

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI**

**BEFORE SHRI ABY T VARKEY, HON'BLE JUDICIAL MEMBER &
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 102/MUM/2023 (A.Y: 2017-18)

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| Clayton Charles Pinto Mumbai. 303 Palm Beach Apartments, 31 J P Road, Andheri West Mumbai- 400061 PAN: AXIPP2068E | v. | INT TAX WARD 3(3)(1) Mumbai. Air India Building, Mumbai- 400021 |
| (Appellant) | | (Respondent) |

| | | |
|--------------------------------------|----------|---|
| Assessee Represented by | : | Shri Bhupendra Shah, CA |
| Department Represented by | : | Shri Soumedu Kumar Dash (Sr. AR) |
| | | |
| Date of conclusion of Hearing | : | 30.03.2023 |
| Date of Pronouncement | : | 09.06.2023 |

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against the order of Learned Commissioner of Income Tax (A)-57, Mumbai - 1 [hereinafter in short "Ld. CIT(A)"] dated 14.11.2022 for the A.Y.2017-18.

2. Brief facts of the case are, assessee is an individual and an NRI. The assessee has filed this return of income on 24.07.2017 declaring the total income at Rs. 277601/-. The returned was process u/s 143(1) of the Act, 1961(in short Act). The case was selected for limited scrutiny under 'CASS' for the reason of cash deposits during the demonetization period. Notices u/s 143(2) and 42(1) were issued and served on the assessee along with the through questioner through ITBA portal. In response AR of the assessee attached and submitted the relevant information as called for. The Assessing Officer observed from the details furnished by the assessee that assessee has deposited cash in his account maintain at Central Bank Of India amounting to Rs. 14,66,500/-. Consequently, the Assessing Officer issued notice u/s 133(6) to the Central Bank of India calling for information in assesses case in order to cross verify the transactions declared by the assessee.

3. In response to notice issued u/s 142(1) of the Act, assessee has submitted that the cash deposited in his account is out of cash withdrawal from the bank. In this regard, Assessing Officer observed that the assessee has nearly stated the source of cash in this account is from earlier withdrawal without any corroborative evidences. When the assessee was asked to substantiate by issue of notice, in response assessee has submitted as under:

1. Details of Cash withdrawals from the Bank :

| Name of Bank : Central Bank of India | | Branch: Seven Bungalows Andheri (w) | Annexure 'A' Passbook 1 st Page |
|--------------------------------------|--------|--|---|
| Account Number : 1182615215 | | A/c Type : Savings A/c. | |
| Sr. No. | Amount | Date | Remark |
| 1. | 100000 | 12/02/2016 | Page 2 (a) |
| 2. | 46500 | 14/03/2016 | Page 3 (a) |
| 3. | 48000 | 21/03/2016 | Page 3 (b) |
| 4. | 27000 | 29/03/2016 | Page 3 (c) |
| 5. | 75000 | 11/04/2016 | Page 3 (d) |
| 6. | 70000 | 27/04/2016 | Page 3 (e) |
| 7. | 50000 | 10/05/2016 | Page 3 (f) |
| 8. | 75000 | 15/06/2016 | Page 4 (a) |
| 9. | 75000 | 30/06/2016 | Page 4 (b) |

| | | | |
|-------|---------|------------|------------|
| 10. | 75000 | 26/07/2016 | Page 5 (a) |
| 11. | 50000 | 01/08/2016 | Page 5 (b) |
| 12. | 100000 | 08/08/2016 | Page 5 (c) |
| 13. | 75000 | 16/08/2016 | Page 5 (d) |
| 14. | 100000 | 23/08/2016 | Page 6 (a) |
| 15. | 100000 | 02/09/2016 | Page 6 (b) |
| 16. | 100000 | 16/09/2016 | Page 6 (c) |
| 17. | 100000 | 27/09/2016 | Page 6 (d) |
| 18. | 100000 | 20/10/2016 | Page 7 (a) |
| 19. | 100000 | 01/11/2016 | Page 7 (b) |
| Total | 1466500 | - | - |

