IN THE INCOME TAX APPELLATE TRIBUNAL
JABALPUR BENCH, JABALPUR

BEFORE SHRI SANJAY ARORA, HON'BLE ACCOUNTANT MEMBER &
SHRI MANOMOHAN DAS, HON'BLE JUDICIAL MEMBER

I.T.A. No. 105/JAB/2018
(Asst. Year: 2009-10)

Dy. CIT (Central), Jabalpur.	vs.	Naresh Burman, Katni [PAN : ATHPB 3212 F]
(Appellant)		(Respondent)

CO No. 13/JAB/2018
(Asst. Year: 2009-10)

Naresh Burman, Katni [PAN : ATHPB 3212 F]	vs.	Dy. CIT (Central), Jabalpur.
(Cross Objector)		(Respondent)

A

Revenue by : Shri Sanjay Kumar, CIT-DR
Assessee by : Shri Dhiraj Ghai, FCA

Date of hearing : 22/08/2022
Date of pronouncement : 25/08/2022

O R D E R

Per Bench:

This is an Appeal by the Revenue and a Cross Objection (CO) by the Assessee directed against the Order dated 12/02/2018 by the Commissioner of Income Tax (Appeals)-1, Jabalpur ('CIT(A)' for short), partly allowing the assessee's appeal contesting his assessment dated 16/12/2016 under section 144 read with section 147 of the Income Tax Act, 1961 ('the Act' hereinafter) for Assessment Year (AY) 2009-10.

2.1 The appeal raises two Grounds, which are as under:

'1. On the facts and in the circumstances of the case the ld. CIT (Appeals) erred in deleting the addition of Rs. 1,71,89,400/- made by AO on account of unexplained cash deposit in bank account without appreciating the fact that during the course of assessment proceedings the assessee failed to produce books of account and evidence of the source of cash deposit and other deposit.

2. On the facts and in the circumstances of the case the ld. CIT (Appeals) erred in deleting the addition of Rs. 64,93,024/- made by AO on account of presumptive taxation scheme u/s. 44AD at 8% on receipt of Rs. 8,11,62,800/-.'

The assessee's CO also raises two legal grounds, of which though only one survives; the first having been not pressed by Sh. Ghai, the learned counsel for the assessee, and which reads as under:

'2. Considering the fact that the order of Hon'ble ITAT Jabalpur Bench, Jabalpur in the case of Raga Finvest Ltd. has attained finality and the factual position of the case of the assessee is similar to that of Raga Finvest Ltd. hence the ld. CIT(A) was fully justified in following the decision of Hon'ble ITAT in the case of M/s. Raga Finvest Ltd. and deleting the addition of Rs. 1,71,89,400/- made by the ld. AO.'

2.2 At the very outset, it was submitted by Sh. Ghai that the facts and circumstances of the instant case are the same as that in *ITO v. Dassu Patel*, decided by the Tribunal (in ITA No. 95/Jab/2018 and CO 8/Jab/2018) on 29/04/2022. Copy of the said order, placed on record (PB pgs. 66-78), was then adverted to by him, which we find to be under similar facts and circumstances, also considering the decision in *Raga Finvest Ltd.*, also relied upon by the assessee per his CO in the instant case, though found it as distinguishable.

2.3 In the facts of that case as well, huge, unexplained cash and (local) cheque deposits were found in the assessee's bank account. And, similarly, while the cash deposits were added u/s. 69A, a presumptive rate of 8% was applied to the cheques issued, rejecting the assessee's explanation that the same stand received from customers to whom, in lieu thereof, outstation cheques in favour of the parties as notified by them, were issued, charging a sum of Rs. 150 to 200 per lac as commission. A bare reading of the assessment and the appellate order would show the facts and circumstances, as indeed the respective cases of the parties, the

assesee and the Revenue, to be the same in the instant case; the only difference being in that cash deposit/s for Rs. 6 lacs was found in that case (in another bank account), treated like-wise by the assessing and the first appellate authority, i.e., as the cash deposited in the regular account witnessing both debit (deposit) and credit (issue of cheque) entries.

2.4 We may at this stage reproduce the relevant part of the decision in *Dassu Patel* (supra), as under. Vide para 2 of the order, the Tribunal notes the facts as well as the respective cases of the parties. Paras 3.1 & 3.2 concern the assessee's legal ground, absent in the instant case:

'3.3 We may next take up the two additions being agitated by the Revenue, both of which have their genesis in the transactions reflected in the assessee's two bank accounts aforesaid (not on record). The additions by the AO are on the premise that the assessee has abysmally failed to substantiate his claim of being engaged in the cheque issuing business, i.e., on receipt of cash or local cheque, issuing outstation cheque in the case of the latter. The first is clearly laundering of money, a criminal offence under law. The second would also require a licence from the Reserve Bank of India (RBI), or at least being registered with it as a non-banking financial institution, so that the same is, again, illegal. Our purview in the instant proceedings, however, is to determine factually the income arising from these transactions, i.e., as per the provisions of the Act, as it is only the real income, subject to the provisions of the Act, that is liable to be assessed as income (*Poona Electric Supply Co. Ltd. v. CIT* [1965] 57 ITR 521 (SC)). The first question that therefore emerges is if the assessee is indeed engaged in the said two business or, put differently, the two limbs of the same business, broadly described as and claimed to be 'cheque issue business', even if illegal or constituting an offence under law. No evidence stands brought on record by the assessee toward the same, either at the assessment or at the first appellate stage, even as confirmed by the parties during hearing. *The ld. CIT(A) stating (at para 7.3.3 of his order) of his decision being based on the material evidences brought on record is, thus, a false statement.* There is in fact no reference in his order to any material or even a mention of what those material evidences are, much less exhibit consideration thereof and, as the law and the principle of natural justice require him to, allow an opportunity to the assessing authority to examine the same as well as to bring any material in rebuttal on record (rule 46A). In fact, the said material, where so, i.e., existent, would have impelled us to remit the matter back for following the procedure laid down under the law; r.46A being mandatory in nature. This, however, was only to take the argument to its logical end; we having already found as a fact, duly admitted by the assessee's counsel, Shri Ghai, during hearing, to no

such material having been furnished before the first appellate authority. Rather, Shri Ghai would justify the said non-furnishing on the basis of a time gap of eight years between the end of the relevant year and the assessment proceedings. It does not, however, lie in the mouth of the assessee, who has failed to even maintain the books of account, which the law requires him to, to state that he was unable to do so in view of the lapse of time; the reopening of assessment being even otherwise within the time limitation provided therefor under the Act. That is, the said plea is not maintainable, both on facts and in law. In fact, the AO correctly observes that even in a 'no accounts' case, the assessee is supposed to furnish evidences in support of his claim/s. A finding of fact by the assessing or an appellate authority could, after all, only be on the basis of material on record (refer, inter alia, *CIT v. Radha Kishan Nandlal* [1975] 99 ITR 143 (SC)). Further, as observed by the Bench during hearing, all that the assessee was required to do, in substantiating his claim/s, was to produce some customers to whom the cheques had been issued, borne out by the bank statements inasmuch as, as per the assessee, it is they who had deposited cash (or cheque) in his bank account in lieu of a cheque (or, as the case may be, an outstation cheque). Even if the party depositing the cheque, and the outstation party to whom the corresponding cheque is issued, are, as would appear, different, as it is only that which would provide a basis or a rationale to the transaction, both the parties are known and, thus, available for confirmation. A one-to-one correlation between the debits and credits, with the two parties having trade relations, would at once establish that the assessee is not the beneficiary of the sums deposited in his bank accounts. The same would also exhibit if the commission stands paid in his bank accounts, or outside it. For example, a cash deposit of Rs. 1,00,200, as against a remittance of Rs. 1,00,000, would clearly exhibit both, the extent of commission as well as prove the transaction to be a financial accommodation transaction. No such attempt has been made by the assessee at any stage, whose case remains, thus, wholly unsubstantiated, accepted by the ld. CIT(A) without any evidence whatsoever; rather, claiming that the AO had 'accepted' the assessee's claim as to 'cheque issue business', as well as income therefrom. He has, in fact, clubbed two separate additions of Rs. 152.19 lacs and Rs. 6 lacs, *qua* cash deposits in bank account xxxx1088 (# 1) and bank account xxxx3970 (# 2) respectively, even as observed by the Bench during hearing, without appreciating that while there are debit and credit entries and, further, in nearly the same sum, in bank account # 1 (so that apparently the commission amount is received in cash and not in account), indicating payment in respect of all receipts, cash or cheque, therein, while no such payment is stated in respect of deposits in bank account # 2, nor has any been brought on record or even claimed before us. Couple this with the absence of any material evidence produced before the ld. CIT(A), stated by him to have been, without specifying those materials or, assuming so, consideration thereof, and it is, to our mind, a classical case of non-application of mind by the first appellate authority.

3.4 Continuing further, the question that still survives is if the assessment as made can be upheld? In our clear view, the answer is 'No'. The reason is simple. The starting point of the investigation process is the search on 21/03/2016 on three individuals who had admitted running a racket of providing financial accommodation entries at a commission @ 0.15% to 0.2%. The assessee is a part of this racket. *If that be true, how can the sum deposited in the bank accounts be regarded as that of the account holders, i.e., the persons doing the said business*? Yes, we are conscious that the investigation report clearly states of this being done through 'layering'. But, then, there has been no further investigation by the Revenue in the matter. Sure, we say so only on the basis of the material on record, and it may well be that there has been an omission in bringing it on record, but there is even no whisper of any further investigation. This perhaps also explains as to why the assessee did not provide the names and addresses of his customers, who are stated to be the beneficiaries of the amounts received in the assessee's bank accounts, explaining thus the nature and source of the credits (receipts or deposits) in his bank accounts, as he is obliged to under law (s. 69A). Further, why should, in that case, the assessee have transactions with the persons searched, as the investigation of these accounts disclosed, and which in fact led to the issue of notice u/s. 148(1) in his case? Surely, there are gaps in the factual framework, as suggested by the explanation furnished and the material found and analysed by the Revenue (through the Investigation Wing), and which remain unaddressed. Neither the assessee has stated the truth nor has the Revenue made any further investigation in the matter. Following the money trail would have surely led to a better clarity on facts. However, the very fact of it being a part of such racket implies it to be an organized business. As such, it caters to some persons, even if unidentified, outside the assessee. A business implies an exchange. The two facts, i.e., the money laundering and financial accommodation business, on one hand, and the money in his bank account/s belonging entirely to the assessee, on the other, are inconsistent with each other, so that the latter, an inferential fact, which is under dispute, cannot hold. Even if therefore the assessee is unable to establish the source of the moneys deposited in his bank accounts, given the fact of such business being undertaken, only the peak balance in his bank accounts could be added as unexplained money u/s. 69/69A. The second aspect of the matter would be the income earned through such business, which the assessee admits at Rs. 1.51 lacs, albeit, *sans* any evidence.

3.5 The only material on record in this respect, i.e., income arising from business, is the stated consideration of 0.15% - 0.2% on turnover, also admitted by the assessee. It is inconceivable though that such a meagre commission is charged for assuming such a high risk; the illegality factor alone (i.e., even ignoring the service component of the activity undertaken, which involves transmission of liquid cash, which itself involves high risk) scaling up the risk factor inordinately, while, as simple economic theory and plain common sense advocate, there is a positive correlation between the risk & return. Further, it also doesn't explain cash

deposit of Rs. 6 lacs in Bank Account # 2, against which there are, as afore-stated, no corresponding debits, i.e., on the basis of the material on record, including the explanation furnished. The peak balance of the two bank accounts for the relevant year is not on record. Also, we are conscious that it may be that there are business transactions subsequent to the date of the peak balance/s, so that the income attributable to those transactions, though not manifesting in the form of bank balance/s (or, more aptly, a higher bank balance/s), would warrant being assessed as income, i.e., in addition to the peak balance/s. We are also, in view of the unsatisfactory factual determination (for which it is the assessee, being in the know of his financial affairs and obliged by law to explain the same, who, having failed to, is principally responsible), and the long period that has since lapsed, disinclined to restore the matter back, and consider it proper to, under the given facts and circumstances, adjudicate the matter on the basis of the material on record. In our considered view, the assessee's income for the relevant year shall comprise following:

a) the excess of the aggregate credits over aggregate debits for the year in bank account # 1, i.e., Rs. 45,200; and

b) the unexplained cash deposit of Rs. 6 lacs in bank account # 2.

The assessee shall thus stand to be assessed for a total income of Rs. 6,45,200, as business income, as against the returned income of Rs.1,51,000. This is as there is nothing on record to suggest the assessee, who did not file any return u/s. 139, but only (on 18/11/2016) after being served the notice u/s. 148(1) on 02/04/2016, carrying on any other business or vocation during the year.'

The reliance by the assessee on the decision in *Raga Finvest Ltd*. (ITA Nos. 256-259/Jab/2013 & 218/Jab/2015, dated 31/8/2016) and *Rakesh Yadav* stands discussed by the Tribunal at paras 3.6 & 3.7 of it's order, with para 3.8 noting the assessee's CO (in that case) to be only supportive of the impugned order.

2.5 The ld. CIT-DR was accordingly asked by the Bench to meet the assessee's reliance on *Dassu Patel* (supra), as, in its absence; it apparently covering the assessee's case, would oblige us to follow the same. To no satisfactory reply. We say so as his objection thereto, i.e., the assessee's inability to, despite abundant opportunity, satisfactorily explain the source of the cash deposited in his bank account, justifying the addition in its respect on that basis, since deleted – which is being contested by the Revenue, stands already considered by the Tribunal in

Dassu Patel (supra), holding it to be of no avail as far as the Revenue's case is concerned. As explained by it, the said deposits could not, in the given facts and circumstances of the case, be regarded as belonging to the assessee, which is the premise of ss. 68/69/69A, but to the various customers who were, in lieu thereof, issued cheques in favour of different persons, and who were thus the beneficiary/s of the said amount/s and, in any case, the persons in whose favour the cheques were issued. We therefore find no reason to treat the cash deposit of Rs. 171.894 lacs in assessee's bank account during the year, added u/s. 69A, as any differently from the cheque deposits of Rs. 811.628 lacs in the said account, and which sum has not been similarly added u/s. 69A, even as the assessee's explanation for both of them is the same.

3.1 We, in view of the foregoing, hold as under:

a). the cash deposit of Rs. 171.89 lacs shall, together with cheque deposit of the Rs. 811.63 lacs, cannot be in the fact and circumstances of the case regarded as the assessee's own money;

b). the source of income for the assessee would be the commission at the rate 0.175 % on the cheques issued (at nearly Rs. 10 cr.) during the year, i.e., at Rs. 1.75 lacs and, accordingly, assessable as business income; and

c). no case for telescoping having been made out by the assessee, the excess deposit of Rs. 1,14,200 (i.e., Rs. 983.52 lacs – Rs. 982.38 lacs) as the assseesse's deemed income u/s. 69A.

3.2 We are conscious that no separate addition for Rs. 1.75 lacs; the corresponding figure of commission in *Dassu Patel* (supra) being Rs. 2.51 lacs, was confirmed by the Tribunal in that case, even as it noted a complete absence of any evidence toward expenditure being claimed there-against (rs. 1 lac), as is the case in the instant case (at Rs. 0.70 lacs). This is for the reason of the Tribunal finding the assessee to have collected commission in cash, with another bank account, with unexplained cash deposit at rs. 6 lacs, absent in the instant case, having been found, and which sum was confirmed for addition in full.

3.3 We decide accordingly.

4. In the result the assessee's CO is dismissed and Revenue's appeal is partly allowed.

Order pronounced in open Court on August 25, 2022

Sd/-	Sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Dated: 25/08/2022

Copy to:

1. The Appellant: Deputy CIT(Central), Jabalpur.
2. The Respondent: Shri Naresh Burman, Opp. Dr. Mangat Ram Eye Hospital, Nai Basti, Jai Prakash Ward, Katni, M.P.
3. Income Tax Officer –Ward -1 Katni
4. The CIT(Appeals)-1 Jabalpur
5. The CIT-DR, ITAT, Jabalpur.
6. Guard File

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