

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H", MUMBAI
BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 6334/Mum/2017 (A.Y. 2007-08)

DCIT-1(3) (1),
Aayakar Bhavan,
M.K. Marg, Mumbai-400020. Appellant

Vs.

Late Shri Haresh Dhakan through his
Legal heir Mr. Krunal H. Dhakan,
A-304, Classique Centre,
Plot No. 26, Mahal Industrial Estate,
Andheri (West), Mumbai-400093
PAN: AADPD5584BRespondent

ITA No. 6337/Mum/2017 (A.Y. 2011-12)

DCIT-1(3)(1),
Aayakar Bhavan,
M.K. Marg, Mumbai-400020. Appellant

Vs.

M/s SSS Sai Shipping Services Pvt. Ltd.
A-304, Classique Centre,
Plot No. 26, Mahal Industrial Estate,
Andheri (West), Mumbai-400093
PAN: AALCS4908DRespondent

Appellant by : Sh. Anil S. Sant, Sr.DR

Respondent by : Sh. Vinod Bindal with Sh. Gaurav Bansal

Date of hearing : 12/05/2022
Date of pronouncement : 08/06/2022

ORDER

PER GAGAN GOYAL, A.M:

These two appeals by the Revenue are directed against the order of Id. Commissioner of Income Tax (Appeals)-3, Mumbai [hereinafter referred to as the 'CIT (A)'] vide Appeal No. CIT (A)-3/DCIT-1(3) (2)/IT-257/2007-08 and Appeal No. CIT (A)-3/DCIT-1(3) (1)/IT-25/2015-16 both dated 03.08.2017 for the Assessment Year (AY) 2007-08 & 2011-12. The Revenue has raised the identical grounds of appeal in both the AYs which are as under:

1. On the facts and the circumstances of the case the Ld CIT(A) has erred in law for allowing 90% of the cash expenses for the year as claimed by the assessee as business related, by relying on the Assessing Officer's decision for A.Y. 2014-15 which is totally misplaced because the principles of res judicata are not applicable to Income Tax proceedings, and also due to the fact that the expenses details are not verified for the year.

2. On the facts and the circumstances of the case and in law the decision of the LD CIT (A) in accepting the assessee's argument for introduction of short cash on particular date without verifying its sources is not correct and justifiable. This fact is specifically mentioned in the remand proceedings.

3. On the facts and the circumstances of the case and in law the decision of the Ld CIT(A) in accepting the assessee's argument that the cash expenses are incurred for business purposes is not justified due to the fact that the same were not proved with evidences by the assessee and the same is specifically mentioned in the remand proceedings.

2. Brief facts of the case are that the assessee was mainly dealing in clearing and forwarding of Cargo in respect of import and export and rendered various upcountry customers through head office at Mumbai and various branches.

3. Ground No.1 preferred by the Revenue is against the action of the Id. CIT(A) in following the action of the AO for AY 2014-15. According to the Revenue, the principle of res-judicata is not applicable.

4. We have heard both the parties and perused the records. It is settled position of law that for Income Tax proceedings, the principle of res-judicata is not applicable. However, it has to be borne in mind in this regard that the principle of consistency has been recognized by the Hon'ble Apex Court. In the light of the aforesaid observations, the ground no.1 does not require any adjudication.

5. Coming to ground no.2 & 3 is against the action of the Id. CIT(A) in accepting the assessee submission regarding introduction of short cash without verifying its source (on particular basis) without verifying its source as well as the Id. CIT(A)'s action of allowing cash expenses without looking into veracity of the expenses as to whether it has been incurred for business purpose.

6. Brief facts of the case are that a survey u/s 133A of the I.T Act was carried out at the business premise of M/s SSS Sai Shipping Services Private Limited at A-304-305, Chassique Centre, Plot No. 26, Mahal Industrial Estate, Off Mahakali Caves Road, Andheri East, Mumbai 400093 on 17.10.2013 in which the appellant was the promoter Director. During survey proceedings a pen drive was found. This pen drive contained a voluminous data relating to cash transactions. A statement of Mr. Haresh Dhakan, the late appellant was recorded under section 131 of the Income tax Act, on 17.10.2013 which was concluded on 18.10.2013. In the statement recorded, the Appellant submitted a reconciliation of data found in survey and when the transactions were confronted to the Appellant, he disclosed

an income of Rs. 12,37,44,230/- as unaccounted income for the period from 1.4.2007 to 13.10.2013. The year-wise break up of such income was given as under:

Assessment Year	Financial Year	Amount (Rs.)
2008-09	2007-08	5,62,08,798/-
2009-10	2008-09	52,60,571/-
2010-11	2009-10	1,16,58,936/-
2011-12	2010-11	2,80 38,727/-
2012-13	2011-12	1,20,77,111/-
2013-14	2012-13	87,70,569/-
2014-15	2013-14	17,29,518/-

The Appellant also submitted a letter dated 16.12.2013 before DDIT (Inv.) along-with a statement Annexure 1 in which the disclosure for assessment year 2007-08 was also worked out at Rs. 6,54,93,053/-.

7. We note that the AO has passed a best judgment assessment under section 144 of the Act because the assessee did not participate in the proceedings before the AO despite several notices. Therefore, though the assessee had acknowledged/admitted before the survey authorities that the black Pen-drive seized during the survey contains undisclosed transaction made by him from 2000 to 13.10.2013 (date of survey) since the assessee did not participate during the re-assessment proceedings, the AO had no other alternative but to assess on the basis of the admissions made during the survey. However, for AY 2014-15, the

assessee had participated before the AO and made certain submissions on the basis of which the AO had computed the peak credit for that year and made certain addition which has been accepted by the assessee which has not preferred any appeal before the Id. CIT(A). Coming to AY 2007-08, the assessee challenged the action of the AO as to how he made addition of Rs. 6,54,93,053/- under section 68 of the Act before the Id. CIT(A) (AY 2007-08) which was partly allowed by taking note of the AO's action for AY 2014-15, this action of the Id. CIT(A) has been challenged by the Revenue on the ground that res-judicata is not applicable as well according to the Id. DR, the peak credit computed by the AO for AY 2014-15 cannot be the basis for calculation of peak credit as well as telescoping for the year under consideration. Therefore, the Id. DR wants us to remand the issues back to the AO for denovo assessment, since the Id. CIT(A) has accepted the cash introduction without verifying the source as well as allowed the expenses claimed by the assessee without verifying the veracity of the expenses as to whether it has been incurred for business purpose or not?

8. Per contra, the Id. AR of the assessee contended that the Id. CIT(A) has rightly allowed the relief on the principle of consistency. According to Id. AR based on the black Pen-drive retrieved/seized during survey the addition has been made against the assessee. According to Id. AR, the contents of Pen-drive (both undisclosed income, undisclosed expenses, the disclosed income, disclosed expenses) all has to be considered. According to the Id. AR, since the assessee was not well, he was not able to take out the print out of the entire transaction from 2000 to 2013 and therefore, was not able to participate before the AO. According to Id. AR for AY 2014-15, the assessee was able to take out the entire print out of the contents of the Pen-drive which shows both introductions of cash as well as

expenses which were undisclosed as well as certain disclosed income as well as expenses (which were shown in the regular books of the assessee). So the assessee had re-conciled the same and brought to the notice of the AO detailed working of the peak credit from AY 2007-08 to 2014-15. Taking note of the aforesaid working made by the assessee, the AO has accepted the same and has made addition only in respect of the peak credit for AY 2014-15, so the Id. CIT(A) for this assessment order (AY 2007-08) as well as for AY 2011-12 has accepted the peak credit worked out by the assessee and has confirmed only that amount (peak credit) for these two years and gave relief to the assessee. Therefore, according to the Id. AR, the impugned action of the Id. CIT(A) in the light of the facts discussed (supra) does not require any interference from our side.

9. After hearing both parties and having carefully perused the records placed before us, we note that the Id. CIT(A) in this case has given part relief to the assessee by following a strange method. We note in this case for AY 2007-08 to 2011-12, the AO had made addition based on the undisclosed income which came to light from seizure of the Pen-drive during the survey which happened on 13.10.2013. During the survey, the assessee had admitted that the contents of the Pen-drive found during the survey was his undisclosed transaction which were carried out by him. Since the assessee did not participate before the AO during assessment proceedings, the AO had no other alternative but to make addition u/s 68 of the Act for Ay 2007-08 to 2013-14 on the basis of the admission/surrender during survey. For AY 2007-08, the AO had made addition of Rs. 6,54,93,053/-and for AY 2011-12 Rs. 2,80,38,727/-. On appeal the Id. CIT(A) has given part relief to the assessee by following a strange method i.e. to say he followed the logic of the AO accepting the working of peak credit as shown by the

assessee for AY 2014-15. First of all, we do not countenance the impugned action of the CIT(A) for the reason that when computing the peak credit, the first AY in this case should have been AY-2007-08 and so on (AY 2008-09 to 2014-15) and not the other way around. In order to understand the concept Peak credit/telescoping, it has to be borne in mind that there is a distinction between telescoping and peak. Telescoping is adjustment of one income against other, so that same income is not taxed twice. In peak, the withdrawal of cash, if not utilized elsewhere, is considered as available for making deposits. The highest unexplained cash deposit is considered as peak. The determination of peak reduces the taxable income. However, where withdrawals are through cheques and it is not proved that such withdrawals have come back to the pocket of the assessee, then benefit of those withdrawals will not be available to explain the deposits. The crux in applying peak credit theory is a reasonable certainty that withdrawals have not gone elsewhere, either as investment in some assets, or meeting some expenditure, or to the pocket of other person. Even in cases where deposits and withdrawals are in several accounts (in the name of different persons), and assessee owns all these accounts as his own and transactions therein as non-genuine and there is no evidence that outflow has gone to any other person or any other purpose, then cumulative account of all the accounts put together can be drawn and peak there under be determined. For that we rely on the following decisions:

[2020] 118 taxmann.com 109 (Gujarat)/ [2020] 273 Taxman 220 (Gujarat)[24-07-2020] Commissioner of Income-tax v. Manojbhai Bhupatrai Vadodaria

Kahan Udyog v. Commissioner of Income-tax [2013] 38 taxmann.com 261 (Delhi)

10. Therefore, in the light of our aforesaid discussion, we are setting-aside the impugned order of the CIT(A) and remanding the matter back to the file of AO for denovo assessment with the following directions.

(i) After providing proper opportunity to the assessee may be with the help of special auditor under section 142(2A), examine the working prepared and submitted by the assessee before the Id. CIT (A) and

(ii) AO must give specific reason before treating any entry as income and before disallowing any expense. And the AO to give telescoping benefits as per law.

11. In the light of the aforesaid discussion, on the facts and circumstances of the appeals before us (AY 2007-08 & 2011-12) we are inclined to set-aside the impugned order of Id. CIT(A) and remand both the matter before the AO.

12. In the result, appeals filed by the revenue is Allowed for statistical purposes.

Order pronounced in the open court on 8th day of June, 2022.

Sd/-
(ABY T VARKEY)
JUDICIAL MEMBER

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Mumbai, दिनांक / Dated: 08/06/2022

SK, Sr.PS

Copy of the Order forwarded to:

1. अपीलार्थी / The Appellant ,
2. प्रतिवादी / The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT

5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy. /Asstt. Registrar)
ITAT, Mumbai