

IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, MUMBAI

BEFORE SHRI PROMOD KUMAR, VICE PRESIDENT AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.18/Mum./2020
(Assessment Year : 2010-11)

Shri Swapnil Bobhate
803, D-1, Boston Puranik City
Kararwadavali Ghodbandar Road
Thane (West), Thane 400 610
PAN - AHKPB6143N

..... Appellant

v/s

Income Tax Officer
Ward-28(3)(3), Mumbai

..... Respondent

Assessee by : Shri Khushiram Jadhvani
Revenue by : Smt. Sudha Ramchandran

Date of Hearing - 19.04.2022

Date of Order - 12/07/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee against the impugned order dated 25/10/2019, passed under section 250, of the Income Tax Act, 1961 (*'the Act'*) by the learned Commissioner of Income Tax (Appeals)-26, Mumbai [*'learned CIT(A)'*], for the assessment year 2010-11.

2. In this appeal, the assessee has raised following grounds:

"The appellant to aggrieved by the order passed by Id. CIT (a) = 26 Mumbai confirming the men der passed by ITO Ward 23(3\4) Mumbai u/s 143(3) rws 147 of the Income Tax Act 1961 and is in appeal

1. Because, the Ld. CIT(A) erred in law and on facts in confirming the order passed under Section 143(1) as the assessment order is wholly without jurisdiction and is bad in law.

2. Because, the Ld. cr(A) erred in law and on facts in confirming the order passed under Section 143(3) of the Act since no return has been filed by the Appellant.

3. Because, Ld. CIT(A) erred in law and on facts in confirming addition u/s 28 to the tune of Rs.30,081/- being business receipts of Rain Bow Enterprises.

4. Because, Ld. CIT(A) erred in law and on facts in confirming the addition u./s 68 to the tune of Rs.18.51,435/- when assessee explained that the same are business receipts of Rain Bow Enterprises.

5. Because, Ld. CIT(A) erred in law and on facts in confirming the addition u./s 68 to the tune of Rs.18,51,435/- in the form of cash deposits when the Appellant has duly informed Ld. AO the fact of corresponding withdrawals and therefore in any case only peak can be added in the Appellant case.

6. Because, Ld. CI(A) erred in law and on facts in not adjudicating the initiation of penalty proceedings u/s 271(1)(c) by the Ld. AO in the assessment order passed u/s 143(3) r.w.s. 147 of the Act."

2. The brief facts of the case, as emanating from the record, are: The assessee is an individual. For the year under consideration, no return under section 139 of the Act was filed by the assessee. Subsequently, on the basis of information available in ITD system, the case was reopened under section 147 of the Act, after recording reasons for reopening and taking necessary approval under section 151 of the Act. The assessee, despite repeated reminders, did not even filed the return of income in response to notice under section 148 of the Act till the date of passing of the assessment order. As per the information available in ITD system,

assessee had deposited cash of Rs. 18,51,435, in his savings bank account maintained with the Cosmos Cooperative Bank. Accordingly, assessee was asked to explain the source of the cash deposit. In response, assessee submitted that he has distribution agencies of Mother Dairy, Garden Chips, Nutralite Butter for Navi Mumbai and Panvel Region in the name of the Rainbow Enterprises. The assessee further submitted that most of the small inventors pay the bill in cash only and accordingly the assessee was depositing that cash in his account and made pay order, on the above mentioned companies, for purchasing the products. In respect of 4 big entries, the assessee submitted that same was not done by him and his childhood friend who was working with the same bank told him regarding that cash deposit and took cheque for withdrawing the same in the name of Maladeep Construction. After perusal of the reply filed by the assessee, the Assessing Officer further sought information regarding the address of his friend as well as Maladeep Construction. The Assessing Officer also directed the assessee to furnish the license of his distribution agencies, copies of bills of these products purchased, cash book, purchase register and sales register. In reply, though the assessee furnished the address of Maladeep Construction, however, failed to furnish the other information as sought by the Assessing Officer. Accordingly, summons were issued to proprietor of Maladeep Construction and statement on oath was recorded, relevant portion of same is as under:

"Q.7 Do you know Shri Swapnil Subhashchandra Bobhate?"

