

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH (SMC), SURAT  
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 139/Srt/2023 (AY: 2008-09 Quantum appeal)

ITA No. 140/Srt/2023 [AY: 2008-09 Penalty u/s 271(1)(c)]  
(Virtual hearing)

Late Noorulkalam Abdulmajid Shaikh represented through his son Husnejamal Nurulkalam Shaikh, (PAN: IAHPS 9546 C) 313, Phoolwadi, Survey No. 734, Saheb Telecom, Singanpore, Bharimata Road, Ved Road, Surat-395004. <b>PAN No. AZVPS 7495 K</b>	Vs.	I.T.O., Ward-3(2)(1), Surat.
Appellant/ assessee		Respondent/ revenue

Assessee represented by	Shri Hiren Vepari, CA
Department represented by	Shri Vinod Kumar, Sr. DR
Date of institution of appeal	22/02/2023
Date of hearing	13/03/2023
Date of pronouncement	15/03/2023

**Order under Section 254(1) of Income Tax Act**

**PER: PAWAN SINGH, JUDICIAL MEMBER:**

1. These two appeals by the legal heir of the assessee/appellant are directed against the separate orders of National Faceless Appeal Centre, Delhi (NFAC)/Commissioner of Income Tax (Appeals), (in short, the Id. CIT(A)) both dated 27/01/2023 for the Assessment Year (AY) 2008-09. In ITA No. 139/Srt/2023 the assessee has challenged the validity of addition in quantum assessment and in ITA No. 140/Srt/2023, the assessee has challenged the validity of penalty levied under Section 271(1)(c) of the Income Tax Act, 1961 (in short, the Act). Both the appeals are

interconnected, thus, both the appeals were clubbed, heard together and are decided by consolidated order. In quantum assessment appeal the assessee has raised following grounds of appeal:

- “1. On the facts and circumstances of the case, the Id. CIT(A) was not justified in confirming addition of Rs. 29,91,500/- as income of the amount deposited in bank account of the appellant for the transfer of funds to the villages in Bihar by appellant’s friends and relatives.*
- 2. The Id. CIT(A) failed to appreciate the reality that it was not unusual for the persons like appellant to help other people hailing from villages of Bihar in transferring the funds by depositing cash into the bank account in Surat and corresponding withdrawal of such cash through ATM in villages in Bihar the very next day.*
- 3. The Id. CIT(A) was driven by extraneous consideration in dismissing the appeal.*
- 4. The appellant craves leave to add, alter or vary any of the grounds of appeal.”*

2. Brief facts of the case are that no return of income was filed by deceased assessee for the A.Y. 2008-09. The case of assessee was reopened on the basis of information received by the Assessing Officer that the assessee has made cash deposit of Rs. 29,91,500/- in his savings bank account. To examine the source of cash deposit, the Assessing Officer after recording reasons that the income to the extent of Rs. 29,91,500/- has escaped assessment, reopened the case under Section 147 of the Act. Notice under Section 148 dated 26/03/2015 was served upon the assessee. In response to notice under Section 148, the assessee filed his return of income on 29/01/2016 declaring income of Rs. 1,75,830/-. The

Assessing Officer after serving statutory notices under Section 143(2) and 142(1), proceeded for assessment. The Assessing Officer obtained the information from the assessee's bank after issuing notice under Section 133(6) of the Act. On perusal of such information, the Assessing Officer noted that the assessee was having a bank account in Axis bank Ltd. wherein there are cash deposit of Rs. 29,91,500/-. The assessee was asked to furnish the source of cash deposit. The Assessing Officer noted that the assessee furnished part details and could not furnish complete details called by him. In absence of complete details, the Assessing Officer issued final show cause notice, contents of which is recorded in para 6 of assessment order. The Assessing Officer noted that despite repeated show cause notice, the assessee failed to furnish reply and substantiate the source of cash deposit. The Assessing Officer in absence of any explanation, made addition of aggregate amount deposited in cash of Rs. 29,91,500/- under Section 68 and initiated penalty under Section 271(1)(c) of the Act.

3. Aggrieved by the addition in the assessment order, the assessee filed appeal before the Id. CIT(A). Before the Id. CIT(A), the assessee filed detailed written submissions. Some of the contents of written submission of assessee is recorded in para 6 of order of Id. CIT(A). The assessee in his submission, submitted that he was running a small tea shop and STD/PCO in Surat. Cash deposit in his account was from the persons

know to him who belongs to Bihar and working in Surat and they do not have their bank account. For sending their money to their relatives at their native place in Bihar, they used to give amount to the assessee and assessee has deposited cash in his bank account which was withdrawn by his brother in Bihar and handed over cash to his family members of concerned person. The assessee also furnished copy of statement of bank account with Axis Bank, name of the persons whose cash were deposited in the bank account alongwith their confirmation and identity proof in the form of Aadhar Card and the affidavit of assessee. The assessee also stated that they could not furnish such evidence at the time of assessment as the assessment relates to F.Y. 2007-08 while proceeding took place in A.Y. 2015-16. The assessee could not retrieve eight years old bank statement. The assessee could retrieve the bank statement after finalization of assessment order, i.e. during the appellate stage. The assessee prayed to admit the additional evidence under Rule 46A of the Income Tax Rules, 1962.

4. The Id. CIT(A) after considering the submission of assessee, upheld the additions made by the Assessing Officer by holding that there was no exceptional situation in which the resident of India was unable to open a bank account specially for amounts like Rs. 10,000/- to Rs. 50,000/- as seen in this case. So many persons were using cash transfer mode of postal authorities by way of money order and the explanation of assessee

was held to be not satisfactory and dismissed the appeal of assessee. Further aggrieved, the assessee has filed the present appeal before this Tribunal.

5. I have heard the submissions of the learned Authorised Representative (Id. AR) of the assessee and the learned Senior Departmental Representative (Id. Sr. DR) for the Revenue and have gone through the orders of the lower authorities carefully. The Id. AR of the assessee submits that the deceased assessee was running a tea shop and STD/PCO booth at 313, Fulwadi, Bhari Mata Road, near Madina Masjid, Katargam, Surat. A number of persons, who belonged to Bihar and eastern UP, were working in the adjoining area where the assessee was running his STD/PCO booth and they used to come for making call at his booth. Most of such persons were from labour class either uneducated or very less educated and were not having their own bank account. Such labourers were unable to send the money earned by them for their family members who were staying at Bihar. The assessee assisted them by taking their money and depositing in his bank account with Axis Bank in Surat. Such money were withdrawn on the same day or very next day by his brother Shaukat Ali by using assessee's ATM card and then delivered to their family members in their native placed/villages. In all such arrangements, the assessee used to get Rs. 200/- as commission for transfer of such amount by using his bank account and ATM card which

was with his brother. The assessee during the financial year made such total deposit of Rs. 29,91,500/- in his bank account. All the money were immediately or next working day was withdrawn. Before the Assessing Officer, the assessee could not furnish complete evidence i.e. details of deposit in bank account and their withdrawal, confirmation by such labourers and their identity. However, all such evidences were gathered during the first appellate stage. The assessee furnished copy of bank statement with Axis bank alongwith bank book maintained by assessee for bank account and the statement of such transactions. List of persons whose cash was deposited, their confirmation and Aadhar card with ledger account from the books of assessee. The assessee also filed his affidavit to substantiate such fact.

6. The Id. AR of the assessee by referring the bank statement, invited my attention to certain entry wherein cash of Rs. 40,200/- was deposited on 10/09/2007 and it was withdrawn through ATM on 10/09/2007 at 6.13 PM and 6.15 PM by withdrawing Rs. 20,034/- each. On specific question that how the ATM withdrawal is shown as strange figure of Rs. 20,034/- , the Id. AR explained that Rs. 34/- may be on account of transaction charge which were credited in the next day as has been shown in the statement. The Id. AR submits that similar pattern of cash deposit and withdrawal is shown in all the transactions. The Id. AR of the assessee submits that the Assessing Officer added the aggregate of all the deposits

which cannot be the income of assessee in any circumstances, at the most, a peak credit entry/ amount which is highest of Rs. 50,000/- could be added.

7. In the alternative submission, the Id. AR of the assessee submits that either a reasonable percentage of one or two or at the maximum Rs. 200/- per transaction as has been shown in all the deposits can be added and not the entire aggregate amount. The Id. AR of the assessee submits that it is settled position in law that only real income can be taxed and not the entire transaction. The assessee earned a very small amount of commission while allowing his bank account for sending money of poor labourers to their family member. The Id. AR of the assessee submits that he has already placed on record the copy of summary of cash deposits and withdrawals by the brother of deceased assessee Shaukat Ali through ATM at Bihar. He has also filed copy of bank statement, confirmation of all the persons on whose behalf, the impugned money was sent. The Id. AR prayed for deleting the addition under Section 68 of the Act.
8. On the other hand, the Id. Sr. DR for the revenue supported the orders of lower authorities. The Id. Sr. DR submits that during the assessment, the assessee has not filed a single document despite giving numerous opportunities. The assessee filed bank statement and confirmation of various persons. The confirmations of all the persons are drafted in a similar fashion. Such confirmations are self-serving certificates. On the

submission for making addition on the basis of peak credit, the Id. Sr. DR submits that theory of peak credit can be applied only in the situation where the same amount is deposited, withdrawn on a repeated occasion. However, in the present case, the case of assessee is that the amount was deposited in Surat and was withdrawn in Bihar so on each and every time, additional amount was deposited, therefore, such principle of peak credit is not applicable.