2. Cash Deposited in bank of old denominations:

| Sr. No. | Name of the Bank | Account No. | Amount (in Rs.) | Remarks | Annexure |
|---------|-----------------------|-------------|-----------------|-------------------------------|------------|
| 1. | Central Bank of India | 11182615215 | 14,66,500 | Cash Deposit dated 11/11/2016 | Page 8 (a) |

4. Further, Assessee also submitted written submission for the sake of clarity its reproduce below.

The assessee was a 30 year old Non Resident and worked on the ship with Foreign Shipping Lines - Geepee Shipping Thailand as a Marine Officer. When he was in India, he resided with his parents in Mumbai. In 2016 the assessee with the intention of getting married decided to purchase residential house property - Flat No. B/24, Tranquil Treat Co-op Hsg. Soc. Ltd, Off Yari Road, Versova, Andheri (W), Mumbai - 400 061 with housing loan from Bank. Hence, the assessee had also made an application with Central Bank of India, Seven Bungalows Branch, Andheri (West), Mumbai in June, 2016 for purpose of obtaining Housing Loan of Rs. 1.5 Crores. As proof of the same, we are attaching herewith letter received from Central Bank of India stating the same in Annexure-A.

The assessee had decided to undertake extensive repair and renovation work of the proposed new house property. For the same, the assessee had authorized his father to withdraw cash at periodic intervals from his Bank Account with Central Bank of India A/c No. 1182615215 from February, 2016.

Considering the security and other aspects, the assessee felt it prudent to withdraw the amount not at one go but over a period of time.

Subsequently, in November 2016, due to demonetization, the assessee was forced to deposit the unspent cash withdrawn amounting to Rs. 14,66,500/-, back into his Central Bank of India Account.

Meanwhile the loan procedures were still ongoing and Tranquil Treat Co-op Hsg. Soc. Ltd. also issued a Non Encumbrance Letter dated 23/04/2017 to Central Bank of India for loan purposes at the assessee's request which is attached herewith In Annexure-B. Subsequently however Central Bank of India did not sanction the loan due to non availability of requisite documents with the Society and the property transaction did not materialize.

5. Assessing Officer observed in his order that initially assessee has submitted that the source of the cash deposited in his bank account is from

earlier withdrawal, however, when probed further, the assessee came up with another explanation that he wanted to purchase a new house property and wanted to take extensive repair and renovation work of the proposed new property. However, the Assessing Officer rejected the same and observed that the assessee has made application for housing loan on 06.02.2016 and it is to be believed for a movement that the assessee wanted to withdraw the cash for renovation and repair, there was no house in first place until 06.06.2016 and as per the letter from Bank Manager, the housing loan was not sanctioned finally due to unavailability of property documents. Further, he observed that the assessee did not withdraw the money in one go, but kept withdrawing money from the month of Feb, 2016 to Nov 2016 and according to him he kept a cash accumulating with his father. Accordingly, Assessing Officer rejected the contentions of the assessee and he tabulated that Assessee's statement indicating that assessee withdrawn every month as under:

7.7 In this regard, a monthly cash withdrawal statement has been prepared in the case of the assessee as under:

| Month | Cash withdrawal during the month |
|---|----------------------------------|
| February, 2016 | Rs. 1,00,000/- |
| March, 2016 | Rs. 1,21,500/- |
| April, 2016 | Rs. 1,45,000/- |
| May, 2016 | Rs. 50,000/- |
| June, 2016 | Rs. 1,50,000/- |
| July, 2016 | Rs. 75,000/- |
| August, 2016 | Rs. 3,25,000/- |
| September, 2016 | Rs. 3,00,000/- |
| October, 2016 | Rs. 1,00,000/- |
| November, 2016 (before 8 th Nov) | Rs. 1,00,000/- |

6. Accordingly, by referring to the above table Assessing Officer allowed the cash withdrawn by the assessee of last two months and by applying the concept of human probability, he proceeded to make addition u/s 69A of the Act, to the extent of Rs 12,66,500/-and charge to tax u/s 115BBE of the Act.

7. Aggrieved assessee preferred an appeal before Id.CIT(A) and filed detail submissions, for the sake of clarity it is reproduced below:

"The assessee was a 30 year old Non Resident and worked on the ship with Foreign Shipping Lines-Geepee Shipping Thailand as a Marine Officer. When he was in India, he resided with his parents in Mumbai, in 2016 the assessee with the intention of getting married decided to purchase residential house property- Flat No. B/24, Tranquil Treat Co-op Hsg. Soc. Ltd, Off Yari Road, Versova, Andheri (W), Mumbai - 400 061 with housing loan from Bank. Hence, the assessee had also made an application with Central Bank of India, Seven Bungalows Branch, Andheri (West), Mumbai in June, 2016 for purpose of obtaining Housing Loan of Rs. 1.5 Crores. As proof of the same, we are attaching herewith letter received from Central Bank of India stating the same in Annexure-

A. The assessee had decided to undertake extensive repair and renovation work of the proposed new house property. For the same, the assessee had authorized his father to withdraw cash at periodic intervals from his Bank Account with Central Bank of India A/c No. 1182615215 from February, 2016. Considering the security and other aspects, the assessee felt it prudent to withdraw the amount not at one

go but over a period of time. Subsequently, in November 2016, due to demonetization, the assessee was forced to deposit the unspent cash withdrawn amounting to Rs. 14,66,500, back into his Central Bank of India Account. Meanwhile the loan procedures were still ongoing and Tranquil Treat Co-op Hsg. Soc. Ltd, also issued a Non Encumbrance Letter dated 23/04/2017 to Central Bank of India for loan purposes at the assessee's request which is attached herewith in Annexure-B. Subsequently however Central Bank of India did not sanction the loan due to non availability of requisite documents with the Society and the property transaction did not materialize."

1) No books are required to be maintained (Addition of Rs. 12,66,500/- out of total deposit of Rs. 14,66,500/-):

i) Cash deposits aggregating to Rs 12.66,500 hav MENT been made in the bank account of the Appellant, but the mere fact that these deposits have been made in a bank account does not indicate that these deposits constitute an income. The Assessing Officer has opined that an income of Rs 12,66,500/- is added to income because the Appellant has deposited unexplained cash of Rs 12,66,500/- in his bank account but then such an opinion proceeds on the fallacious assumption that the bank deposits constitute undisclosed income, and overlooks the fact that the sources of deposit need not necessarily be income of the Appellant. The above ratio is also upheld by Delhi ITAT in the case of Bir Bahadur Singh Sijwall v. Income Tax Officer ITA No. 3814/Del/11.

ii) The assessing officer has made the addition merely on the basis of Summises and Conjectures. Just because the Appellant have withdrawn the money from bank without utilizing the earlier withdrawal and also withdrawing a higher amount as compared to previous withdrawal, the assessing officer have assumed that the amount has been withdrawn for

other purposes and the amount re-deposited by the Appellant is unexplained money u/s 69A of the Income Tax Act.

iii) In the given case, the Appellant is an Individual and does not have any business income. Accordingly, the Appellant is not obliged to maintain books of account and so the Appellant have not maintained any books of account. Since, one of the precondition for applicability of section 69A as enumerated above has not been satisfied, the question of making any addition under section 69A does not arise.

iv) It is interesting to note that same logic applies to bank accounts not recorded in the books of account. Also, even where books of account are maintained the deposits in bank accounts reflected therein can't be added u/s 69A even though the explanation for the source thereof is not satisfactory. This is for the reason that such amounts are debited to the concerned bank account in the books of account of the assessee but not credited. In such a case the Revenue can only add, if the facts so justify, the funds shown as the sources for making such deposits u/s. 69A.

v) In view of the use of the word of "may" and not "shall" in section 69 A, these provisions vest discretion in the assessing officer to consider all the circumstances and to decide whether or not the amount in question is the income of the assessee [CIT v. Smt. P.K. Noorjahan [1999] 103 Taxman 382/237 ITR 570 (SC)]. Even if the assessee's explanation is not satisfactory, still the Assessing officer cant treat as unexplained the amounts in question if the surrounding circumstances require such a treatment, like in case of a minor individual or student having no sources of income for making the investments in question or in case of a person having meager sources of income.

