

आयकर अपीलीय अधिकरण “बी” न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, PUNE

BEFORE SHRI S.S.GODARA, JM
AND SHRI DR. DIPAK P. RIPOTE, AM

आयकर अपील सं./ ITA No.221/PUN/2018
निर्धारण वर्ष / Assessment Year : 2012-13

Shri Roashan Vishnu Pathare,
L/H of Vishnu Tukaram Pathare,
3, Patharemala,
Near Tuljabhavani Mandir,
Charholi Budruk,
Tal - Haveli,
Pune -412 105

PAN : ATCPP3031F

.....अपीलार्थी / Appellant

बनाम / V/s.

ITO, Ward 4(4), Pune

.....प्रत्यर्थी / Respondent

Assessee by : Shri Pramod Shingte
Revenue by : Shri M.G.Jasnani

सुनवाई की तारीख / Date of Hearing : 12.10.2022

घोषणा की तारीख / Date of Pronouncement : 17.11.2022

आदेश / ORDER

PER S. S. GODARA, JM :

1. This assessee's appeal for AY 2012-13 arises against the CIT(A)-2, Pune's order dated 17/07/2017 passed in case No. PN/CIT(A)-2/ITO Wd-4(4)/PN/537 (New) & 145 (Old)/2015-16, involving proceedings u/s 143(3) of the Income Tax Act, 1961; in short "the Act".

Heard both the parties. Case file perused

2. Coming to Assessee's first and foremost substantive ground raised in the instant appeal challenges correctness of both the lower authorities action disallowing section 54F deduction claim of Rs.60,18,750/- in the course of assessment dated 31.03.2015 as upheld in the CIT(A)'s order, it emerges during the course of hearing on perusal of not only assessment discussions but also from the learned CIT(A)'s findings that he has fails to prove that he has reinvested the corresponding capital gain derived by original assessee/ father Shri Vishnu Tukaram Pathare. This is further coupled with the fact that the assessee had additional evidence/submissions before the CIT(A) who had sought for a remand report as well. It is in this report dated 03.02.2017 that Assessing Officer could not verify the assessee having re-invested the impugned long term capital gains in his name. We rather note that the alleged newly constructed house property was found belonging to this appellant's deceased grandfather Lt. Tukaram Govind Pathare. We therefore quote hon'ble jurisdictional high court's decision in Prakash V/s. ITO 2009 312 ITR 40 (Bom.) to affirmed the impugned disallowance in principle.

4. The fact also remains that we have prime facie notice assessee have executed his corresponding sale deed (registered documents) on 24.12.2010 whether as the Assessing Officer's remand report stated the same have been acted upon on 30.04.2011 (in the relevant previous year). We are therefore of the view that the instant clinching issue regarding the correct sale deed

viz-a-viz taxability of consequential capital gain requires afresh adjudication at the CIT(A)'s end. We therefore restore the instant former issue back to the CIT(A) for his appropriate adjudication as per law within three effective opportunities to this limited extent. Ordered accordingly. The assessee's instant former subsequent ground is the partly accepted for statistical purposes.

5. Next comes the latter issue of unexplained cash credit amount 12,05,000/- lakhs wherein the assessee has not been able to explain the source and genuineness. The CIT(A)'s detailed discussion affirming this impugned addition reads as follows :

“5. In Ground No.2, the appellant has challenged the addition made u/s. 68 at Rs. 12,51,000/-. The facts in brief are that as per the ITS details received by the AO, it was noticed that the assessee had deposited cash of Rs. 12,51,000 on 03.05.2011 in Anna Saheb Magar Sahkari Bank Maryadit, Bhosari. In the course of the assessment proceedings, when the AO confronted about the source of the deposits, it was just submitted that the same is out of joint income. However, no supporting details were filed.

5.1 *In the course of appellant proceedings, it was submitted as under :*

During the F.Y.2011-12, your appellant has deposited a sum of Rs.12,50,000.00 in Annasaheb Magar Sahakari Bank Ltd. It is your appellant contention that amount deposited is out of sale of Old Wooden Items and sale of live stock. Accordingly your appellant prays for deleting the addition arising in Ground no. 2

Ground 2:

"On the facts and in circumstances of the cases and in law the learned Assessing Officer erred in making addition on account of unexpired cash credit u/s 68 of the income Tax Act 1961, a sum of Rs. 12,51,000/- on account of cash deposited in bank, by disregarding appellants contention in this regards."

In Para 9 of the Assessment Order, Learned Assessing Officer observed that assessee has deposited a sum of Rs.12,50,000.00/- in bank called Annasaheb Magar Sahakari Bank Ltd. During the course of hearing the when appellant was confronted he tried to explain the details but being person without any background of law could not explain these cash deposits. We enclosed on page no 44 to 52, a details of receipts of these amount and your appellant's claims that these deposits are out of sale of old wooden material extracted from old house which was demolished and new house has been constructed. Similarly the money was also received on account of sale of live stock in possession of the appellant and his family members. During the course of the assessment these details were not submitted. Therefore, it is most humbly prays before your honors to admit the same as additional evidence under rule 46A of Income Tax Rules 1961 and obliged.