Ans: I personally do not know him. However on verification of account it is seen that he has advance Rs.3,00,000/- Rs.4,60,000/- on 10/12/2009 &10/3/2010 which was refund to him on 23/12/2009 and 12/3/2010.

Q.8. During the course of assessment proceedings of Shri Swapnil Subhashchandra Bobhate, Shri Swapnil Subhashchandra Bobhate has contended that cash was deposited in his bank account maintained with Cosmos Bank, Vashi Branch on different dates on behalf of Maladeep Construction and the same was returned to Maladeep Construction through cheques, What is your say on this?

Ans: Sir, as I said earlier, I do not know Shri Swapnil S. Bobhate, I do not know how he is alleging that cash is deposited and then withdraw on behalf of Maladeep Construction. Money is received from him which was refunded by me."

3. Further, the assessee was asked as to why business receipts of partnership firm Rainbow Enterprises, wherein he is one of the partners, were deposited in his personal savings bank account. In reply, assessee submitted that it was agreed mutually between the partners that part of the business receipts will be deposited in his personal bank account and from there he will issue cheque or DD to the creditors. However, assessee neither filed the partnership deed nor produced the other partner to corroborate the submission. The Assessing Officer vide order dated 29/11/2017, passed under section 143(3) r.w.s. 147 of the Act did not agree with the submissions of the assessee and made addition of Rs. 18,51,435, under section 68 of the Act. Further, the Assessing Officer, upon perusal of computation of income of Rainbow Enterprises, wherein assessee is one of the partners, noticed that the assessee has received remuneration of Rs. 30,081. Accordingly, same was added under the head 'income from business'.

4. In appeal before the learned CIT(A), assessee raised grounds both in respect of the jurisdiction of assessment order passed under section 143(3) r.w.s. 147 of the Act as well as on merits of the case. The CIT(A) vide impugned order dated 25/10/2019 dismissed the ground on jurisdiction on the basis that such a defect comes under the purview of section 292B of the Act. Further, on merits, learned CIT(A), in absence of any sworn statement of assessee's friend and denial of statement of proprietor of Maladeep Construction and also in absence of documentary evidence such as distribution license, copies of bills and invoices, etc. upheld the addition made by the Assessing Officer under section 68 of the Act. The learned CIT(A) also upheld the addition of the Rs. 30,081, received by the assessee as remuneration from the partnership firm, as business income of the assessee. Being aggrieved, the assessee is in appeal before us.

5. During the course of hearing, learned Authorised Representative ('learned AR') submitted that the order passed by the Assessing Officer passed under section 143(3) r.w.s. 147 of the Act is bad in law as no return was filed by the assessee. In respect of merits, learned AR reiterated the submissions made before the lower authorities. Without prejudice, learned AR submitted that even if any addition is maintainable under section 68 of the Act, same can be done only by adopting concept of peak credit.

6. On the other hand, learned Departmental Representative vehemently relied upon the orders passed by the lower authorities.

7. We have considered the rival submissions and perused the material available on record. While dismissing assessee's ground in respect of jurisdiction of assessment order passed under section 143(3) r.w.s. 147 of the Act, learned CIT(A) observed as under:

"7.1 On perusal of the facts of the case, it is observed that the assessment was validly reopened on the receipt of information by the AO. As far as the issue of passing the order u/s. 143(3) r.w.s. 147 of the Act rather than passing it u/s. 144 r.w.s. 147 of the Act, it is observed that a mere mention of the wrong section would not render the assessment invalid. The AO has also mentioned in Para 2.1 and Para 4 of the Assessment Order that the assessee failed to file a return in response to notice u/s. 148 of the Act and has made the assessment accordingly. Further, the above defect very much comes under the purview of section 2928 of the Act. The various case laws relied upon by the assessee have been perused and are found to be irrelevant in the instant case. In this case, the assessment has been completed after proper issuance and service of the statutory notices. Hence, the case laws relied upon by the assessee are distinguishable on the basis of facts. In light of the above, the Grounds nos. 1 and 2 are 'Dismissed'."

8. We find no infirmity in the impugned order passed by the learned CIT(A) on the issue of jurisdiction, as at many places the Assessing Officer has noted the fact that the assessee despite various reminders did not file the return of income. Thus, in the peculiar facts of present appeal, the aforesaid findings of learned CIT(A), on the issue of jurisdiction, are upheld. As a result, grounds no. 1 and 2 raised in assessee's appeal are dismissed.

9. On merits, in the present case, assessee claimed to have distribution agencies of Mother Dairy, Garden Chips, Nutralite Butter for Navi Mumbai and Panvel Region in the name of the Rainbow Enterprises. Further, from the information available in ITD system, it was observed by the Assessing Officer that assessee has deposited cash of Rs. 18,51,435 in a saving bank account maintained with The Cosmos Co-operative Bank. During the assessment proceedings, assessee submitted that the most of the small vendors pay their bill in cash only and same was deposited in assessee's bank account and payment was made for purchasing the orders. In respect of large deposits, assessee submitted that the said transaction was not done by him and his childhood friend Mr. Suresh R Jaybhay working in the same bank told him regarding the cash deposit and took cheque for withdrawing the same. During the assessment proceedings, in order to verify the submission of the assessee, the Assessing Officer sought the addresses of assessee's friend as well as Maladeep Construction on behalf of whom the said cash was deposited and withdrawn by cheque. The Assessing Officer also sought the license for the distribution agency, copy of bills of the product purchased, cash book, purchase register and sales register. However, the assessee only furnished the address of proprietor of Maladeep Construction. In its statement recorded pursuant to summons, the proprietor of Maladeep Construction denied to have personally known the assessee. The proprietor further submitted that the assessee advanced money to

Maladeep Construction, which was refunded to the assessee. The proprietor also denied the statement of the assessee that the cash was deposited and then withdrawn on behalf of Maladeep Construction and reiterated that money was received from the assessee which was refunded to him. The assessee was apprised of the statement of proprietor of Maladeep Construction, however, the assessee did not comment on same. The assessee could neither produce his childhood friend nor furnish his sworn statement/affidavit to support his claim that the aforesaid transaction was done by his childhood friend. Further, in the submission filed before the learned CIT(A), which is forming part of the paper book, assessee has provided the following details of transactions in respect of Maladeep Construction:

DATE	AMOUNT	REMARK
10/12/2009	3,00,000/-	Cash Amount received from Maldeep Construction and deposit in Bank
10/12/2009	3,00,000/-	Cheque issued to Maldeep Construction
15/12/2009	1,58,782/-	Cash deposited by Maldeep Construction for the purpose of payment to CIDCO
15/12/2009	1,58,782/-	Amount used by Maldeep Construction
23/12/2009	3,00,000/-	Cash deposited by Maldeep Construction
23/12/2009	3,00,000/-	Amount transferred to Maldeep Construction
10/03/2009	4,66,000/-	Cash deposited by Maldeep Construction
10/03/2009	4,66,000/-	Amount transferred to Maldeep Construction
12/03/2010	4,66,000/-	Amount transferred by Maldeep Construction into appellant's account
12/03/2010	4,66,000/-	Cash withdrawn and handed over to Maldeep Construction

10. Thus, there is clear contradiction in the statement of the assessee vis-à-vis the proprietor of Maladeep Construction, which raises doubt as to

assessee's justification regarding these transactions. Further, it is pertinent to note the following transactions, appearing in bank statement of assessee in the Cosmos Co-operative Bank Ltd.:

<i>Date</i>	<i>Particulars</i>	<i>Chq. no.</i>	<i>Withdrawals</i>	<i>Deposits</i>	<i>Balance</i>
10.12.2009	By Cash			3,00,000.00	3,01,234.00
10.12.2009	To C.A. 6071 Maladeep Construction	426445	3,00,000.00		1,234.00
15.12.2009	By Cash			1,58,800.00	1,83,402.00
15.12.2009	To PYS + COMM		1,58,800.00		24,620.00
23.12.2009	By CA 6071 Maladeep Construction			3,00,000.00	3,00,574.00
30.12.2009	By Cash		3,00,000.00		574.00
10.03.2010	By Cash			4,66,000.00	4,66,310.00
10.03.2010	To C.A. 6021 Maladeep Construction	426458	4,66,000.00		310.00
12.03.2010	By C.A. 6071 Maladeep Construction			4,66,000.00	4,66,310.00
12.03.2010	To Self	251821	4,66,000.00		310.00

11. From the above, even if it is assumed that the cash deposited in the bank account of the assessee was received from Maladeep Construction, exact same amount was withdrawn by cheque, on certain occasions, by the assessee and there is no explanation as to how the said sum was utilised. Even if assessee's submission is accepted that the amount was returned to Maladeep Construction, even in such a scenario it is difficult to accept that a company will deposit in bank account of the assessee and will take cash in return.

12. Further, from the perusal of bank statement of assessee in the Cosmos Co-operative Bank Ltd., which is forming part of the paper book, it is evident that apart from the aforesaid transactions there are various other cash deposits made by the assessee which were almost on the same date withdrawn by cheque or issued demand draft. The assessee, in his submission before the learned CIT(A), also claimed that the assessee is an employee working in finance company having income from salary in addition to having the distribution agency. During the assessment proceedings, assessee could not justify deposit of business receipts of the partnership firm (i.e. Rainbow Enterprises) in his savings bank account despite the firm also having the account in the same bank. The assessee neither furnished copy of partnership deed nor produced the any statement/affidavit of the other partner to justify such conduct, even before us.

13. During the course of hearing, learned AR sought application of concept of peak credit for making any addition under section 68 of the Act. In this regard, it is relevant to note the following observations of Hon'ble Delhi High Court in CIT vs D.K. Garg, [2017] 84 Taxmann.com 257(Delhi):

"18. In that case, it was held that as die amount of cash credits stood in the patties of different persons which the Assessee had all along been claiming to be genuine deposits, withdrawal payments different persons during the previous years, the Assessee was, therefore, not entitled to claim the benefit of peak credit. Later in Vijay Agricultural Industries case

(supra), it was reiterated that "The principle of peak credit is not applicable in case where the deposits remained unexplained under Section 68 of the Act. It cannot apply in a case of different depositors where there has been no transaction of deposits and repayment between a particular depositor and the assessee. On the facts of that case it was held that peak credit could be applied only in the case of squared up accounts. In other words, where an Assessee was unable to explain the sources of deposits and the corresponding payments then he would not get the benefit of 'peak credit'.

19. The legal position in respect of an accommodation entry provider seeking the benefit of peak credit appears to have been totally overlooked by the ITAT in the present case. Indeed, if the Assessee a self-confessed accommodation entry provider wanted to avail the benefit of the peak credit, he had to make a clean breast of all the facts within his knowledge concerning the credit entries in the accounts. He has to explain with sufficient detail the source of all the deposits in his accounts as well as the corresponding destination of all payments from the accounts. The Assessee should be able to show that money has been transferred through banking channels from the bank account of creditors to the bank account of the Assessee, the identity of the creditors and that the money paid from the accounts of the Assessee has returned to the bank accounts of the creditors. The Assessee has to discharge the primary onus of disclosure in this regard.

20. While the AO in the present case did not question the working out of the peak credit by the Assessee, he, at the same time, insisted that the additions made by him to the returned income of the Assessee should be sustained. The peak credit worked out by the Assessee was on the basis that the principle of peak credit would apply, notwithstanding the failure of the Assessee to explain each of the sources of the deposits and the corresponding destination of the payment without squaring them off. That is not permissible in law as explained by the Allahabad High Court in the aforementioned decisions which, this Court concurs with.

Conclusion

21. As already noted, the ITAT went merely on the basis of accountancy, overlooking the settled legal position that peak credit is not applicable where deposits remain unexplained under Section 68 of the Act. The question of law framed by this Court, is accordingly, answered in the negative i.e. in favour of the Revenue and against the Assessee. The impugned order of ITAT is, accordingly, set aside and the order of the AO is restored to file.

14. In the aforesaid decision, in D.K.Garg (supra), Hon'ble Delhi High Court has emphasised that for application of principle of peak credit, the

taxpayer should be able to show that the money has been transferred through banking channels from the bank account of creditors to the bank account of the taxpayer and that the money paid from the accounts of the taxpayer has returned to the bank accounts of the creditors. In the present case, as noted above though the assessee has claimed that the cash received from Maladeep Construction and was returned to the same entity through cheque, however, the proprietor of the said concern has given a contradictory statement on oath. As evident from the record, the statement made by the assessee is not supported by any evidence since the assessee could not produce any statement/affidavit of his childhood friend to support his claim. On the other hand, proprietor of Maladeep Construction has made a statement on oath that the money was advanced by the assessee, which was later on returned. We find from the said statement recorded on oath that the proprietor has also mentioned the dates and amounts on which the said money was advanced by the assessee and when the same was returned to assessee by Maladeep Construction. Further, we find that this part of the statement of proprietor of Maladeep Construction also tally with the bank statement of assessee's account. Thus, following the principle for application of peak credit as laid down by Hon'ble Delhi High Court in aforesaid decision, we are of the considered view that the assessee is entitled to benefit of peak credit only in respect of this transaction, which is mentioned in statement of proprietor of Maladeep Construction and which also tallies with assessee's

bank statement, since in respect of said transaction, linkage/chain of transaction through banking channel is evident and therefore, the assessing officer is directed to grant the benefit of peak credit to the assessee in respect of this transaction. In respect of other transactions in assessee's bank account, if the assessee is able to prove linkage/chain of transaction through banking channel then in respect of those transactions also, following the principle laid down by Hon'ble Delhi High Court in aforesaid decision, benefit of peak credit should be granted to the assessee. With the above directions, we remand the matter to the assessing officer for *de novo* adjudication. Further, assessee is directed to file necessary details in support of its claim of peak credit in respect of other transactions. We order accordingly. As a result, grounds no. 4 and 5 raised in assessee's appeal are allowed for statistical purpose.

15. The assessee vide application dated 09/04/2022, has also sought admission of following additional ground of appeal:

"7. On the facts and circumstance of instant case, the addition u/s. 68 to the tune of Rs. 18.51.435 is erroneous as far as corresponding refund of sums received for partly from whom funds were received and at the best commission income @ 0.15% can be assessed in light of decision of hon'ble Bombay High Court in case of CIT V/S. ALAG SECURITIES PVT. LTD. reported at [2020] 117 taxmann.com 292 (Bombay)."

16. The Hon'ble Supreme Court in NTPC Ltd vs CIT: 229 ITR 338 held that the Tribunal can consider a question of law arising from the facts which are on record in the assessment proceedings. We are of the

considered view that the aforesaid additional ground raised by the assessee cannot be admitted, in the present case, as facts for deciding the same are not available on record. It is pertinent to note that the Hon'ble jurisdictional High Court in CIT vs Alag Securities Ltd. [2020] 117 Taxmann.com 292 (Bombay) was dealing with the case wherein the taxpayer was admitted to be an accommodation entry provider and first appellate authority has treated 0.15% of the total deposits as income from commission. However, in the present case, the assessee has not admitted itself to be an accommodation entry provider and has claimed itself to be an employee working in finance company having income from salary in addition to having the distribution agency and the fact whether any commission income was earned by the assessee is also not on record. Further, even before the lower authorities assessee has not claimed to have earned commission income. Thus, the petition seeking admission of additional ground filed by the assessee is rejected.

17. From the perusal of profit and loss account of Rainbow Enterprises, forming part of the paper book, it is evident that the assessee was paid remuneration of Rs. 30,081 as partner and said amount was added as business income by the Assessing Officer. In view of the above, we do not find any infirmity in the impugned order passed by the learned CIT(A) upholding the aforesaid addition. As a result ground no. 3 raised in assessee's appeal is dismissed.

18. Ground no. 6 raised in assessee's appeal is pertaining to initiation of penalty proceedings, which is premature in nature and therefore is dismissed.

19. In the result, appeal by the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on 12/07/2022

Sd/-
PRAMOD KUMAR
VICE PRESIDENT

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 12/07/2022

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai