

IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH 'C', KOLKATA

[Before Shri Rajesh Kumar, Accountant Member &
Shri Sonjoy Sarma, Judicial Member]

I.T.A. No. 8/Kol/2021
Assessment Year : 2017-18

ITO, Ward-50(1), Kolkata	Vs	Joydeb Kundu
		PAN: ALKPK 8245 Q
Appellant		Respondent

Date of Hearing	16.05.2023
Date of Pronouncement	16.05.2023
For the Assessee	Shri Siddarth Agarwal, Advocate
For the Revenue	Shri Vijay Kumar, Addl. CIT

ORDER

Per Sonjoy Sarma, JM:

This is an appeal filed by the revenue against the order of Id. CIT(A)-15, Kolkata dated 23.09.2020 for the A.Y. 2017-18. The revenue has raised the following grounds of appeal:

“i. Whether Learned Commissioner of Income Tax (Appeals)-15, Kolkata was justified in deleting the entire addition made by the Assessing Officer amounting to Rs. 1,65,17,000/- on account of cash deposit made by the assessee during the demonetization period i.e. from 09.11.2016 to 30.12.2016 being treated as unexplained money u/s 69A of the Income Tax Act, 1961.

ii. That the department craves leave to add modify or alter the above ground of appeal and/or adduce additional evidence at the time of hearing of the case.”

2. Brief facts of the case are that the assessee is an individual and filed its return of income for the A.Y. 2017-18 on 31.10.2018 by declaring total income of Rs. 10,48,160/-. The case of the

assessee was selected for complete scrutiny and notices u/s 143(2) and 142(1) was issued for the purpose of verification of which value of cash deposit during the demonetization period. However, assessee neither complied with the notices issued by the AO nor filed any books of accounts as asked by the AO. Accordingly, ld. AO rejected the books of account u/s 145(3) of the Act and viewed that assessee has nothing to offer regarding cash deposit of Rs. 1,65,17,000/- during the demonetization period that is 09.11.2016 to 30.12.2016 and added the entire unexplained money in the hands of assessee.

3. Aggrieved by the above order, assessee preferred an appeal before the ld. CIT(A).

4. Before ld. CIT(A), assessee submitted that cash deposit in bank account during the demonetization period was out of cash sales made and such sales were duly accounted in its books of account maintained by the assessee. The assessee also contended that accounts were subject to audit wherein no irregularities were found by the auditor and assessee has been declaring the true sales and purchase figures in another statutory return also lie VAT etc. The ld. CIT(A) accepted the contention of the assessee and allowed the appeal of the assessee by stating as under:

“5.4. In regard to Ground No. 2, it is observed that the appellant is engaged in wholesale and retail business on various grocery items such as Rice, Oil, Dal, Sugar, Atta, Maida etc. During the assessment proceedings, the A.O. found that the appellant had deposited Rs.

1,65,17,000/- in the bank accounts during the demonetization period i.e., from 08.11.2016 to 30.12.2016. On query raised by the A.O., the appellant explained the source of such cash deposits as under –

Opening cash in hand on 08.11.2016 was Rs.10,95,420/-. Further, collection from sundry debtors on 08.11.2016 was Rs.1,09,01,000/-. Further Cash received against cash sale or collection from the Debtors during the demonetization period (in valid notes) Rs.45,20,580/-.

Thus, the total availability of funds for the aforesaid deposits of Rs.1,65,17,000/- in the bank account was explained as under –

Rs.10,95,420/- + Rs. 1,09,01,000/- + Rs.45,20,580/- = Rs.1,65,17,000/-.

5.4.1 It is observed that the source of deposits in the bank accounts was explained by the appellant by submitting various details along with books of accounts / records electronically on 23.09.2019, 13.12.2019 and 26.12.2019, copies of which has been submitted before the undersigned and marked as Annexure: H, I and J. Therefore, the allegation of the A.O. that no books of accounts were submitted, does not stand.

