<u>आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ</u>
IN THE INCOME TAX APPELLATE TRIBUNAL,
'' SMC'' BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
Ms. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./**ITA Nos. 2472-2473/AHD/2018**
निर्धारण वर्ष/Asstt. Years: 2013-14 & 2014-15

Smt. Ritaben Dhirenkumar Lakhtaria, Surendranagar Fulwadi Plot, Thjangadh, Dist. Surendranagar-383530. **PAN: ABWPL5094Q**	Vs.	I.T.O., Ward-5, Surendranagar.

(Applicant)		**(Respondent)**

Assessee by	:	Written Submission
Revenue by	:	Shri S.S. Shukla, Sr. DR

सुनवाई की तारीख**/Date of Hearing : 25/04/2022**
घोषणा की तारीख **/Date of Pronouncement: 27/05/2022**

<u>आदेश/O R D E R</u>

<u>PER WASEEM AHMED, ACCOUNTANT MEMBER:</u>

The captioned appeals have been filed at the instance of the Assessee against the separate orders of the Learned Commissioner of Income Tax (Appeals)-7, Ahmedabad, of even dated 28/09/2018 arising in the matter of assessment order passed under s. 144 r.w.s 147 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Years 2013-14 & 2014-15.

First we take up ITA No. 2472/Ahd/2018, an appeal by the assessee for A.Y. 2013-14

2. The assessee has raised following grounds of appeal:

1 . The Id CIT(Appeals) has erred both in law and on facts in confirming legality of reassessment . On the facts and circumstances of the case, the reassessment ought to be held to be invalid. It be so hid.

2. Without prejudice to the above, the Id CIT(Appeals) erred in law and on facts in confirming the addition of Rs. 2,00,000/- in respect of gross unrecorded sales ignoring the submission that the payments for purchase of goods was also apparent from bank account of appellant and as per the judgments cited only profit on unrecorded sales could be made. It be so held now and gross addition be deleted.

3. The Id CIT(Appeals) erred in law and on facts in not commenting on the judgments cited before her and failed to appreciate that entire transcations remained to be unrecorded hence in law only profit and income can be taxed. It be so held now and addition be directed to be limited to profit on unrecorded sales noted by AO.

4. The Id CIT(Appeals) failed to consider the submissions made in entirety and hence order passed by her suffers from vice of application of mind and deserves to be set aside .

The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.

3. The first issue raised by the assessee is that the learned CIT-A erred in holding the validity of the assessment framed under section 144 r.w.s. 147 of the Act.

4. The brief fact is that the assessee is an individual and alleged to be engaged in the business of trading of ceramic tiles. The AO received an information from central circle-2(4) of Ahmadabad stating that there was a search and seizure operation carried out in case of "Dharamdev Group" dated 14th December 2016. In the post search proceeding it was found that "Dharamdev Group" has issued certain cheques in favour of the assessee and her husband Shri Dhirenkumar S Lakhataria. Accordingly, the husband of the assessee was summoned and statement under section 131(1) of the Act was recorded. In the statement the assessee's husband Shri Dhirenkumar S Lakhatari admitted that he is carrying out business of ceramic tiles in his wife name. During the year under, he has supplied tiles to "Dharamdev

Group" against the payment received through cheque which was neither recorded in his books of account nor in books of his wife (i.e. the assessee). The details of cheque received and deposited in assessee's bank account maintained with Dena bank stand as under:

Date	*Particulars*	*Deposit/withdrawn bank*
14.03.2013	*CL BY INST 3806 :OUTWARD-MI*	*50,000(Deposit)*
15,03.2013	*CL BY IMST 3807 : OUTWARD-MI*	*50,000 (Deposit)*
16.03.2013	*CL BY INST 3809 : OUTWARD-MI*	*50,000 (Deposit)*
18,03.2013	*CL BY INST 3808 : OUTWARD-MI*	*50,000 (Deposit)*
	TOTAL	*2,00,000*

5. The AO in view of the above information formed reasons to believe that the income has escaped assessment and issued notice under section 148 of the Act dated 2nd March 2017 which was return as unclaimed. Thereafter the assessee personally came to the office of the AO and received the notice under section 148 dated 15th March 2017. However the assessee failed to file return of income under section 148 and also failed to make any reply in response to several notices issued thereafter. Accordingly the AO proceeded to make assessment under section 144 of the Act.

6. The aggrieved assessee preferred an appeal before learned CIT-A

7. The assessee before the learned CIT-A challenged the validity of the assessment framed under section 144 r.w.s. 147 of the Act on ground that the AO has not provided reason recorded for reopening despite of making a specific request in this regard. Therefore, the proceeding under section 147 of the Act without providing reason recorded is invalid and liable to be quashed.

8. However the learned CIT-A dismissed the ground of appeal of the assessee by observing as under:

> *5. Grounds of appeal Mos, 2 & 3 are against the reopening of assessment proceedings u/s. 148 read with section 147 of the IT. Act. In this case, the AQ had received information from Central Circle-2(4),Ahmedabad in respect of search action carried out in the Dharmadev Group of cases on 05.10.2013. It was found that cheques had been issued in favour of the appellant and her husband Shri Dhirenkumar Lakh.tl.ana. In his statement u/s. 131 of the Act, Shri Dhirenkuinar Lakhataria had stated that he had supplied tiles to Dharmadev group for which he and his wife i.e. the appellant had received payments which had not been reflected in either his or his wife's books of accounts. Therefore, the AO had very tangible material and reason to believe that income to the extent of unrecorded sales had escaped assessment and after following due procedure, he issued notice u/s. 148 of the I.T Act. I, therefore, find no infirmity in the issue of notice u/s. 148 of the Act and the action of the AC is upheld. Grounds of appeal Nos. 2 &3 are accordingly dismissed.*

9. Being aggrieved by the order of the learned CIT-A the assessee is in appeal before us.

10. The learned AR before us filed written submission wherein the validity of the assessment was challenged.

11. On the other hand learned DR vehemently supported the order of the authorities below.

12. We have heard learned DR and perused the written submissions filed by the learned AR before us along with other materials available on records. Admittedly the assessment of the appellant on hand was reopened under section 147 of the Act by issuing notice under section 148 of the Act. The Hon'ble Supreme Court laid down certain procedure for making assessment under section 147 of the Act in case of GKN Drive Shaft (India) Ltd vs. ITO reported in 259 ITR 19. The violation of the procedure will amount to invalidation of the proceeding under section 147 of the Act. The relevant observation of the Hon'ble Supreme Court extracted below:

> *There was no justifiable reason to interfere with the order under challenge. However, it was clarified that when a notice under section 148 is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notice. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons had*

been disclosed in the proceedings, the Assessing Officer had to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment.

12.1 On perusal of the above observation of the Hon'ble Supreme Court we find that on issuance of notice under section 148 of the Act it is the duty of the assessee to file return of income. Thereafter, the assessee may ask the AO to supply the copy of reason recorded for reopening. If the assessee does so then it is the duty of the AO to supply the same.

12.2 Coming to the fact of the case on hand we find that the assessee has not filed return of income in response to the notice issued under section 148 of the Act, also not submitted any reply in response several subsequent notices issued under section 142(1) of the Act. Thus the very first step (i.e. filing of return) laid down by the Hon'ble Supreme court in case of GKN Drive Shaft (Supra) was not complied by the assessee. Therefore the argument of learned AR that assessment is invalid due to the fact that the copy of reason recorded was not supplied is not acceptable in view of the above discussion. The other case relied by the learned AR is distinguishable from the fact of the case of the appellant on hand. In those cases it is not the case that the return in response to notice under section 148 of the Act was not field, furthermore, those assessee repeatedly asked the AO to supply the copy of reason recorded but in case of present appellant it not the case. Indeed, the assessee failed to make any reply to several notices issued upon her. Hence, we are of the view that there is no violation of rule laid down by the Hon'ble Supreme Court in case of GKN Drive Shaft (Supra). Accordingly the ground of appeal raised by the Assessee is hereby dismissed.

13. The next issue raised by the assessee vide ground number 2 to 4 of its appeal is that the learned CIT-A erred in confirming the addition of gross amount of unaccounted sale.

14. The assessee during the year received 4 cheques on different dates amounting to Rs. 50,000/- each from "Dharamdev Group" against the alleged

unaccounted sale of ceramic tiles. Thus the AO added the aggregate amount of Rs. 2 Lakh to the total income of the assessee in the assessment framed under section 144 r.w.s. 147 of the Act.

15. On appeal, the learned CIT-A confirmed the addition made by the AO by observing as under:

> *I have carefully considered the assessment order, facts of the case and the submissions made by the appellant The AO made the impugned addition on the basis of tangible material and information received by him and on account of statement recorded from the appellant's husband wherein he admitted that he and his wife i.e. the appellant had received payment from Dharmadev group which had not been reflected in their accounts. The appellant during the appellate proceedings has simply Furnished a perfunctory submission bating that payment? made for purchases should have been considered by the AO. However, the appellant's submission cannot be accepted for the reason that no details in respect of the transactions done during the year have been furnished by the appellant. No documentary evidences in the form of bank statement, sales arid purchase hills, ledger accounts, etc. have been furnished. Considering the discussion above and the facts of the case, I have no reason to disagree with the decision taken by the AO and the addition of rs.2,00,000/- made by the Assessing Officer is confirmed. Grounds of appeal Nos.4,5 & 6 are accordingly dismissed.*

16. Being aggrieved by the order of the learned CIT-A the assessee is in appeal before us.

17. The learned AR though not appeared at the time of hearing but through written submission contended only net profit embedded under the unaccounted sales should have been brought to tax. But the authorities below have made the addition of gross unaccounted sale which is against settled provisions of law. As such, there cannot be made any sale without incurring purchase cost.

18. On the other hand learned DR vehemently supported the order of the authorities below.

19. We have heard the learned DR and perused the written submission of the learned AR of the assessee and also perused the materials available on record. It is undisputed fact that the assessee made unaccounted sale of tiles for Rs. 2 lakh which was added to the total income of the assessee by the AO and confirmed by

the learned CIT-A. The case of the appellant before us is that only profit embedded in such sale should be brought to tax after providing adjustment of purchase cost and other expenses. The 1st controversy arises whether the impugned receipt of Rs. 2 lakhs represents the sales of the assessee. In this regard, we note that the assessee before the ld. CIT-A has contended as under:

> *In the instant case of appellant, the fact regarding receipt against sales of tiles made to Dharamdev Group against which payments are received and credited to appellant's bank account with Dena bank(which remained to be accounted for by oversight) is accepted by AO. Thus the receipt of gross sales amount is not disputed which is Rs.2,00,000/- for the years under consideration However, how the AO can miss the fact that from the very bank account the payments made for purchase of such material to Royal trading and Navkar trading co etc has to be deducted since there is no sale without there being purchase. Thus it is only the difference (PROFIT) which can be taxed and not gross sales transaction since both sales transactions and purchase transactions remained to be accounted.*

19.1 The above contention has not been doubted by the authorities below. Therefore, it can be presumed that the impugned amount of receipt of Rs. 2 lakhs represents the sales made by the assessee. In addition to the above, we also note that the revenue was aware of the party which made payment to the assessee. Had there been any doubt about the nature of the receipt shown by the assessee, the revenue should have exercised their powers granted under the statute under section 131/133(6) of the Act to find out whether the impugned amount represents the sales of the assessee. But, we find that no such exercise has been carried out by the revenue. Accordingly we hold that, the impugned amount of receipt of Rs. 2 lakhs represents the business receipts of the assessee. Thus we find force in the submission of the learned AR for the assessee that the amount of gross sale per se do not amount to income of the assessee. As such, the sale can only be made after incurring purchase/manufacturing cost. We also find pertinent to refer the judgment of the Hon'ble Jurisdictional High Court of Gujarat in case of CIT vs. President Industries reported in 258 ITR 654 where it was held as under:

> *The amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales. The sales only represent the price received by the seller of the goods for the acquisition of which it has already incurred the cost. It is the realisation of excess over the cost incurred that only forms part of the profit included in the consideration of sales. Therefore, unless there is a finding to the effect that the investment by way of incurring cost in acquiring goods which have been sold has been made by the assessee and that has also not been disclosed, the question whether entire sum of undisclosed sales proceeds can be treated as income, answers by itself in the negative.*

19.2 Now the next question arises, how to determine/estimate the income of the assessee. In this regard, we note that there is no standard jacket formula to determine the income on estimated basis. Some element of guesswork is required. Thus, in the interest of justice and fair play we are of the view that 10% of the gross amount of Rs. 2 lakhs will be sufficient enough to add to the total income of the assessee out of the undisclosed business of the assessee. Hence, the ground of appeal of the assessee is allowed.

19.3 In the result appeal of the assessee partly allowed.

Coming ITA No. 2473/Ahd/2018 an appeal by the assessee for A.Y. 2014-15

20. The assessee has raised the following grounds of appeal:

1 . The Id CIT(Appeals) has erred both in law and on facts in confirming legality of reassessment . On the facts and circumstances of the case, the reassessment ought to be held to be invalid. It be so hid.

2. Without prejudice to the above, the Id CIT(Appeals) erred in law and on facts in confirming the addition of Rs. 8,89,5067- in respect of gross unrecorded sales ignoring the submission that the payments for purchase of goods was also apparent from bank account of appellant and as per the judgments cited only profit on unrecorded sales could be made. It be so held now and gross addition be deleted.

3. The Id CIT(Appeals) erred in law and on facts in not commenting on the judgments cited before her and failed to appreciate that entire transactions remained to be unrecorded hence in law only profit and income can be taxed. It be so held now and addition be directed to be limited to profit on sales noted by AO.

4. The Id CIT(Appeals) failed to consider the submissions made In entirety and hence order passed by her suffers from vice of application of mind and deserves to be set aside .

The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.

21. The first issue raised by the assessee is that the learned CIT-A erred in holding the validity of the assessment framed under section 144 r.w.s. 147 of the Act.

22. At the outset we note that the issue raised by the Assessee in her grounds of appeal for the AY 2014-15 are identical to the issues raised by the assessee in ITA No. 2472/AHD/2018 for the assessment year 2013-14. Therefore, the findings given in 2472/AHD/2018 shall also be applicable for the year under consideration i.e. AY 2014-15. The ground appeal of the assessee for the assessment 2013-14 has been decided by us vide paragraph No.12 of this order against the assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2013-14 shall also be applied for the year under consideration i.e. AY 2014-15. Hence, the grounds of appeal filed by the assessee is hereby dismissed.

23. The next issue raised by the assessee vide ground Nos. 2 to 4 of its appeal is that the learned CIT-A erred in confirming the addition of gross amount of unaccounted sale.

24. At the outset we note that the issues raised by the Assessee in her grounds of appeal for the AY 2014-15 are identical to the issues raised by the assessee in ITA No. 2472/AHD/2018 for the assessment year 2013-14. Therefore, the findings given in 2472/AHD/2018 shall also be applicable for the year under consideration i.e. AY 2014-15. The ground appeal of the assessee for the assessment 2013-14 has been decided by us vide paragraph No. 19 of this order in favour of the assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2013-14 shall also be applied for the year under

consideration i.e. AY 2014-15. Hence, the grounds of appeal filed by the assessee are hereby allowed.

24.1 In the result appeal of the assessee is partly allowed.

25. In the combined result both the appeal of the assessee are partly allowed.

Order pronounced in the Court on 27/05/2022 at Ahmedabad.

Sd/-	**Sd/-**
(MADHUMITA ROY)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 27/05/2022
Manish