

**IN THE INCOME TAX APPELLATE TRIBUNAL
“RAJKOT” BENCH, RAJKOT**

[Conducted through E-Court at Ahmedabad]

**BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMEBR
& SHRI WASEEM AHMED, ACCOUNTANT MEMEBR**

आयकर अपील सं./I.T.A. No. 426/Rjt/2017
(निर्धारण वर्ष / Assessment Year : 2011-12)

Rajnikant Ghelabhai Vekaria 1-Parsana Society, Jungleshwar Road, Rajkot	बनाम/ Vs.	The I.T.O. Ward – 3(1)(1), Rajkot
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ABQPV4377C		
(Appellant)	..	(Respondent)

अपीलार्थी ओर से/Appellant by :	Written Submission
प्रत्यर्थी की ओर से / Respondent by :	Shri B. D. Gupta, Sr. DR

सुनवाई की तारीख / Date of Hearing	02/06/2022
घोषणा की तारीख /Date of Pronouncement	24/08/2022

ORDER

PER WASEEM AHMED - AM:

The appeal has been preferred by the assessee against the order of the Commissioner of Income Tax (Appeals)-3, Rajkot ('CIT(A)' in short) vide Appeal No. CIT(A)-3/A3/0912/14-15 dated 12.10.2017 arising in the assessment order dated 07.11.2014 passed by the Assessing Officer (AO) under s. 143(3) r.w.s. 147 of the Income Tax Act, 1961 (the Act) concerning AY. 2011-12.

2. The grounds of appeal raised by assessee read as under:

- "1. *The Ld. CIT(A) has erred in law and facts in confirming addition of Rs. 1,99,262/-. The addition needs reduction.*
2. *The Ld. CIT(A) has erred in law and facts in confirming addition of Rs. 1,99,262/- based on factual position which he described wrongly. The addition needs reduction.*
3. *The Ld. CIT(A) has erred in law and facts in confirming addition of Rs. 1,99,262/- erroneously applying provisions of section 69B which he described wrongly. The addition needs reduction*
4. *The Ld. CIT(A) has erred in law and facts in confirming addition of Rs. 1,99,262/- based on presumption and surmises and against the settled position. The addition needs reduction.*
5. *The Ld. CIT(A) has erred in law and facts in confirming addition of Rs. 1,99,262/- based on peak working instead of considering provisions of section 44AF. The addition needs reduction.*
6. *The Ld. CIT(A) has erred in law and facts in not granting deduction of interest expenditure of Rs. 77,664/-. The same needs to be allowed.*
7. *Taking into consideration the legal, statutory, factual and administrative aspects, no addition of an amount of Rs. 1,99,262/- ought to have been made as also expenditure of Rs. 77,664/- ought to have been allowed. The addition and disallowance needs deletion."*

3. The interconnected issue raised by the assessee is that the learned CIT(A) erred in confirming the addition of Rs. 1,99,262/- being peak credit of cash deposit and not allowing the adjustment of the interest expenses.

4. The assessee is an individual and filed her return of income for the year under consideration declaring an income of Rs. 55,360/- from salary, rent, and share of profit from the firm which was processed and accepted under section 143(1) of the Act. However, a notice under section 148 of the Act was issued for reopening of assessment for escapement of income on account of cash deposited in bank account held with ICICI Bank. Accordingly, the assessee filed return of income declaring income at Rs. 151,090/- in response to the notice issued under section 148 of the Act. Thus, the proceedings under section 147 of the Act were initiated. In the course of the proceeding, the assessee submitted that during the year it started business of imitation jewelry and Mangalsutra which were sold to the party based outside Gujarat. The proceeds of sale of

imitation Jewelry or Mangalsutra were deposited in the bank account, aggregating to Rs. 16,53,355/- only. However due to inadvertent mistake, the same was omitted to be incorporated in the return of income. Therefore, considering the small scale of business and fact that no books of account were maintained, a profit @ 5 to 8% of such deposits should be taken under section 44AF of the Act. The assessee in support his contention produced the evidences of cash deposit from different location.

4.1 However, the AO found that the assessee has produced the evidence to substantiate that the cash deposits were out of business of "Imitation Jewelry and Mangalsutra" and offered profit @ 5 to 8% of turnover. But the request of the assessee is not acceptable for the reason that the assessee made this offer only after the issuance of notice under section 148 of the Act. Thus, the AO treated the peak credit in the bank account of Rs. 1,99,262.00 as unexplained income of the assessee and added to the total income of the assessee.

4.2 The AO further observed that the assessee has shown remuneration from the firm namely M/s Jadeshwar Industries for an amount of Rs. 75,750.00 which was adjusted against the interest expenses of Rs. 77,664/- only. The AO held that the set-off of interest income (in negative) against the remuneration received from firm is not allowable. Therefore, the AO disallowed the same. Thus the AO in view of the above computed the income of the assessee as under:

(i)	<i>Remuneration from:</i>		
	<i>M/s. Jadeshwar Industries</i>	<i>Rs. 75,750/-</i>	
	<i>M/s. Jetum Auto Industries</i>	<i>Rs.51,500/-</i>	
(i)	<i>Interest on Capital from:</i>		
	<i>M/s. Jetum Auto Industries</i>	<i>Rs.5,575/-</i>	
	<i>Total</i>	<i>Rs.1,32,825/-</i>	<i>Rs.1,32,825/-</i>
<i>Add:</i>	<i>Addition as discussed in para 4 above</i>		<i>Rs.1,99,262/-</i>
	<i>Total Income</i>		<i>Rs.3,32,087/-</i>
<i>Less:</i>	<i>Deduction under chapter VIA</i>		<i>Rs. 42,073/-</i>
	<i>Total Assessed Income</i>		<i>Rs. 2,90,014/-</i>
	<i>Total assessed income rounded off</i>		<i>Rs.2,90,010/-</i>

5. On appeal by the assessee, the learned CIT(A) confirmed the order of the AO by observing as under:

"5.2 It is apparent from para 4 of the assessment order that the 3 bank a/c with ICIC bank had received the impugned cash deposits of more than Rs.10 lacs and AO had noted that these bank accounts and transactions therein have been recorded by appellant in his books of accounts reflected in return of income filed in response to notice u/s. 148. It is therefore apparent (after reading para 3 of the said order) that prior to issue of notice u/s. 148 these bank accounts were not disclosed by appellant to the department. It is also apparent that total cash deposits in these bank accounts are of Rs.16,53,355/-. The appellant has submitted before the AO that transactions in this bank a/c reflect affairs of his small business of Mangalsutra and imitation jewellery wherein cash were deposited at outstations by his customers to whom he has given his account numbers and cash withdrawals from said account has been utilized for making purchases towards making of Mangalsutra and imitation jewellery to be supplied to the customers at outstation. He had admitted that these business affairs remained to be disclosed to the department due to oversight and requested AO to estimate profit @5 to 8% of total cash deposits. He had also admitted of not maintaining any books of accounts. AO has significantly noted in para 4.2 of the order that appellant had submitted copies of supporting evidences regarding his claim that the cash deposits were made in bank accounts in respect of the transactions of business of imitation jewellery. The AO has not contradicted these evidences but has rejected the appellants plea (of estimating profit of this undeclared business) only on the ground that these transactions were not declared in the regular return and hence only peak credit balance as appearing in the above bank a/c will be treated as assessee's unexplained income. Also there is a significant finding in para 4.4 of the assessment order wherein it has been clearly noted that the AR of the appellant had agreed to the addition of the peak balance in the above bank a/c of Rs.1,99,262/- and the same was recorded in the order-sheet. After considering the facts there is no doubt that appellant has unequivocally admitted of using impugned bank accounts for his hitherto undisclosed bank transactions and appellant and AO had agreed to quantify undisclosed income arising out of this transactions at Rs.1,99,262/-. In such circumstances AR is not justified in insisting for re-estimation of profit on the basis of NP ratio of 5%. Peak of negative cash balance in any undeclared bank account is one of the trusted and accepted methods of determining the profit element of such undisclosed income and I do not see any reason to interfere with the action of AO. Hence the addition made by AO is confirmed.

5.3 In Ground 6 & 7 the appellant has sought to claim deduction out of the peak credit balance alleged interest expenses. This is totally incorrect demand and is against the spirit and theory of peak cash credit which gives consideration to all the cash withdrawals. Further no elaboration has been given to these alleged interest expenses i.e. whether it has been incurred in cash or through cheque. If these expenses have been incurred in cash then the peak balance will also get enhanced by same amount of expenses as the cash withdrawal which is available for cash deposits get reduced i.e. net effect will be neutralized. Similarly the new demand made by Ld. AR (which is not in grounds) of giving set off to the earlier years addition of peak balance is not supported by facts/computation from the appellant to show that it had any cash balance with him at the year end. Evidently this claim is also wrong. Thus in effect all the grounds are dismissed."

6. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

6.1 The learned AR before us filed the written submissions wherein it was contended that once the AO has admitted the fact in his assessment order that the assessee was engaged in the business of imitation of jewellery and the cash was deposited out of such business, then the question of applying the peak credit theory for determining the income does not arise. As such, the AO is under the obligation to work out the income from the business not disclosed in the income tax return based on certain percentage of profit.

6.2 The learned AR further contended that the AO has not pointed out in his assessment order under which provisions of the Income Tax Act, he has disallowed the said interest expenses against the remuneration received from the partnership firm. Thus, it was prayed by the learned AR that the assessee should be allowed the interest expense incurred on the capital against the income derived from the partnership firm.

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

7. We have heard the Id, DR and perused the materials available on record. There is no dispute to the fact that there was cash deposit in the bank account of the assessee which was out of the business receipts. We are holding so after making reference to the finding of the AO contained in the assessment order which is reproduced as under:

"Further, the assessee has produced evidence in support of his claim that the transactions as appearing in the above banks are from out of his imitation jewellery business and the assessee's request to consider net profit of 5% of the turnover is also not acceptable as the assessee has come forward to offer this income by filing return of income in response to notice u/s. 148 of the Act and the case was reopened u/s. 148 of the Act and accordingly it is decided to take peak credit balance as appearing in the bank account and added in to the income declared by the assessee."

7.1 Thus, in such facts and circumstances, we are of the view that percentage of profit should be applied to determine the income of the assessee out of such undisclosed income. In holding so, we draw support and guidance

from the judgment of the Hon'ble Gujarat High Court in the case of CIT vs. President Industries reported in 258 ITR 654 where it was directed to make the addition only to the extent of gross profit. The relevant extract of the order is reproduced 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.'

7.2 Before parting, it is important to highlight the fact that such unaccounted business requires the investments. However none of the authority below, has touched this aspect. Therefore, we do not find any reason to comment on this.

8. Now the next issue arises what rate of profit should be applied to determine the income on such unaccounted sales. For this purpose, we note that under the provisions of the Income Tax Act income on presumption basis at the rate of 5% has been provided under section 44 AF of the Act. Taking the leaf from such provision, we are of the view that justice will be served to the revenue as well as to the assessee if the amount of cash deposit in the bank is brought to tax at the rate of 5% of such cash deposits.

9. With respect to the finding of the learned CIT-A that the assessee has admitted to have applied the peak credit, we note that income of the assessee has to be determined as per the provisions of law. In other words, mere acceptance by the assessee for the addition, will not give authority to the revenue to calculate the income of the assessee accordingly. Thus we disagree with the finding of the learned CIT-A and direct the AO to determine income on estimated basis in the manner as discussed above.

10. With respect to the denial of adjustment of the interest expenses against the remuneration received from the partnership firm, we note that the AO has not brought any cogent material for denying such adjustment. Assuming the assessee has borrowed fund for making the investment in the partnership firm on which he is incurring interest expenses, then the same should be eligible for the adjustment against the taxable income derived from the partnership firm in the form of remuneration and the interest on the capital. It is for the reason that there is direct nexus between the interest expenses viz a viz taxable income from the partnership firm. In the absence of any cogent material brought on record by the AO, we set aside the finding of the learned CIT-A and direct the AO to allow the adjustment of interest expenses against the taxable income from the partnership firm. Hence the ground of appeal of the assessee is partly allowed.

11. In the result, the appeal of the assessee is partly allowed.

This Order pronounced in Open Court on 24/08/2022

Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER
Ahmedabad: Dated 24/08/2022

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

True Copy

S.K.SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

Deputy/Asstt. Registrar
ITAT, Rajkot