

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद।
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, AHMEDABAD

BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
T.R. SENTHIL KUMAR, JUDICIAL MEMBER

ITA No.2686/Ahd/2016
Assessment Year : 2012-13

Himanshu L. Shethia (HUF) Prop: Himanshu Fabrics 524, New Cloth Market O/s Raipur Gate, Raipur Ahmedabad 380002.	Vs	ITO, Ward-5(3)(4) Ahmedabad.
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(Applicant)		(Responent)
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Assessee by :	None
Revenue by :	Shri V.K. Singh, Sr.DR

सुनवाई की तारीख/Date of Hearing : 07/03/2022

घोषणा की तारीख /Date of Pronouncement: 03/06/2022

आदेश/O R D E R

PER T.R. SENTHIL KUMAR, JUDICIAL MEMBER

This appeal is filed by the assessee against order dated 22.7.2016 passed by the Commissioner of Income-tax (Appeals)-5, Ahmedabad relating to the Asst.Year 2012-13.

2. There is a delay of 9 days in filing this appeal before this Tribunal. The assessee has filed an affidavit that he was suffering with acute back-pain and trauma during the period and advised rest by Orthopedic Surgeon and also produced a copy of the Doctor's certificate dated 5.10.2016 which has caused delay of 9 days in filing the appeal. The Id.DR appearing for the Revenue has no objection in condoning the delay.

3. We are satisfied with the reasons given by the assessee, and hereby condone the delay of 9 days in filing appeal and take the appeal for adjudication.

4. Brief facts of the case is that the assessee is *Karta* of HUF and running whole-sale trade in cloth in the name and style of "M/s.Himanshu Fabrics". For the Asstt.Year 2012-13, the assessee has filed return of income on 30.9.2012 declaring total income of Rs.9,19,240/-. The return was processed under section 143(1) of the Income Tax Act, 1961 ("the Act" for short), and thereafter taken for scrutiny assessment and notice under section 143(2) was issued on 8.8.2013. As per the Annual Information Report available with the Department, it was seen that the assessee has made cash deposit to the tune of Rs.1,09,30,500/- in the saving bank account at Oriental Bank of Commerce (for short "OBC Bank") on various dates. Therefore, the assessee was requested to furnish details of such cash deposits, and explain source thereof with corroborative evidence and copy of bank account. The assessee filed its written submissions stating that the transactions recorded in the OBC bank are not part and parcel of the regular business account of M/s.Himanshu Fabrics, which is involved in wholesale trading of grey fabrics/cloth as *Karta* of HUF. Simultaneously, the assessee was also doing retail trading of such type of cloth of grey fabrics in very small quantity on cash basis, which were being kept out of their regular books of account and deposited in the OBC Bank account. From the same bank account withdrawal was made for payments to the vendors and re-deposited cash received by the assessee from cash sales. The assessee further submitted that there was a survey operation carried out at the business premises of the assessee on 9.1.2014 which is relating to the Asst.Year 2014-15 not the present Asst.Year 2012-13.

5. During the course of survey operation, excess stock of cloth to the tune of Rs.51,21,318/- was found pertaining to the assessee and the same was disclosed as an investment out of income from undisclosed source. However, the survey team could not find any excess cash or any other asset or expenditure from the assessee's premises. Thus, the assessee claimed that whatever he earned in the past are parked as closing stock in the current year. The same has been duly disclosed during the course survey proceedings and the taxes attributable thereto of Rs.16 lakhs have duly been paid in the relevant financial year. Thus, the assessee claimed unaccounted small trading transactions inclusive of capital and profit were duly invested in the stock and the same has duly offered for taxation in the relevant year. Thus, taxing the cash deposits in the OBC Bank will amount to double taxation which is contrary to the basic principle of taxation.

6. Without prejudice to the above submissions and to buy peace of mind, the assessee offered peak credit of the cash transaction Rs.6,05,000/- recorded in the OBC Bank account as his income for the present Asst.Year 2012-13.