5.4.2 The A.O. has not pointed out any defect in the books and/ or details. He accepted the purchases but the cash received against sale which had been Subsequently deposited was not accepted on irrelevant considerations. The appellant has rebutted the adverse comments raised by the A.O. in the assessment order. As regards non service / non compliance from the sundry debtors, it is observed on perusal of the debtors' ledger uploaded on portal that all the debtors were trade debtors and the entire cash receipts were against the sales made to them in the relevant year. Needless to say, sales have formed part of the credit side of the trading account on which tax has been paid. The appellant has placed reliance upon various decisions for the proposition that no adverse inference can be drawn in case of unverifiable sales if proper books are maintained. I find the decisions referred to in the submissions viz., **Kanpur Steel Co. Ltd. vs. Commissioner of Income-tax (1957) 32 ITR 56 (ALL.), CIT v Kailash Jewellery House, ITA No. 613/2010 (Delhi High Court) decision dtd. 09.04.2010 and CIT V. Vishal**

Exports Overseas Ltd., Tax Appeal No. 2471 of 2009 (Gujarat High Court), decision dtd. 03.07.2012 applies to the appellant's case.

5.4.3 It is further observed that the appellant during the relevant year deposited total cash of Rs.5,20,48,000/-, out of which substantial portion of cash deposit (Rs.3,61,26,000/-) was made during pre-demonetization period i.e. before 08.11.2016. Therefore, it is not a case of the A.O. that the appellant only deposited cash into the bank account during the post demonetization period which proves the bonafide of the appellant.

5.4.4 The appellant has further submitted that after announcement of demonetization, in a situation of panic, the customers in large numbers gathered in the shop for making payment of outstanding dues in demonetized notes. In this regard, I do not find any abnormality in such situation where the appellant had no option but to accept the payments in cash.

5.4.5 It is observed that in **R. B. Jessaram Fetechand (Sugar Dept.) v. CIT (1969) 75 ITR 33 (Bom.)**, Hon'ble Bombay High Court has held that where all the other transactions, except the cash transactions, which were verifiable, have been verified and scrutinized by the Income-tax Officer and there is nothing wrong whatsoever found with them and as to the cash transactions also, the quantity of sugar sold has not been disputed and the rates at which sugar was sold were not such as would excite suspicion, cash transactions cannot be disbelieved.

In **CIT v. Jaora Flour and Foods Pvt. Ltd. (2012) 344 ITR 294 (MP)**, it was held by the Hon'ble court that where sales had been duly entered in the books, the view of the Tribunal that addition of the same amount again during assessment proceedings amounted to double addition and cannot be sustained cannot be interfered with. In the case of **Lalchand Bhagat Ambica Ram v. Commissioner of Income-tax (1959) 37 ITR 288 (SC)**, where similar addition was made in the case of deposit of demonetized currency notes (pertaining to demonetization announced by the British in India in the year 1946), Hon'ble Supreme Court granting relief to the assessee, where ITAT had confirmed the addition in respect of deposits of demonetized currency notes, held that the Tribunal in arriving at the conclusion it did in the present case indulged in suspicions, conjectures and surmises and acted without any evidence or upon a view of the facts which could not reasonably be entertained or the facts found were such

that no person acting judicially and properly instructed as to the relevant law could have found, or the finding was. in other words, perverse and this court is entitled to interfere.

In Dhakeswari Cotton Mills Ltd. v. Commissioner of Income-tax 26 ITR 775, Hon'ble Supreme Court has held that there must be something more than bare suspicion to support the assessment under section 143(3).

5.4.6 It is observed that there are various decisions rendered by the courts and ITAT, which have examined the issue from the perspective of applicability of sec 68 to sales offered to tax in the regular books of accounts. The findings of such cases are reproduced hereunder –

a) New Pooja Jewellers v. ITO (Kolkata ITAT) ITA No. 1329/Ko/2018

"Be it as it may, in the normal course, we would have restored the issue to the file of the AO for fresh verification of the claim of the assessee that it had received advances from customers on the occasion of Ramnavami Nayakhata. In other words, we would have given the AO more time to conduct enquiries and investigation. In this case we find that these advances have subsequently been recorded as sales of the assessee firm and that these sales have been accepted as income by the AO during the year. He has not disturbed the sales of the assessee. When a receipt is accounted for as income, no separate addition of the same amount as income of the assessee under any other Section of the Act can be made as it would be a double addition. In the result, we delete the addition made and allow its claim of the assessee."

b) CIT v. Smt. Harshil Chordia v. ITO (Rajasthan High Court) 2008 298 ITR 349 Raj

"So far as question No. 2 is concerned, apparently when the Tribunal has found as a fact that the assessee was receiving money from the customers in hands against the payment on delivery of the vehicles on receipt from the dealer the question of such amount standing in the books of account of the assessee would not attract Section 68 because the cash deposits becomes self-explanatory and such amounts were received by the assessee from the customers against which the delivery of the vehicle was made to the customers. The question of sustaining the addition of Rs. 6,98,000 would not arise.

**c) Shree Sanad Textiles Industries Ltd. V. DCIT (Ahmedabad ITAT)
ITA No. 1166/Ahd/2014**

We also note that the provisions of section 68 cannot be applied in relation to the Sales receipt shown by the assessee in its books of accounts. It is because the sales receipt has already been shown in the books of accounts as income at the time of sale only.

We are also aware of the fact that there is no iota of evidence having any adverse remark on the purchase shown by the assessee in the books of accounts. Once the purchases have been accepted, then the corresponding sales cannot be disturbed without giving any conclusive evidence/finding. In view of the above we are not convinced with the finding of the leaned CIT(A) and accordingly we set 'aside the same with the direction to the AO to delete the addition made by him. "

5.4.6 Further. I find that the A.O. rejected the books of accounts u/s. 145(3) of the Act. It is observed as per the provision of Section 145(3), an Assessing Officer is empowered to reject books and make an assessment in the manner provided in sec. 144 only when he is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section(1) or accounting standards as notified under sub-section (2), have not been regularly followed by the assessee.

In the instant case, it is seen that the A.O. has alleged that books of accounts were not produced but the appellant has demonstrated that books were uploaded in the portal from time to time. Further, it is seen that from the tax audit report that complete set of books is maintained by the appellant and the same are audited by the Chartered Accountant.

It is observed that all the details as asked by the A.O were uploaded on portal from time to time by the appellant and the A.O. has nowhere pointed out that the accounts produced/uploaded were not correct or complete or that the method of accounting or accounting standards as notified have not been regularly followed. Further, by passing the assessment order under section 143(3), there is tacit admission on the part of the AO that the books were properly maintained

In view of the above, I hold that the rejection of books by the A.O is not sustainable law.

5.4.7 Further I find that the A O invoked the provisions of section 69A of the Act at the time of making the addition of Rs.1,65,17,000/-. On perusal of the provision or Sec. 69A of the Act, it is observed that the pre-condition for the invoking the said provision is that money or valuable is not recorded in the books of accounts, which is not the case here.

Appellant has placed reliance upon the **Bangalore ITAT decision in the case of Smt. Teena Bethala vs. ITO 1TA No. 1383/Bang/2019)** dated 28/08/2019, where it has been held as under-

"On a reading of section 69A (supra), it is clear that the onus is upon the AO to find the assessee to be the owner of any money. Bullion, jewellery or valuable article and such money, bullion, jewellery or valuable article was not recorded in the books of account, if any, maintained by the assessee for any source of income. In these circumstances, the AO can resort to making an addition under section 69A of the Act only in respect of such monies / assets / articles or things which are not recorded in the assessee's books of account. In the case on hand, the cash deposits are recorded in the books of account and are reportedly made on the receipt from a creditor Further, the PAN and address of the creditor as well as ledger account copies of the creditor in the assessee's books of account have also been filed before the AO. In these circumstances, it is evident that the AO has not made out a case calling for an addition under section 69A of the Act. Probably, an addition under section 68 of the Act could have been considered; but then that is not the case of the AO. The assessee, apart from raising several other grounds, has challenged the legality of the addition being made under section 69A of the Act. In support of the assessee's contentions, the learned AR placed reliance on the decision of the ITAT - Mumbai Bench in the case of DCIT Vs. Karthik Construction Co. in ITA No. 2292/Mum/2016 dated 23.02.2018, wherein the Bench at para 6 thereof has held that addition under section 69A of the Act Cannot be made in respect of those assets / monies / entries which are recorded in the assessee's books of account. In ITA Nos. 1383 and 1384/Bang/2019 my considered view, the aforesaid decision of the ITAT - Mumbai Bench (supra). is squarely applicable to the facts of the case on hand where the entries are recorded in the assessee's books of account. In this view of the matter, I am of the opinion that the addition of Rs. 6,30, 000/- made under section 69A of the Act is bad in law in the facts and circumstances of the case on hand and therefore delete the addition of Rs.6,30, 000/- made thereunder. The AO is accordingly directed."

5. Aggrieved by the above order passed by the ld. CIT(A), the department is in appeal before the Tribunal by raising the exclusive ground in respect of deposit of cash made during the period of demonetization amounting to Rs. 1,65,17,000/- by treating it as unexplained money u/s 69A of the Act.

6. At the time of hearing before us, ld. DR argued the matter and contended that the claim of the assessee arising out of sales made during the period of demonetization could not be able to substantiate before the AO at the time of hearing and assessee even did not produce the necessary supported document in reference to such sale before the AO, therefore, the ld. AO correctly treated the cash deposit during the period of demonetization as unexplained transaction u/s 69A of the Act.

7. On the other hand, ld. AR submitted that the order passed by the ld. CIT(A) is a reasoned order and the assessee has produced necessary books of accounts and supported documents to justify the sale made during the period of demonetization and after verification, the ld. CIT(A) has passed a reasoned order. In such a situation, there is no scope to interfere in the order passed by the ld. CIT(A) by this Tribunal.

8. We have carefully gone through the material available on record and considering the rival submission made by the parties, in the present case both the authorities below accepted the fact that the amount received by assessee are nothing but sale

proceeds in the course of business of the assessee. The addition has made only on the basis that after demonetization, the demonetization note could not have been accepted as valid tender. Since the sales proceeds for which cash was received are added u/s 69A of the Act which would amount to double taxation once as sale and another against as unexplained cash credit which is violate principles of taxation. The ld. AR further contended that Hon'ble ITAT of Kolkata in the case of ITO vs M/s. Senco Alankar in ITA No. 10/Kol/2021 dated 27.06.2022 on an identical fact held as under:

“7. We have heard the rival submissions and carefully considered the material placed on record and gone through various judicial precedents relied upon by both the parties. At the outset, we find that the moot point for consideration is in respect of explanation furnished by the assessee regarding nature and source of cash deposit to the tune of Rs.1,95,03,291/- (Rs.3,87,69,800 – Rs.1,92,66,509) during the demonetization period which has been treated as deemed income of the assessee and added to the total income u/s. 69A of the Act as unexplained money. We find that written submissions and all the relevant documentary evidences were placed on record.

7.1 The foremost point which invites our attention is the computation method adopted by the AO in arriving at this figure of Rs.1,95,03,291/- which is nothing but based on a hypothesis to arrive at estimated probable sales value that could have been made on 08.11.2016 between the time window from 8.30PM to 12 midnight and the entire day. As discussed above, Ld. AO has made certain assumptions on the logistics and the conduct of business transactions/operations to arrive at this probable sale value estimation. We find that the assumptions so made by the Ld. AO are devoid of any scientific basis and third party comparable which gives credibility to such an estimation. All these assumptions and calculations carry AO's own figment of imagination. We note that the assessee has countered all the assertions and assumptions made by the AO by submitting the details from its audited books of accounts and stock registers by providing all the relevant details from time to time. We

note that the assessee had given all the explanations which are reasonable and there is no other material except for the estimation of probable sales value done by the Ld. AO for the purpose of treating the deemed income as unexplained money in the hands of the assessee. We also note that assessee has duly recorded in its books of accounts all the sales made on the date of announcement of demonetization in the time window available on that day which has been credited in the P&L Account. It is also noted that the assessee had stock in hand to meet the sales demand, all of which is duly recorded in the stock register furnished before the authorities below. It is also noted that there is no specific discrepancy pointed out in respect of the books of account, more particularly when the purchases have not been doubted in the assessment. Ld. AO has noted that details of customers on the invoices raised during the time window on the date of announcement of demonetization were not recorded on the invoices for some of the instances wherein the details were recorded, summons were issued to those customers, most of which remained unreplied. We note that all the sales were cash sales and in case of cash transactions of sale, delivery of goods is taken against the cash payment and it is hardly necessary for the seller to bother about the name and address of the purchaser.

7.2 We further observe that the assertion of the ld. AO on the mere possibility of assessee earning considerable amount out of cash sales on the date of announcement of demonetization is a pure conjecture on the part of the AO and is based on surmises, speculating on the approach adopted by the assessee. Rather, the estimation approach of arriving at probable sales value by the Ld. AO cannot be rationally inferred to justify the addition so made. Thus, we find that the Ld. AO indulged in suspicion, conjecture and surmises and acted without any evidence and upon a view of facts which cannot reasonably be entertained. It is a settled position of law that in making the assessment, the AO is not entitled to make a pure guess and make an assumption without reference to any evidence or any material at all. It has been consistently held by various Hon'ble Courts that there must be some matter more than their suspicion to support the assumption made u/s. 143(3) of the Act. We find force from the decision of Hon'ble Apex Court in the case of Lalchand Bhagat Ambica Ram v. CIT [1959] 37 ITR 288 (SC) wherein it was held as under –

“The mere possibility of the appellant earning considerable amounts in the year under consideration was a pure conjecture on the part of the Income-tax Officer and the fact that the appellant indulged in

speculation (in Kalai account) could not legitimately lead to the inference that the profit in a single transaction or in a chain of transactions could exceed the amounts, involved in the high denomination noted, - this also was a pure conjecture or surmise on the part of the Income-tax Officer. It is, therefore, clear that the Tribunal in arriving at the conclusion it did in the present case indulged in suspicion, conjectures and surmises and acted without any evidence or upon a view of the facts which could not reasonably be entertained or the facts found were such that no person acting judicially and properly instructed as to the relevant law could have found, or the finding was, in other words, perverse and this court is entitled to interfere.”

7.3 *Ld. Counsel pointed out that assessee had all the capabilities, infrastructure, manpower, process and procedures to handle and deal with high volume of customers during small time window available to it. For comparability of the circumstances which existed on the day of demonetization announcement, he pointed to the occasion of Dhanteras which is a festival wherein similar kind of high traffic volume of customers happens for the purchase and sale of gold/bullion/jewellery, it being an auspicious day for making such investments. It was placed on record that on the day of Dhanteras which fell on 28.10.2016 i.e. prior to the day of announcement of demonetization, sales bills to the tune of 229 numbers were generated while dealing with those many customers which was also during the smaller time window available on that day depending on the muhurats. It was also pointed out that the VAT returns filed by the assessee for the year under consideration have not been revised in any manner so as to reflect any kind of adjustment or accommodation made in the accounted data of the assessee. All these facts and explanations were placed before the lower authorities, copies of which are placed in the paper book at page 19 to 28 and 52 to 75.*

8. *Keeping in view the above mentioned peculiar facts and circumstances of the case, the guess work adopted by the ld. AO in arriving at probable sales value and the judicial precedents relied upon, we find no reason to interfere with the factual findings given by the Ld. CIT(A) in deleting the addition of Rs.1,95,03,291/- made by the ld. AO. Accordingly, the appeal of the revenue stands dismissed.*

9. Therefore, we respectfully applying the proposition of law laid down in the judgement cited above to the fact of the case, we hold that there is no reason to interfere with the factual findings given by the ld. CIT(A) in deleting the addition of Rs. 1,65,17,000/- made by the AO, accordingly appeal filed by the revenue is dismissed.

10. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 16.05.2023.

Sd/-

Sd/-

(Rajesh Kumar)
Accountant Member

(Sonjoy Sarma)
Judicial Member

Dated:16.05.2023

Biswajit, Sr. PS

Copy of the order forwarded to:

1. Appellant- ITO, Ward-50(1), Kolkata.
2. Respondent – Joydeb Kundu, 35, MB Road, Mahajati Nagar, Birati, Kolkata-700081.
3. Ld. CIT
4. Ld. CIT(A)
5. Ld. DR

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata