

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणेमें।
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCHES "B" :: PUNE

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No.369/PUN/2020
निर्धारण वर्ष / Assessment Year : 2008-09

Smt.Smita Balasaheb Madhwai, 40, Sathe Baug, M.G.Road, Nashik – 422001. PAN: AJRPM 6832 E	V s	The Income Tax Officer, Ward-1(4).
Appellant/ Assessee		Respondent / Revenue

Assessee by	None.
Revenue by	Shri M.G.Jasnani – DR
Date of hearing	19/12/2022
Date of pronouncement	23/12/2022

आदेश/ ORDER

PER DR. DIPAK P. RIPOTE, AM:

This appeal filed by the Assessee is directed against the order of Id.Commissioner of Income Tax(Appeals)-1, Nashik dated 13.07.2017 emanating from assessment order of Assessing officer dated 10.03.2016 under section 144(A) r.w.s 147 of the I.T.Act, 1961 for the A.Y.2008-09. The Assessee has raised the following grounds of appeal:

40A(3) Disallowance against cash payments

The Ld. CIT (A) in her order dated 13/07/2017 has held that and amount of Rs.60,36,500/- paid by the appellant in cash to the persons from whom land was purchased to be hit by the provisions of section 40A (3) of the IT Act 1961. Here the Ld. CIT (A) has not considered the fact that while deciding issues related to the provisions of section 40A(3) of the IT Act 1961 the fact that the

payments have been endorsed by the H'ble Sub- Registrar, business expediencies, etc. as has been decided in Judicial forums, should have been considered.

In this regard a kind reference is invited to Honorable Guj'rat High Court's Judgment covering the similar issues in case of Anupam Tele Services Vs. ITO in Tax Appeal No. 556 of 2013 reported in 268 CTR 121 (Guj.). It has been held that, the paramount consideration of section 40A(3) is to curb and reduce the possibilities of black money transactions and as held by the H'ble Supreme Court in the case of Attar Singh Grumukh Singh (1991) 191 ITR667 (SC), section 40A(3) of the Act does not eliminate considerations of business expediencies.

The appellants further invite a kind attention to the judgment delivered by ITAT Pune in the cases of Shri. Gangadhar Karbhari Jadhav Vs. DCIT in its order in ITA No. 1695/PUN/2015 dated 21.04.2017 and Dyaneshwar Dhamne Vs ITO in ITA No. 202/PN/2016 dated 08.07.2016 has held in similar facts and circumstances that such payments are not hit by the provisions of section 40A (3) of the IT Act 1961.

Therefore appellants state that, on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in holding that the amount of Rs. 64,66,000/- is hit by the provisions of section 40A (3) of the IT Act 1961, without considering the issue in its entirety.

69 unexplained investment:-

The Ld. CIT (A) in her order dated 13/07/2017 has held that and amount of Rs.60,36,500/- paid by the appellant in cash to the persons from whom land was purchased to be hit by the provisions of section 40A (3) of the IT Act 1961 as also the provisions of section 69 of the IT Act 1961. Here the Ld. CIT (A) has not specified how the provisions of section 69 of the IT Act 1961 are also attracted to the impugned addition without dwelling into this issue in detail and without stipulating the details.

On the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in holding that the amount of Rs.60,36,500/- is hit by the provisions of section 40A (3) as also section 69 of the

IT Act 1961, without considering the issue in its entirety and without specifying how the provisions of the section 69 of the IT Act 1961 would apply.

The appellant craves for addition, deletion, alteration, and modification etc. of the grounds of appeal.”

2. Briefly facts of the case are that the appellant is an individual engaged in the business of plots and land dealings. The return of income for A.Y. 2008-09 was not filed. The appellant is director in M/s.Satyaroop Buildcon Pvt. Ltd., and partner in M/s.Tirtharoop Buildcon. A survey action u/s.133A was conducted in the case of appellant on 22.01.2015. On the basis of the impounded documents, the Assessing Officer held that the assessee has made cash payments exceeding Rs.20,000/- to five parties, totaling to Rs.1,74,36,500/-. The Assessing Officer also held that the assessee has not explained the source of Rs.1,74,36,500/-. The Assessing Officer made an addition of Rs.1,74,36,500/- and assessed the income of the appellant at Rs.1,74,36,500/-.

3. Aggrieved by the addition made by the AO, the assessee filed appeal before the ld.CIT(A). The ld.CIT(A) gave part relief to the appeal of the assessee.

4. Aggrieved by the order of the ld.CIT(A), the assessee filed appeal before this Tribunal.

5. The ld.CIT(A) in para 5.4 to 5.25 held as under:

5.4 I have carefully considered the facts of the case, the assessment order and the submission of the appellant. I have collated the information from the assessment order as well as from the appellant's submission. On conjoint reading of the same it is found that the Assessing Officer has not appreciated the facts properly. There are payments made through bank which has been also disallowed u/s 40A(3). The material on record shows that the total cash

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payment is only ₹17,06,500 which can be disallowed under section 40A(3) of the act.

5.5 Section 40A(3) reads as under :-

"Where the assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day ; otherwise than by an account payee cheque drawn on a bank or account payee bank draft, exceeds twenty thousand rupees, no deduction shall be allowed in respect of such expenditure."

5.6 The main object of section 40A(3) of the Act is to regulate the financial transactions and to prevent the use of unaccounted money or reduce the chances of use of black money for business transactions. Plain reading of the above section reveals that the provisions of this section hit the assessee if two conditions are simultaneously satisfied. First there has to be an expenditure claimed by the assessee. Secondly, he should have made payment exceeding ₹ 20,000/- by any means otherwise than by an account payee cheque/draft. The very purpose of the section is to discourage such transaction and parallel economy.

5.7 However, a perusal of the provisions of section 40A(3) shows that the said provision is a 'restriction' on the allowance of a particular expenditure representing cash payment claimed in the profit and loss account. Further, the *non obstante* clause in section 40A(3) has a far wider amplitude because it uses the words 'notwithstanding anything contained in any other provisions of this Act'. This provision is introduced in the act with a specific purpose of controlling the black money. Therefore, even assuming that the deduction is permissible or the deduction is deemed to have been allowed under any other provisions of this Act, still the control placed by the provisions of section 40A(3) in respect of the cash payment still holds precedence over such allowance. In these circumstances, the disallowance made by the Assessing Officer by invoking the provisions of section 40A(3) in respect of the cash payments of more than ₹ 20,000/- are in order.

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5.8 Further, the assessee has not been able to demonstrate that the payment made is covered under any exception mentioned under rule 6DD.

5.9 In view of the aforesaid discussion and facts and circumstances of the case, in my considered opinion the action of the assessing officer in making disallowance of ₹ 17,06,500/- is in order and is upheld.

5.10 The second issue in consideration is the disallowance of unexplained investment under section 69A of ₹ 1,74,36,500/-. There are five investments in property and flat aggregating to ₹1,74,36,500/- as under:-

15/03/2008 Purchase of land at Gat No.750 1,16,80,900/-

5.11 The assessee has filed the sale and purchase deed of the same land. The said deeds were available with the AO as it was found during the course of survey. It is trite law that even while making best judgement assessment the assessing officer has to consider the available material with him. The dealing in this land was like short sale. The assessee sold the land before it was purchased. The assessee being a land dealer his modus operandi of business was like that he would indulge in quick sale purchase of land to make profit. The assessee paid ₹2,80,000/- on 15/03/2008 in cash to purchase the impugned land. The balance of ₹1.14 crores was paid after 30/04/2008. This is evident from the deed filed in paper book at page 6 and 7. Thus investment of 1.14 crores was made in AY 2009-10. Therefore, I agree with the appellant's contention that in A.Y. 2008-09 ₹1.14 crores cannot be made under section 69 in the current assessment year. The Assessing Officer is directed to delete the addition of ₹1.14 crore. The amount of ₹ 2,80,000/- since it is paid in cash will be disallowed under section 40A(3) as discussed above.

5.12 This land is sold to Niranjn Batwal by sale deed dated 12/06/2008 for ₹2.31 crores. ₹90 lacs of sale proceed was received in Jan 2008 and April 2008 and balance of ₹1.41 crores in June 2008. The profit on sale of land is to be assessed as business income in A.Y. 2009-10. The appellant has stated that the same is assessed as business income in A.Y. 2009-10. The AO is



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directed to verify the contention of the appellant and if the same has not been done to take rectificatory measures for the same.

5.13 Regarding the balance investment of ₹57,56,500/- which he has made in four other properties as under:-

13/09/2007	Residential flat	10,00,000/-
28/11/2007	Land at Gat No.944	6,66,500/-
17/12/2007	Land at Gat No.293/51	1,90,000/-
07/02/2008	Land at Gat No.518/1	39,00,000/-

It is visible from the submission of the appellant that he is not able to explain the source of investments. It is a trite law that he has made the investment so the onus is on him to explain the same. The section 114(g) of Indian Evidence Act, 1872 lays a presumption that evidence which could be and is not produced, would, if produced, be unfavourable to the person who withholds it. In the appellate proceedings, burden of proof lies on the Assessee to prove that facts and findings of the AO are incorrect. If the assessee fails to disprove or rebut with cogent evidence such facts and findings, no interference is required. In this case, the assessee did not choose to avail several opportunities in appellate proceedings which entails conclusion that he had no evidence or say or explanation to explain the source of investment of ₹57,56,500/-.

5.14 The word 'evidence' as used in section 143(3) obviously cannot be confined to direct evidence. The word is comprehensive enough to cover circumstantial evidence also. Under the tax jurisprudence the connotation of the term 'evidence' is much wider. U/s 143(3) of the I.T. Act, 1961 it is used in a generic sense and not in the breasted sense so as to be either oral or documentary evidence or both. While the word 'evidence' may recall the oral and documentary evidence as may be admissible under the Indian Evidence Act, the use of word material in section 143(3) shows that the assessing Officer, not being a court, can rely upon material, which may not strictly be evidence admissible under the Indian Evidence Act, for the purpose of making an order of assessment. Court often takes judicial notice of certain facts

which need not be proved, while administrative and quasi-judicial authorities can take "official notice" of wider varieties of facts which need not be proved before them. Thus, not only in respect of the relevancy but also in respect of proof the material which can be taken into consideration by the assessing officer and other authorities under the Act is far wide than the evidence which is strictly relevant and admissible under the Evidence Act.

5.15 It may be seen from Section 142 & 143 that A.O. may also act on "the material gathered" by him. The word "material" clearly shows that the A.O. is not fettered by the technical rules of evidence and the like, and that he may act on material which may not strictly speaking, be accepted evidence in a court of law. All relevant circumstances which have bearing on the issue which are revealed in the course of assessment would be covered by the expression "material or evidence" on which A.O. could reply.



5.16 It is well settled that it is for the assessee to give a satisfactory explanation in regard to the investment made in the properties, if the explanation furnished by assessee is found to be not acceptable it may be taken to represent income that has accrued to the assessee during the year of the account. The burden of proof however rests squarely on the shoulder of the assessee to establish the truth and tenability of his explanation

5.17 The law as regards to burden of proof on the subject is relevant not merely for section 68, but also in all matters, where the law places responsibility on the assessee to prove what is best known to him, since facts relating to him are in his custody and it is, therefore, for the assessee to establish the facts relating to the claim, whether a particular receipt or investment has income character.

5.18 Sections 68 and 69 of the Act read as under:—

"68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the sum so credited may be

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charged to income-tax as the income of the assessee of that previous year."

69. Where in the financial year immediately preceding the assessment year the assessee has made investments which are 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 the investments or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year."

5.19 The aforesaid provisions show that as per Section 68, if any sum is found credited in the books of accounts of the Assessee, and if the Assessee offers no explanation about nature and the source thereof, or explanation offered is not in the opinion of the Assessing Officer, is not satisfactory, the sum so credited may be charged to income tax as the income of the Assessee. Section 69 of the Act provides that when the Assessee has made investments which are not recorded in the books of account, if any, maintained by him for the source of income and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the value of the investments may be treated as income of the assessee for the respective financial year.

5.20 At this stage, I may make useful reference to the decision of the Apex Court in case of *Sumati Dayal v. CIT* [1995] 214 ITR 801/80 Taxman 89 wherein, the Apex Court, inter alia, observed at page 805 as under:—

"It is no doubt true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee. [See: *Parimiseti Seetharamamma* (1965) 57 ITR 532. But, in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year the same may be charged to income tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such case there is, prima facie, evidence against the assessee, viz., the receipt of

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money, and if he fails to rebut, the said evidence being un rebutted, can be used against him by holding that it was a receipt of an income nature. While considering the explanation of the assessee, the Department cannot, however, act unreasonably. (See : Sreelekha Banerjee's case (1963)49 ITR (SC) 112 at page 120."

5.21 The aforesaid shows that the burden would be upon the Assessee to give explanation and the Assessing Officer has to consider the explanation reasonably. The relevant aspect is that assessee is not at all maintaining any books of account. Therefore, investment in the properties may be required to be considered by showing the corresponding or contemporaneous evidences if any. No evidence whatsoever is produced by the Assessee before the AO nor before me. In absence of any sufficient satisfactorily material produced by the assessee the investment cannot be taken as out of explained sources. It could not be said that the AO while appreciating the evidence has over acted unreasonably or have not applied reasonable prudence for forming opinion about non-acceptance of the explanation. In my view, as observed earlier, the burden is upon the Assessee to give sufficient explanation for the source of the amount. Moreover, after considering all the materials, on record, the opinion is to be formulated that as to whether the explanation can be considered as sufficient or not? It is true that while forming the opinion, the A.O. has to apply reasonable prudence but thereafter, if the reasonable prudence is applied and the opinion is formed, such would be the ultimate finding of fact as to whether the explanation can be treated as sufficient or not? In my view, if such an opinion is formed by applying reasonable prudence by the A.O. I would not interfere or upset such finding of fact.



5.22 Reference is invited to the decision of Bhagwandas D. Vachhani 56 taxmann.com 284 (Gujarat) as under:

FACTS

- * The assessee-HUF was engaged in the business of manufacture of ceramic tiles and food products etc.
- * A search was carried out at business premises of assessee in course of which it was found that cash deposits were made in the

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bank accounts of HUFs on day to day basis and subsequently, withdrawals were made for investments in the various group concerns as well as for advancing loans to the family members.

- * On queries being raised by the Assessing Officer, the members of assessee-HUF made statements that said amount had been received on account of under-invoicing of sales and inflation of expenses.
- * The Assessing Officer took a view that such statements by itself would not absolve assessee-HUF from the onus cast under provisions of section 69.
- * In view of failure of assessee to discharge burden cast upon it, the Assessing Officer added amount in question to assessee's income by invoking provisions of section 69.
- * The Tribunal upheld addition made by the Assessing Officer.

On appeal:

HELD

- * The burden would be upon the assessee to give explanation and the Assessing Officer has to consider the explanation reasonably. The relevant aspect is that so far as the H.U.F. is concerned, it is not at all maintaining any books of account. Therefore, deposit of the amount in the respective bank accounts of the H.U.F. may be required to be considered by showing the corresponding entry as that of under invoicing or over invoicing of the capital goods or over invoicing of the expenses etc. if any.
- * No evidence whatsoever is produced by the assessee before the Assessing Officer. Mere statement of the partners is too vague and too general that the money credited in the respective bank accounts of the HUFs is earned out of under invoicing of the sales and over invoicing of the expenses and over invoicing of the capital goods.
- * As observed earlier, the burden is upon the assessee to give sufficient explanation for the source of the amount. Moreover, after considering all the materials, namely, statement or the record, if any, produced or when no record of books of account is produced or when no transactions by showing co-relation are demonstrated, the opinion is to be formulated by the Assessing Officer as to whether the explanation can be considered as sufficient or not.
- * It is true that while forming the opinion, the Assessing Officer has to apply reasonable prudence but thereafter, if the reasonable prudence is applied and the opinion is formed, such would be the ultimate finding of fact as to whether the



Signature

explanation can be treated as sufficient or not? If such an opinion is formed by applying reasonable prudence by the Assessing Officer and it is further confirmed by the Tribunal, which is the ultimate fact finding authority, this Court, in the further appeal, wherein, the judicial scrutiny would be limited to substantial question of law only, would not interfere or upset such finding of fact as the same would be beyond the scope of the present appeal. [Para 22]

* Thus, the opinion formed for no sufficient explanation by the assessee-HUF in respect of the amount in question cannot be said as perverse to the record. As such, formation of such opinion appears to be after consideration of the material on record and once the reasonable prudence is applied, it is not open for this Court to substitute the opinion by confirming with the findings of fact in exercise of powers of this Court, which is limited to substantial question of law. [Para 25]

* In view of above, no merit was found in instant appeal and, consequently, impugned addition was to be confirmed. [Para 29]



5.23

I have given serious consideration to all the facts and circumstances of the case in the light of the materials and arguments placed before me. As observed by Lord Templeman in R. v. IRC (1994), 1 WLR 334 (HL), every tax avoidance scheme involves a trick and a pretence. It is the task of the Assessing officer to unravel the trick and the duty of the Court to ignore the pretence. In the case before me, the AO has unravelled the trick that was played by the assessee not explaining the source investments in property. The moot point to note is that the entire transactions of ₹60,36,500/- are made in cash so that the money trail cannot be established. It is not a case of mere rejection of the explanation given by the assessee but a case where the antecedents of the assessee his conduct in doing business in past and present years has been brought on record through positive materials, which has not been satisfactorily rebutted by the assessee. Taking into account the totality of all the facts and circumstances of the case, I hold that the AO has correctly exercised his discretion and jurisdiction in dismissing the assessee's contention I find no illegality, irregularity or irrationality in his order and hence I confirm the addition to the extent of ₹60,36,500/-.

Smita

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5.24 Admittedly the assessee has not been able to explain the source of investment in the properties on one to one basis. Therefore addition made by the assessing officer under section 69 of the act of ₹ 57,56,500/- is in order and is upheld.

5.25 In view of the above facts and circumstances, the net addition to be sustained u/s 40A(3) and u/s 69 is ₹60,36,500/-. The appellant gets relief of ₹1,14,00,000/-.

6. In result, the appeal is allowed in part.

नाशिक
Nashik
दिना
Dated : 13/07/2017

आयकर आयुक्त (अपील) - 1, नाशिक
Commissioner of Income Tax (Appeal)-1, Nashik

-sd/-
(रीना झा त्रिपाठी)
(REENA JHA TRIPATHI)
आयकर आयुक्त (अपील) -1, नाशिक
Commissioner of Income-Tax (Appeal)-1
Nashik.

प्रतिलिपि :
Copy to:

01. The Chief Commissioner of Income Tax, Nashik.
02. The Pr. Commissioner of Income Tax -1, Nashik.
03. The Joint Commissioner of Income Tax, Range-1, Nashik.
04. The Income Tax Officer, Ward 1(4), Nashik.
05. The appellant with Demand Notice.

(प्रशासनिक अधिकारी ग्रेड-III)
(Administrative Officer Grade-III)
कुते आयकर आयुक्त (अपील) -1, नाशिक
For CIT (Appeal)-1, Nashik.

6. None appeared on behalf of the assessee. We heard ld.DR for the Revenue. We find from the record that even before this Tribunal, the assessee has continuously not attended the hearing before the Bench i.e. 12.11.2021, 20.12.2021, 12.07.2022, 11.10.2022 and 19.12.2022. No written submissions filed, no adjournment letter filed. There is no evidence on record from ld.AR to rebut/controvert the said additions confirmed by the ld.CIT(A).

7. Thus, in view of the aforesaid factual position and discussion of the ld.CIT(A), we find merit in the order of the ld.CIT(A), hence,

we uphold the order of the Id.CIT(A). Accordingly, Ground No.1 & 2 of the assessee are dismissed.

8. We find support from the orders of Hon'ble Supreme Court in the case of CIT Vs. K.Y.Pilliah 63ITR 411 (SC) in which Hon'ble Supreme Court observed as under:

“The Income-tax Appellate Tribunal is the final fact-finding authority and normally to should record its conclusion on every disputed question raised before, it setting out its reasons in support of its conclusion. But, in failing to record reasons, when the Appellate Tribunal fully agrees with the view expressed by the Appellate Assistant Commissioner and has no other ground to record in support of its conclusion, it does not act illegally or irregularly, merely because it does not repeat the grounds of the Appellate Assistant Commissioner on which the decision was given against the assessee or the department.”

9. In the result, appeal of the Assessee is Dismissed.

Order pronounced in the open Court on 23rd December, 2022.

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

Sd/-
(DR. DIPAK P. RIPOTE)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 23rd December, 2022/ SGR*

आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकर अपीलीय अधिकरण, “बी” बेंच, पुणे / DR, ITAT, “B” Bench, Pune.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

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