9. I have heard the submissions of both the parties and have gone through the orders of lower authorities carefully. I find that the Assessing Officer reopened the case on the basis of information from ITD system that the assessee has made cash deposits of Rs. 29,91,500/- in his savings bank account with Axis Bank. The Assessing Officer after recording reasons of reopening, issued notice under Section 148 on 26/03/2015. The assessee filed return of income on 29/01/2016 declaring income of Rs. 1,75,830/- . The assessee was asked to substantiate the source and nature of cash deposits of Rs. 29,91,500/- in his bank account. The Assessing Officer after recording his satisfaction that the assessee has not furnished source of cash deposit nor any explanation was furnished. The Assessing Officer added the entire amount on account of unexplained cash credit under Section 68 of the Act. I find that before the Id. CIT(A), the assessee filed detailed written submissions. Alongwith written submissions, the assessee also filed copy of bank statement, statement of account maintained by

him, list of persons whose money was deposited in his Axis bank account, their confirmation to prove the transactions and Aadhar card to prove their identity. By filing Aadhar cards, the assessee submits that he has proved the identity of the persons, by filing confirmations and bank statement, proved the transactions and submitted that the assessee merely assisted a number of labourers who belongs to Bihar and working in adjoining area where the assessee was residing. The assessee also filed application under Rule 46A to admit such evidence on the ground that the assessee could not furnish such evidence as the transactions relate to eight years old and the assessee was not having entire evidence in his power and possession.

10. I find that the Id. CIT(A)/NFAC has referred/ scanned the submission of assessee on page Nos. 4 to 12 in his order. The Id. CIT(A) recorded that he has considered the grounds of appeal and submission of assessee that he used to collect commission for sending the cash through his account to the relatives of various persons in Bihar. The Id. CIT(A) held that in year 2007-08 there was no exceptional situation where the resident of India could not open a bank account and the persons were using cash transfer through postal authority like money order. The Id. CIT(A) further held that explanation offered by assessee is not satisfactory hence money deemed to be an income of assessee and upheld the addition made by the Assessing officer. I find that the assessee has filed confirmation, bank

statement and detailed written submissions to substantiate his contention. The Id. CIT(A) has not given any finding whether the additional evidence deserves to be admitted or required any consideration or not and straightway concluded that there was no exceptional situation in India for not opening a bank account. I find that the Id. CIT(A) neither himself nor through Assessing Officer made any verification of such facts or evidence produced by assessee. The primary contention of assessee is that the amount deposited in Surat was immediately or next day withdrawn in Bihar. No such verification of fact if the amount deposited in the bank account of the assessee was withdrawn locally or such withdrawal was really made in Bihar or Eastern UP, as claimed by the appellant. Such facts of withdrawal could be cross verified from the banker of assessee. Hence, considering the fact that before assessing officer the assessee has not filed any documentary evidences. The additional evidence filed before Id CIT(A), was neither considered nor the application of the assessee under Rule-46A was rejected, therefore, I admit the additional evidence filed by the assessee and restore the grounds of appeal to the file of assessing officer to decide the issue afresh after considering all the evidences filed by the assessee and pass the order afresh in accordance with law. In the result, the grounds of appeal raised by the assessee are allowed for statistical purpose.

11. In the result, the appeal of the assessee in ITA No. 139/Srt/2023 is allowed for statistical purpose.

**ITA No.140/Srt/2023 for the A.Y. 2008-09**

12. Since I have restored the quantum appeal of the assessee to the file of Assessing Officer for deciding the issue afresh, therefore, the order of penalty under section 271(1)(c) will not survive. However, the assessing officer is given liberty to pass the order of penalty afresh, if so desired, in accordance with law. In the result, the grounds of appeal in the present appeal is allowed.

13. In the result, appeal of the assessee in ITA No. 140/Srt/ 2023 is allowed.

Order pronounced in the open court on 15<sup>th</sup> March, 2023.

**Sd/-  
(PAWAN SINGH)  
JUDICIAL MEMBER**

Surat, Dated: 15/03/2023

*\*Ranjan*

Copy to:

1. Assessee –
2. Revenue -
3. CIT
4. DR
5. Guard File

By order

Sr. Private Secretary, ITAT, Surat

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