first issue reads as under :

“5.3 I have carefully considered the facts of the case and law apparent from the records. The AO made addition of Rs.46,00,000/- u/s 68 on account of unexplained share capital. The appellant had not submitted financial statements as per the Companies Act. Discrepancies has been noted in tax audit report and financial statements submitted by the appellant. The audit report submitted does not reflect true state of affairs. Balances for two year are not shown. As per the balance sheet Rs. 45 Lacs has been raised as share capital. As per Form 23AC submitted before the ROC part B-III states that, equity shares of 46 Lacs has been raised during the current financial year. Why such discrepancy is there is best known to the appellant. During the course of assessment proceedings it has been admitted as typographical error. Before the Assessing Officer the appellant could not adduced any evidence in respect of paid capital of Rs.46,00,000/-.

i) Suresh B. Dakle	-	18000 Shares	-	Rs.18,00,000/-
ii) Surekha S Dakle	-	13500 Shares	-	Rs.13,50,000/-
iii) Vijay S. Dakle	-	6750 Shares	-	Rs.6,75,000/-
iv) Geetesh S. Dakle	-	6750 Shares	-	Rs.6,75,000/-

The appellant admitted that Share Capital of Rs.46,00,000/- brought in by the Directors of the appellant Company, there being no contribution actually made by the Shareholders (Directors) as the same is accounted by mere recording the journal entry. Though journal entry in Directors current account share capitals were raised. During the remand proceedings the AO examined the contention of the appellant and found that, current account of the Directors have debit balances. The AO has observed that, in absence of detailed current account it is not possible to comment on correctness of the facts. The appellant has submitted summary of Directors current account which shows only debit balance as on 31/03/2010. The summary does not show any credit during the year. The version of the appellant is doubtful as what is the actual transaction it is known to the appellant only. The appellant has stated that, loans are deposit accepted amount exceeding limit is specified in section 269SS is shown as NA in column 24 of the audit report. In fact, passing journal entry tantamount to taking loan from the Directors.

Apparently, the appellant has misrepresented the balance sheet by passing journal entries. It gives incorrect representation to the extent that without bringing any single rupees. The paid capital has been shown artificially increased. The contention of the appellant is that this is not the job of the ROC to examine such things. The fact remained same that there is credit entry of Rs.46 Lacs in books of account of the appellant. The appellant has failed to explain that what prompted to increase the balances artificially without bringing any money. The appellant was required to explain the credit entry which the appellant has failed. The appellant has also contended that, real income is to be taxed. The appellant is correct in its version to some extent that, no actual money has been brought into the books of appellant. Mere explaining will not absolve the appellant from explaining the cash credit in future. The appellant has miserably failed to demonstrate when money actually came in to the books of account. The process of making journal entry will be completed money actually comes into the books of account. Under this circumstances the addition

made by the Assessing Officer is upheld as the appellant has failed to explain the when actually money has been brought in, this demand will be protective demand only. The actual money should come the four Directors mentioned above. The examination of sources of the money at the future date is must. The appellant itself has chosen journal entry and bringing of the money and making entries in the books of account has been split in two parts.

Once journal entries passed the effect of same should be seen in the statement of affairs of the Directors. The appellant is silent that, how this journal entry is reflected in accounts of the Director and their returns. Admittedly, no money has been brought in there must be some entry in the liability side of the Directors account which must be artificial. In other words, the appellant is source of funds and investment is in the books of the appellant without any passing of the money. Therefore the appeal effect will also be in two parts one relating to the appellant and another relating to the Directors. Substantive addition/examination of the source of the funding for share capital requires examination in case of Directors. Once this process is complete then only appellant will be absolved from explaining the source of share capital.

Accordingly, ground no. 1 of the appeal is dismissed. However, the demand will be protective only, It is for the appellant to demonstrate when actual transactions of money takes placed between appellant and Directors.”

3. We have given our thoughtful consideration to rival pleadings against in support of the impugned addition and find no merit in the Revenue's stand. It has come on record that the CIT(A) has modified the assessment findings to confirm the impugned addition only on protective basis which has attained finality for want of Revenue's challenge thereto. This is an instance of a protective addition only which does not deserve to be upheld in light of (1996) 222 ITR 831 (Guj.) Banyan & Berry Vs. CIT defying nature and scope of such an assessment as follows:

42. Question No. 3 referred to us at the instance of the assessee need not detain us long. It is the settled law that where there is doubt or ambiguity about real entity in whose hands a particular income is to be assessed, the assessing authority is entitled to take recourse to making protective assessment in the case of one and regular assessment in the case of other. However, making of protective assessment does not affect the validity of the other assessment inasmuch as if ultimately one of the entity is really found to be liable to the assessment, then, the assessment in the hands of that entity alone remains the effective assessment and the other becomes infructuous. The levy is enforceable only under one assessment and not under both. Question No. 3 is, therefore, answered in affirmative that is to say in favour of the Revenue and against the assessee.