In view of this submission, your appellants prays for getting the credit of the said amount and delete the additions.

Conclusion:

In view of above submission the appeal of the appellant may kindly be allowed and obliged”.

5.2 Since along with the written submission, some additional documents were filed, therefore, the AO was required to give his comments on the same. The AO in the remand report dated 03.02.2017 mentioned as under:

Issue of cash credit u/s. 68 : Rs. 12,51,000/-:

On the issue of cash deposits of Rs. 12,51,000/- in Anna Saheb Magar Sahakari Bank Ltd, as per additional evidences, the assessee contended that amount deposited is out of sale of old wooden items and sale of live stock.

During the assessment proceedings, the assessee has stated in his submissions dated 24-3-2015 (copy enclosed) that the deposits have been made out of the joint income. However, no supporting evidence were produced. Therefore the AO made addition of Rs. 12,51,000/- by treating unexplained cash credit u/s. 68 of the I. T. Act.

4. *Now, the assessee has filed additional evidence and produce receipts of cash received to the assessee on account of sale of old wooden items and sale of live stock. The receipts seems to be fabricated.*

5.3 *The copy of the aforesaid report of the AO was sent to the appellant vide this office letter dated 23.05.2017 to submit his counter Comment, if any. The hearing was given on 13.06.2017 but none appeared on that date neither any details have been filed till date. Accordingly, the issue is being dealt with on the basis of the details available on record*

5.4 As apparent from the facts of the case, the appellant admittedly made cash deposit of Rs. 12,51,000/- on a single day i.e on 03.05.2011. Considering the meagre salary income of the appellant, the cash deposit is highly disproportionate. In the course of assessment proceedings, general submission was made that the same is out of the joint income without furnishing any corroborative evidence. During the appellate proceedings, new argument was taken stating that the same is out of sale of wooden items and live stock. This plea is nothing but an afterthought. Even if for a moment, this plea of the appellant is considered then it is not known as to why the same was not disclosed in the return of income. I therefore hold that the AO was perfectly justified in making addition of Rs. 12,51,000/- as unexplained cash deposit. However, the Section invoked by him is Section 68 which is not proper and the correct provision in this case to be invoked is Section 69A. The reason being is that Section 69A of the IT Act deals with unexplained money and the same reads as under:

“Where in any financial year, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or other valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year.”

5.5 Thus, on a plain reading of the provision of Section 69A, it is clear that for invoking the provision of Section 69A, it is necessary

that there is unexplained money. The appellant in the present case has unexplained money in the form of cash deposits in his bank account, the sources of which have not been explained. It is further emphasized that just by reference to wrong provision of law, the same would not vitiate the entire proceeding. This proposition has been held by the Hon'ble M.P.High Court in the case of Nandlal Jaiswal and Co. vs. CIT 232 ITR 540.

5.6 *In a recent decision, Hon'ble ITAT Bengaluru bench in the case of **DCIT vs. K.M.Nagaraj 82 taxmann.com 170 (Bengaluru Trib)** has also held identical opinion and has opined that reference to wrong Section would not invalidate the entire proceeding. In view of these decisions as well as facts of the case, it is held that the correct provision to be invoked in the case of the appellant is Section 69A of the IT Act and therefore the AO is directed to invoke Section 69A of the IT Act while making the addition.*

5.7 *In the light of aforesaid discussion on the facts of the case as well as decisions cited, it is held that amount of cash deposit of Rs. 12,51,000/- represents unexplained money of the appellant and the same has been rightly added by the AO to the total income. However, the AO is directed to invoke Section 69A in place of Section 68 of the IT Act. Subject to this, the order of the AO is confirmed. Ground No. 2 is also dismissed.”*

6. The very factual position continuous before us as well since the assessee has not been able to explain source of the impugned cash deposits. We thus upheld the impugned addition in light of CIT(A)'s detailed discussion.

Delay of 85 days in filing of the instant appeal stated to be attributable to communication gaps at various levels is condoned in the larger interest of the justice.

7. This assessee's appeal is partly allowed for statistical purposes in above terms.

Order pronounced in the Open Court on this 17th day of November, 2022.

Sd/-

(DR.DIPAK P.RIPOTE)

लेखा सदस्य/ **ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 17th November, 2022.

Ashwini

Sd/-

(S.S. GODARA)

न्यायिक सदस्य/**JUDICIAL MEMBER**

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-2, Pune.
4. The Pr.CIT-2, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

ITA No.221/PUN/2018
A.Y. : 2012-13
Shri Roashan Vishnu Pathare,

S.No.	Details	Date	Initials
1	Draft dictated on	13.10.2022	
2	Draft placed before author	14.11.2022	
3	Draft proposed & placed before the Second Member		
4	Draft discussed/approved by Second Member		
5	Approved Draft comes to the Sr. PS/PS		
6	Kept for pronouncement on		
7	Date of uploading of Order		
8	File sent to Bench Clerk		
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R.		
11	Date of Dispatch of order		