7. The assessee vide another letter dated 12.3.2015 submitted as follows:

"Please refer to the above captioned subject and reference to our submission dated 05.03.2015 where we have offered the peak amount of Rs. 6,05,000/- as our income for the assessment year under consideration.

Further, as discussed, during the course of our assessment, we have no objection for assessing our income for the year under consideration at Rs.8,74,440/- based on 8% of the total turnover of Rs.1,09,30,500/- of our trading business in place of the peak amount of cash deposited of Rs.6,05,000/-for the year under consideration.

The assessee with the intention to buy peak of mind and to avoid costly litigation and as cooperation offers Rs.8,74,440/- as its income for the assessment year under consideration.”

8. The AO has considered submissions given by the assessee and held that the assessee failed to prove genuineness of the cash credit. Merely stating that cash deposits were from cash sales of its retails business and withdrawal by cheques from the bank account for the purchases made were not sufficient to establish the genuineness of the transaction. There must be some supporting documents which related to particular transactions and prove and justify the genuineness of the transaction. Mere entries of sales and purchase in the books of accounts of the assessee were not enough to justify the cash credits. Thus, the AO held that the assessee has not proved the onus casted upon him, and therefore treated the cash deposits as cash introduced from undisclosed sources and made addition of Rs.1,09,30,500/- to the total income of the assessee and demanded tax thereon.

9. Aggrieved against the same, the assessee filed appeal before the Id.CIT(A). The assessee claimed that the AO has erred in making addition of the withdrawal amount in the bank account as the income of the assessee. The AO failed to consider that the closing stock offered as additional income by the assessee in the subsequent assessment year, was nothing but the asset acquired out of such unaccounted income, and thus was inclusive of the amount incorporated in the bank account. Thus, the AO erred in not adopting either peak credit method or gross profit method, but treated the total deposits in the bank accounts as the income of the assessee. Thus, the assessee pleaded before the CIT(A) to cancel the addition made by the AO.

10. The Id.CIT(A) after considering the submissions of the assessee dismissed the appeal filed by the assessee as follows:

“4.5. The facts of the case and the submissions are considered. Certain deposits were found in the bank account of the assessee for which the appellant has submitted that these deposits are related to unaccounted retail business of the assessee. Other than no explanation and evidences were given by the assessee. The AO has rightly pointed out that the assessee has failed to establish that these deposits are from the unaccounted retail business as no corroborative evidences regarding this business was furnished by the assessee. The assessee has failed to furnish supporting evidences of his unaccounted business such as purchase and sales bills, stock details, name of suppliers and customers etc. which indicate that the assessee has made retail trading business and has received cash out of such activities and the same were deposited out of such receipts in the bank. In the case of the assessee there was a survey on 9.1.2014 in which the assessee has disclosed unaccounted stock of Rs.51,21,318/-. The appellant has tried to make out the case that whatever quantum of investment/profit earned out of such unaccounted trading activities have been parked in the unaccounted stock and the said stock has been disclosed that the income of F.Y. 2013-14. However, the assessee has failed to establish the nexus between the disclosure made during survey operation and unaccounted stock with the cash deposits made in the saving bank account held with the Oriental Bank of Commerce. In fact the survey was conducted on a much later date therefore it cannot be said that the unaccounted stock found during the course of survey is out of the deposits made by the assessee during the year under consideration. With regard to the assessee's alternative arguments regarding peak credit or taxing the profit @8% of total turnover of unaccounted business the AO has rightly pointed out that assessee has failed to establish his unaccounted business to prove the source of the cash deposits and there are no withdrawals from the bank account to establish the theory of peak payments.

4.6. The contentions of the appellant that the provisions of Section-68 is not to the case of the assessee as bank account is not part of any book of accounts is not acceptable. The AO has found cash deposits in the bank account of the assessee and the assessee was failed to prove the nature and source of these deposits therefore the AO has made the addition of cash deposits as cash introduced from undisclosed sources to the total income of the assessee.

Considering the above discussion, the AO is justified in making the addition of Rs.1,09,30,500/- and the same is confirmed. Thus, the ground of appeal are dismissed.”

11. Aggrieved against appellate order, the assessee is before the Tribunal raising the following grounds of appeal:

“1. The Id CIT(Appeals) has erred both in law and on facts in confirming an addition of Rs. 1,09,30,500/- in respect of gross amounts of total deposits on various dates in the bank account of Himanshu Shethia Individual with Oriental bank of commerce ignoring the submissions and the statement of the appellant during survey. The CIT(Appeals) erred in law and on facts in not appreciating that considering the deposits and also withdrawals from the said bank account only profit embedded in the undisclosed turn over ought to be assessed as income. It be so held now.

2. The Id CIT(Appeals) also erred in law and on facts in confirming the addition of entire gross amount of deposits in the bank account when the sources of the said deposits were explained to be unaccounted sales of fabrics purchased from withdrawals from the said bank account and hence only peak amount could be added as claimed by the appellant in the statement during the course of survey. It be so held now and addition of Rs. 1,09,30,500/- be directed to be deleted.

3. Both the lower authorities failed to appreciate the submissions and explanations that the deposits in bank account were from unaccounted trading and hence there was no justification to hold that as there were no bills for sales and purchase, the adoption of only Gross profit was not to be accepted.

4. The Id CIT(A) also erred in law and on facts in not appreciating that the appellant had also adhered to the statement made during survey with regard to disclosure obtained by survey team with respect to excess or unaccounted stock and hence the statement made could not be rejected in part. It be so held and submissions made be directed to be accepted

5. Both the lower authorities erred in making and in confirming addition in the hands of the appellant with regard to the gross deposits of the various amounts in the impugned bank account. It be so held now and addition made be deleted.

6. The Id CIT(Appeals) ought to have allowed the appeal in toto and cancelled illegal and erroneous order passed by AO.”

12. Before us none appeared on behalf of the assessee. Therefore, we proceed to adjudicate the matter based on the material available on record and after hearing the ld.DR.

13. We find that the assessee has filed a detailed written submission during the appellate proceedings. The ld.CIT(A) has incorporated these submission in his impugned order from page No.6 to 9. Before the ld.CIT(A), it was pleaded by the assessee that the assessee has during the assessment year 2012-13 has made the total turnover of Rs.101.09 crores on wholesale basis wherein proper books of accounts were being maintained. However, the assessee made small unaccounted trading transactions to the tune of Rs.1.09 crores, and the same were being reflected in the OBC Bank account. During the survey operation conducted in the assessee's business premises on 9.1.2014, survey team could not find any excess cash or unaccounted stock. However, the assessee offered a disclosure of Rs.51,21,318/- related to the unaccounted investment in stock for which there was no entry in the books of accounts of the assessee. In his submission dated 5.3.2015, the assessee himself submitted that cash deposits in OBC Bank pertained to the transaction of his retail business other than the wholesale business. This statement of the assessee was disbelieved by the AO. According to the AO, there must be some supporting evidence which related to the particular transaction in order to justify the genuineness of the transaction. Thus, the assessee has failed to establish nature and source of cash deposits of Rs.1,09,30,500/- made in the saving bank account with OBC Bank and not substantiated by furnishing concrete evidence thereof. Therefore, the cash deposits were treated as unaccounted cash credit in the hands of the assessee. In answer to Question No.16 the assessee has admitted deposit of unaccounted trading transactions of grey fabrics. This has been reproduced by the

assessee in his written submissions filed before the Ld.CIT(A), which in turn extracted in the impugned order as follows:

“A. 16 In my Savings A/c. No.01202011003929 (Oriental Bank of Commerce), whatever cash has been deposited during F.Y.2011-12 pertains to unaccounted trading transactions of grey fabrics carried out by me and not reflected in my regular books of account. After the working, whatever gross profit or peak amount of the cash deposited will be treated as unaccounted investment and will be offered for tax”.