In Jagannath Hanumanbux vs. ITO (1957) 31 ITR 603 (Cal), Calcutta High Court held that it is open to the Department to make assessments on two persons in respect of the same income, where it is doubtful which assessee is really liable to charge, because unless such 'protective' or 'alternate' assessment is made, assessment proceedings against the party ultimately found to be liable may become time barred; but the Department cannot recover the tax from both the assessees in respect of the same income. We are in respectful agreement.

Similar view was expressed by Allahabad High Court in Smt. Hemlata Agarwal vs. CIT (1967) 64 ITR 428 (All). The question arose in the circumstances where certain income was assessed in the first instance in the status of HUF of husband. That was set aside. Assessment was then made against husband which was challenged before AAC. In the course of assessment of husband, a finding was recorded that wife was not engaged in any business. However, having doubts in his mind that on challenge assessment in the case of husband may be set aside, the ITO thought it prudent to issue a notice under s. 34(1)(a) to wife also ex majorie cautela. It was urged before High Court that ITO having made assessment of husband, s. 34(1)(a) could not apply for issuing notice to wife. The Court held, though ultimately the wife's petition succeeded :

"In our view this is not tantamount to a change of opinion but a more cautious approach of the ITO by way of protective assessment to avoid the recurrence of technical quashing as in the case of the HUF..... The ITO had to guard against the expiry of limitation in peculiar predicament in which he was placed...."

We accordingly hold that the impugned protective addition only deserves to be deleted in above terms. Ordered accordingly.

4. Next comes the assessee's challenge to correctness of section 40A(3) disallowance made in both the lower proceedings involving a sum of Rs.23,10,000/-. A perusal of assessment findings in Para No. 4.1 suggests that the main figure of Rs.15,69,530/- involves M/s. M D Ballorgi. Learned counsel sought to clarify that the assessee's transportation fleet is almost of 150 vehicles wherein the normal wear and tear services requires cash payment only. We fail to understand as to how the impugned payment can be justifiable in the foregoing case only since lacking the supportive evidence as well as genuineness in foregoing details. We thus quote find no merit in the assessee's arguments pertaining to the above sole prayer. The facts also remains that keeping in mind that the nature of assessee's business involving 150 transportation vehicles as well as employees operating in different parts

of country, the other small payments indeed deserve to be allowed involving peculiar day to day business requirements. We accordingly uphold the impugned addition of Rs.23,10,630/- to the extent of Rs.15,69,530/- only. The remaining disallowance component is directed to be deleted.

5. Next comes the second component of assessee's permit charges expenditure of Rs.13,45,280/- disallowed u/s. 40A(3) of the Act. Learned counsel could hardly refer to any cogent supportive evidence containing all the relevant details. We thus affirmed the impugned disallowance. Next national permit charges of Rs.16,40,000/- u/s. 40A(3) representing the expenditure incurred for remuneration paid to the directors only. There can be hardly any dispute that such cash payments made on behalf of the company to its directors carry overwhelming genuineness element which itself forms a very strong reason to be allowed in light of Anupam Tele services Vs. Income Tax Officer reported in 366 ITR 122 (Guj.). We make it clear that there lordships have already considered Attar Singh Gurmukh Singh Vs. Income Tax Officer (1991) 191 ITR 667 (sc) while concluding that the Rules 6DD providing specific instances of cash payments is not self exhaustive. We thus delete the impugned disallowance component of Rs.16,40,000/- in very terms.

6. Lastly comes depreciation of Rs.30,77,876/- made in both the lower proceedings on account of assessee's alleged failure to prove existence of fixed assets, ownership and use of the chasis parts for the purpose of day to day transport business activity. The CIT(A) detailed discussion affirming the Assessing Officer's action to this effect in Page No. 41 last para suggests that the assessee could not prove the purchase of body building works in remand

proceedings followed by reconciliation between transport vehicles as well as other relevant actions. We therefore deem it proper to restore this last issue back to the file of Assessing Officer for his afresh adjudication, subject to the condition assessee only shall file all the relevant details in consequential proceedings. This last substantive ground is accepted for statistical purpose.

7. This assessee's appeal is partly allowed in above terms.

Order pronounced in the open court on 12th May, 2022.

Sd/-
(Shri Dipak P. Ripote)
Accountant Member

Sd/-
(Satbeer Singh Godara)
Judicial Member

पुणे / Pune; दिनांक / Dated : 12th May, 2022.

रवि

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-7, Pune
4. The Pr. CIT-6, Pune
5. DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति// True Copy//

आदेशानुसार / BY ORDER,

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune