

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
" SMC" BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER

Sl. No(s)	ITA No.	Asset. Year(s)	Appeal(s) by	
			Appellant	Respondent
1.	No.1172/Ahd/2015	2006-07	Sureshkumar Mafatlal Shah, Navkar Puvtvado, Nr. Jain Temple, Unjha-384170 PAN: BGKPS5362N	Income Tax officer, Ward-2, Patan.
2.	No.1173/Ahd/2015	2006-07	Hiteshkumar Sureshkumar Shah, Navkar Puvtvado, Nr. Jain Temple, Unjha-384170 PAN: BGKPS5460F	Income Tax officer, Ward-2, Patan.
3.	No.1174/Ahd/2015	2006-07	Jigar Sureshkumar Shah, Navkar Puvtvado, Nr. Jain Temple, Unjha-384170 PAN: BGKPS5457A	Income Tax officer, Ward-2, Patan.

(Applicant)	(Respondent)
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Assessee by :	Shri Hardik Vora, A.R
Revenue by :	Shri Atul Pandey, Sr.D.R

सुनवाई की तारीख / **Date of Hearing** : **28/09/2022**
घोषणा की तारीख / **Date of Pronouncement**: **12/10/2022**

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned three appeals have been filed at the instance of different Assessee against the separate orders of the Learned Commissioner of Income Tax(Appeals), Gandhinagar, Ahmedabad arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2006-07.

ITA No. 1172/Ahd/2015 for A.Y.2006-07, in the case of Suresh Kumar Mafatlal Shah

2. The assessee has raised the following grounds of appeal.

1. *Learned CIT9A) had erred in law and facts in confirming the addition of Rs.31,68,072/- made by AO in respect of cash deposits in bank accounts.*
2. *Learned CIT(A) had further erred in law by not considering the facts of the case of appellant and in concluding that appellant failed to explain source of cash deposit in bank account.*
3. *The appellant crave leave to add, amend, alter or delete any of above grounds of appeal.*

2.1 The assessee has raised the additional grounds of appeal:

1. *That on facts and circumstances of the case in law, Ld.CIT(A) erred in sustaining the reopening action of Ld.AO u/s.148 made in violation of mandatory jurisdictional conditions stipulated under the act.*
2. *That on facts and circumstances of the case and in law, Ld.CIT(A) erred in sustaining the reopening action of Ld.AO u/s.148 where reasons recorded is totally silent and mere cash deposit is treated to be equivalent to income escaping assessment on the basis of AIR information only.*
3. *Ld.CIT(A) erred in sustaining the addition made by AO without considering the facts that impugned order passed without material on records.*

3. The first issue raised by the assessee is that the Ld.CIT(A) erred in confirming the addition made by the AO for Rs.31,68,072/- on account of cash deposit in the bank account.
4. The fact in brief are that the assessee in the present case is an individual and filed the return of income declaring total income at Rs. 15,106/- only in response to the notice issued u/s 148 of the Act. The impugned amount of income was shown as commission income received by him in connection with the public issue work.
5. The AO during the Assessment proceedings found that the assessee has made cash deposit of Rs. 33,37,062/- in his bank account with Kotak Mahindra Bank. On question by the AO about the source of cash deposit the assessee failed to make any satisfactory reply. Therefore, the AO treated the sum of Rs. 31,68,062/-, after adjusting the cash withdrawal of Rs. 1,59,000/-, as unaccounted cash credit u/s 68 of the Act, and added to the total income of the Assessee.
6. Aggrieved assessee preferred an appeal before the Ld. CIT(A). The assessee before the Ld. CIT(A) submitted that he has received cash from 14 persons for making investments in Public Issues. The assessee in support of his contention has filed the copies of the affidavit. As per the assessee, the cash was received from these parties which was deposited in the bank account and utilized for making investments in the initial public offer.
7. Subsequently, in the event, the shares were not allotted to the assessee, the amount used return back in the bank account which was withdrawn to make the payments to the so called parties. The assessee further submitted that in this process he has earned commission income of Rs.15,106/- only which was duly disclosed in the income tax return.

8. However, the Ld.CIT (A), was not satisfied with the submission of the assessee and therefore, confirmed the order of the AO by observing as under:

On careful consideration of entire facts, explanation provided by appellant cannot be accepted for following reasons.

- (i) *During the course of assessment proceedings, appellant vide order sheet entry dated 15/10/2013 was asked to furnish details of confirmation along with name & address, PAN and source of income of the persons from whom cash was received for deposit in bank for application of IPO. Further, ample opportunities were given by AO to appellant to explain source of cash deposit but appellant has failed to explain such source. Thus, argument of appellant that no sufficient opportunity was provided to explain source of such cash deposit is rejected.*
- (ii) *Appellant has contended that it has submitted profit & loss account, balance sheet, copy of ledger of bank account, copy of bank statement along with return of income. It is pertinent to note that had appellant maintained annual accounts like P&L account and balance sheet, there is no reason why appellant cannot establish source of cash deposit in bank account or details of persons from whom cash was received for deposit in bank for application of IPO. The appellant during the course of assessment proceedings never contended that cash were received from "Share party" formed by H persons including appellant being member of such AOP but created whole story in appellate proceeding which is nothing but afterthought story created to treat unexplained cash deposit as explained cash deposit.*
- (iii) *It is pertinent to note that so called "share party" AOP It is pertinent to note that so called "share party" AOP is not assessed to tax nor filing any Return of Income **hence** veracity of balance-sheet, cash-book, bank book of such "Share party" cannot be accepted to be genuine. The appellant contended that three bank accounts of individual persons were managed by "Share party" cannot be accepted because if such AOP was independent entity, it could have easily opened bank account in its AOP name. Thus, balance-sheet, cash book or bank book prepared for so called AOP cannot be held as genuine.*
- (iv) *The appellant has given **cash** book of "Share party" AOP wherein cash were received from members **of sairi** AOP and from such cash balance, cash were given to three members of AOP including AOP on various dates. The appellant has not explained any source of income of members of AOP nor submitted copies of return of income filed by such members to prove genuineness of such cash transactions. It is pertinent to note that none of the members have incorporated above cash transactions in their Return of Income nor "Share-Party" AOP is filing any income tax return hence source of cash receipt and withdrawal in the hands of said "Share Party" is non-genuine and appellant's explanation regarding cash receipt from such "Share Party" cannot be accepted.*
- (v) *In the present case, AO even remand report asked appellant to produce all 14 members of AOP to establish genuineness of the transactions but appellant has failed to produce such parties and merely Affidavits are filed. The said explanation of appellant cannot be accepted as appellant has never discharged his onus casted for giving explanation regarding cash deposited in his bank account with cogent evidences. The appellant has created an eye wash theory to hide undisclosed income of him by creating "Share Party AOP" which never existed in eyes of law.*
- (vi) *The appellant has also contended that "Share Party AOP" has given cash to members of AOP including appellant and such cash were deposited in bank account*

to obtain DD from Bank and same were once again given bank to AOP for making investment in , IPO. Even said AOP has passed accounting entry for public issue application in its so called accounts. It is pertinent to note that if so called "Share party" was in fact in existence and created for the purpose of application for public issue, it should have directly obtained DD from bank account in lieu of cash available with it which was claimed to have been received from its members and there was no need for depositing cash or giving cash to three parties including appellant just for obtaining DD and even no need to give any commission for application of IPO. This itself establishes that appellant has created a circular route of cash deposit by creating an afterthought story of AOP but that too without any facts to explain his cash deposit. Here, said AOP has even not offered to tax, any gain in application of IPO hence theory of obtaining DD for making application of cheque is rejected.

It is pertinent to note that bank statement of Kotak Mahindra Bank as submitted by appellant clearly establishes that appellant has made cash deposit and out of such balance, it has issued various cheques directly for share application and no DDS as claimed by appellant are issued by bank. The bank statement clearly shown various serial numbered cheques issued by appellant in chronological order and same cannot be the case of DD as claimed by appellant.

Considering the facts discussed herein above, appellant has failed to explain genuine source of cash deposited in his bank account with cogent evidences.

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

10. The Ld. AR before us filed a paper book running from pages 1 to 99 and contended the cash was deposited in the bank account out of the money received from 14 parties for making the investments in the initial public offer.

10.1 The Ld. AR further submitted that none of the parties was having income over and above taxable limit and therefore they did not file any income tax return. It was also submitted that all the parties are small business man and therefore they were not maintaining any bank account as well as any other books of accounts. Accordingly, the Ld. AR submitted that no addition is warranted in the given facts and circumstances.

11. On the other hand, the Ld. DR vehemently supported the order of the authorities below.

12. I have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, I find that there was the deposit of cash in the bank account of the assessee amounting to Rs. 33,27,062/-. It was explained by the assessee that there were 14 parties from whom he has the received cash which was utilized in making the deposit in the bank account. According to the assessee, the amount of cash was given by them to make the investment in the shares. The assessee to justify his stand has furnished the affidavit from the parties. However, the AO and the learned CIT-A were not satisfied with the contention of the assessee and therefore the AO confirmed the addition under section 69 of the Act which was subsequently confirmed by the learned CIT-A.

12.1 Admittedly, the primary onus lies upon the assessee to furnish the details in support of his contention. The details should be verifiable and based on the cogent materials and reasons. As such, there has to be live link between the subject matter of dispute and the documentary evidence filed by the assessee. In the present case, there was only the affidavit filed by the assessee of different parties wherein it was stated that the amount of cash was provided by them to the assessee for making the investment in the shares. Besides the affidavit, there was no other documentary evidence filed by the assessing such as the income tax return of those parties, identification proof or any other documentary evidences.

12.2 The 1st controversy arises whether assessee has discharged his onus by furnishing the evidences of the parties to justify the source of cash deposited in the bank account in the given facts and circumstances. The parties who have given the affidavits are the witnesses of the assessee to justify the source of cash. Therefore, it was the primary duty of the assessee to produce these parties before the income tax authorities to establish the genuineness of the transaction. But the assessee failed to do so. In other words, it appears that the assessee failed to discharge the

onus. However, we note that the AO in his remand report has clearly observed as under:

Since the assessee has expressed his inability to produce these 14 persons, this office has no other option but to submit the remand report on the materials available on record.

12.3 From the above, I note that the assessee on one hand is filing affidavits in support of his case but on the other hand he is expressing his inability to produce the parties who have given the affidavits. Thus, there appears contradictory stand of the assessee and therefore it is difficult to accept the affidavits without the verification of the contents appearing there in. However, I note that the statute to counter such problems has given power to the income tax authorities to dig out the truth under the provisions of section 133(6) and 131 of the Act. However I find that these powers have not been exercised by the income tax authorities. To my understanding, the income tax authorities should not sit silent and wait for the evidence from the assessee. If the assessee was unable to produce the persons, then the income tax authorities should exercise their powers and carry out the necessary verification before framing the assessment particularly in a situation where the assessee expresses his inability. To my mind, once the assessee expresses his inability to bring any third-party evidence for any reason, then the onus is upon the revenue to exercise the powers granted under section 133(6)/131 of the Act. However, I find that such power has not been exercised by the income tax authorities before disapproving the affidavits filed by the assessee. Accordingly, I am of the view that the contention of the assessee cannot be rejected based on which the source of cash was justified.

12.4 Furthermore, I note that the assessee claimed to have received only the meagre amount of cash from the parties which was deposited in the bank account and further withdrawn from the bank account. All these facts can be verified from the details available on record. Thus in such facts and circumstances, it is quite possible that the parties have given cash to the assessee who were not filing any income tax return as well as not maintaining the books of accounts. It is also evident

from the affidavit that most of the parties in the statement have admitted to have negligible amount of income by way of commission from the cumin farmers. Thus, in such fact and circumstances I am not inclined to uphold the finding of the authorities below. Accordingly, I set aside the finding of the learned CIT-A, and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

12.5 As I have decided the issue on merit in favour of the assessee, I am not inclined to adjudicate the issue raised by the assessee on the validity of the assessment framed under section 147 read with section 143(3) of the Act. Accordingly, I dismiss the same as infructuous.

12.6 In the result the appeal filed by the assessee is **partly allowed**.

- **Coming to ITA No. 1173/AHD/2015, A.Y. 2006-07 an appeal by the assessee in the case of Hitesh Kumar S. Shah**

13. At the outset, I note that issue raised by the assessee in his ground of appeal is similar to the grounds raised in the case of Shri Suresh kumar M. Shah in ITA No. 1172/Ahd/2015 for A.Y. 2006-07. Therefore, the findings given in ITA No. 1172/AHD2015 for AY 2006-07 shall also be applicable to the assessee's appeal in ITA No. 1173/Ahd/2015 for AY 2006-07. The appeal of the assessee Shri Sureshkumar M. Shah has been decided by us vide paragraph Nos. 12 to 12.6 of this order partly in favour of the assessee. The learned AR and the DR also agreed that whatever will be the findings for issue raised in ITA No. 1172/Ahd/2015 shall also be applied to the present appeal bearing ITA No. 1173/Ahd/2015 for AY 2006-07. Hence, the grounds of appeal filed by the assessee is partly allowed.

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

- **Coming to ITA No. 1174/AHD/2015, A.Y. 2006-07 an appeal by the assessee in the case of Shri Jigar S. Shah**

14. At the outset, I note that issue raised by the assessee in his ground of appeal is similar to the grounds raised in the case of Shri Sureshkumar M. Shah in ITA No. 1172/Ahd/2015 for AY 2006-07. Therefore, the findings given in ITA No. 1172/AHD2015 for AY 2006-07 shall also be applicable for the assessee's appeal in ITA No. 1173/Ahd/2015 for A.Y. 2006-07. The appeal of the assessee, Shri Sureshkumar M. Shah has been decided by us vide paragraph Nos. 12 to 12.6 of this order partly in favour of the assessee. The learned AR and the DR also agreed that whatever will be the findings for issue raised in ITA No. 1172/Ahd/2015 shall also be applied to the present appeal bearing ITA No. 1174/Ahd/2015 for A.Y. 2006-07. Hence, the grounds of appeal filed by the assessee is partly allowed.

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

15. In the combined results, the appeals filed by the different assessee are **partly allowed.**

Order pronounced in the Court on 12/10/2022 at Ahmedabad.

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 12/10/2022
Manish