14. Thus, during the course of survey, the assessee admitted the fact of unaccounted transactions of grey cloth and has offered the same for taxation either GP on such unaccounted trade or peak amount of cash deposits. Further, the ld.AO mainly rejected the contentions of the assessee on the ground that entries in the bank account are not supported by corroborative evidence, the assessee has not submitted copies of bills raised for sales made and purchase invoice for co-relating to the bank entries. The AO further observed that names and address of the parties for purchase and sales are not furnished, and therefore, genuineness of the transactions cannot be verified. The AO further held that the assessee has not maintained any account for the unaccounted business of Rs.1.09 crores whereas books of accounts are maintained for wholesale business of Rs.101.09 crores. The assessee further claimed that the undisputed fact as it emerged from the bank account itself is that, there were cash deposits and withdrawals either through bearer cheques or cross bearer cheques. Thus, in nutshell the rotation of the funds throughout the year was an undisputed fact available on the record and such rotation was nowhere disputed by the ld.AO also. The observation of the AO are just on the basis of non-availability of purchase or sales bills and these bills were not available as the transactions were unrecorded and by virtue of the same, the peak or gross profit has been offered as income. It was

further pleaded that the AO erred in treating the cash deposits in OBC Bank account as unexplained cash credit, and relied upon Bombay High Court judgment in the case of CIT Vs., Bhaichand H. Gandhi, 141 ITR 67 wherein it has been held that where money are deposited in a bank, the relationship that is constituted between the banker and the customer is one of the debtor and creditor and not of trustee and beneficiary. The passbook supplied by the bank to its constituent is only a copy of the constituent's account in the books maintained by the bank. It is not, if the pass book is maintained by the bank as the agent of constituent or it can be said that the passbook is maintained by the bank under the instruction of the constituent. Hence, the passbook supplied by the bank to the assessee cannot be regarded as book of the assessee i.e book maintained by the assessee or under his instruction. Thus, the AO erred in adding the amount of Rs.1.09 crores reflected in the assessee's bank account which is not a book maintained by the assessee, and therefore, addition under section 68 of the Act cannot be made.

15. Per contra, the ld.DR appearing for the Revenue strongly supported orders of the lower authorities, and pleaded that no interference is called for in this matter.

16. We have given our thoughtful consideration and perused the material available on record. We find that there is a considerable force in the pleadings of the assessee in treating cash deposits in the bank account as unexplained income of the assessee and whereas the correct method is applying peak calculation method to compute the profit from the unaccounted cash sales made by the assessee. In this connection we have gone through page No.59 to 66 of the paper book filed by the assessee, wherein OBC SB Account entries

are being placed. A perusal of the same would indicate that cash deposits were being made and the same were withdrawn by issuing cheques to various parties, whereas cash withdrawal of Rs.1000/- made on 27.4.2011 vide cheque no.579072 and few more cash withdrawal by way of cheque withdrawal only. The assessee also gave peak calculation at page no.67 & 68 of the paper book filed by the assessee. There is a considerable force in the submission of the assessee that entire cash deposits in the bank account cannot be added as income of the assessee. Cash sales made by the assessee do not have any bills or other record. However, the same is deposited in the bank accounts, and the purchases are made through bearer cheques to various parties. In the above circumstances, we deem it fit that the matter to be remanded to the AO only to the extent of considering the peak calculation and determine the income of the assessee in accordance with law. We order accordingly. Needless to say the assessee should cooperate with the AO for furnishing all the details for determining peak calculation of the above OBC Bank transactions. Thus, the appeal filed by the assessee is allowed to the extent indicated above.

17. In the result, appeal of the assessee is allowed for statistical purpose.

Order pronounced in the Court on 3rd June, 2022 at Ahmedabad.

**Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER**

**Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER**

Ahmedabad, dated 3/06/2022

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