vi) *The assessing officer has relied on the chart of cash withdrawal and deposits furnished during the course of scrutiny proceedings which is just a summary from the Bank Statement. The cash deposits made in bank cannot be assumed as income especially when the cash has been deposited out of the cash balance held by the Appellant. The Bombay High Court in the case of CIT v. Bhal Chand H. Gandhi (1983) 141 ITR 67 (Bom) held that pass book supplied by the bank to the assessee cannot be regarded as books of the assessee i.e. a book maintained by the assessee or under his Instruction. Hence, credit shown in Pass book without corresponding entry in the books of account does not fall within the ambit of section 68. There are many other judicial decisions by various authorities where it is held that addition under section 68 cannot be made if no books of accounts are maintained. Few of them are cited below:*

- *CIT v Taj Borewells [2007] 291 ITR 232 (Mad)*
- *Smt Shanta Devi v. CIT (1988) 37 Taxman 104 (Punj & Har) A*
- *Amitabh Bansal v. ITO (2019] 102 taxmann.com 229/175 ITD 401 (Delhi-Trib.)*
- *Anand Ram Raitoni v. CIT (1997) 223 ITR 544 (Gauhati High Court)*
- *ITO v. Kamal Kumar Mishra (2013) 143 ITD 0686 (Lucknow Tribunal)*
- *Babbal Bhatia v. ITO (2018) (Delhi ITAT)*
- *Baladin Ram v. CIT (1969) 71 ITR 427 (SC)*
- *CIT v. Ms Mayavati 338 ITR 563 (Delhi High Court)*
- *Smt Mansi Mahendra Pitkar 160 ITD 605 (Mumbai Trib)*
- *Smt Madhu Raitani 10 ITR(T) 91 (Gauhati) (TM)*

vi) Without prejudice to above, the facts of the given case are well covered by the decision of the Delhi High Court in the case of *Jaya Aggrawal v. ITO (2018) 92 Taxmann 108* where it is held by the Hon High Court that "Explanation given by assessee that deposit was made out of sum withdrawn earlier was not fanciful and sham story and it was perfectly plausible, thus, impugned additions under section 68 was to be deleted."

Section 115BBE wrongly invoked:

1) The Assessing Officer erred in adding 12,66,500/- u/s 69A r.w.s 115BBE without considering the fact that the said deposits were made out of past withdrawal from the bank. The Main source is past withdrawals made from account maintained with Central Bank of India amounting to Rs. 14,66,500/-. The AO considered the cash withdrawals made within a one month's period from the date of cash deposits, ie, cash withdrawals of Rs. 1,00,000/- each on 20.10.2016 and 1.11.2016 as explained source of cash deposits made by the Appellant thereby making an addition of the same on ad hoc basis, viz, Rs. 12,66,500/-.

ii) *Section 115BBE is not retrospective:*

i). In the case of *J.K. Synthetics Ltd 119 CTR 222 (SC)* it was held that, "As per well established law provision regarding levy of penalty and increased rate are in the nature of substantive law and not objective law,".

ii. In the case of *Vatika Township (P) Ltd 367 ITR 466 (SC)* it was held that, "Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment retrospective effect; unless legislation is for purpose of

supplying an obvious omission in a former legislation or to explain a former legislation.”

iii. In the case of Star Television News Ltd 317 ITR 66 (Bom) it was held that, "Section 245HA(1)(iv) would, therefore, in the ordinary course, has to be held to be arbitrary, unreasonable and violative of article 14 of the Constitution of India, inasmuch as such an applicant cannot be visited with such great hardship, disadvantage and prejudice for no fault of its own but solely by reason of the inability of the Settlement Commission to dispose of such application by the specified date." This was affirmed by Supreme Court in 373ITR 528 (SC).

iv. In the case of Pyare Lal Sharma v. M.D. J & K Industries AIR 1989 SC 1854 it was held that, "It is the basic principle of natural justice that no one can be penalized on the ground of conduct which was not penal on the day it was committed"

v. Also in the case of National Agricultural Co-operative Marketing Federation of India Ltd v UOI (2003) 260 ITR 548 (SC) it is was held that, "Govt. has the power to make the law retrospectively, subject to several restrictions."

vi. In the case of Hitendra Vishnu Thakur v State of Maharashtra AIR 1994 SC 2623 it was held that, "A statute which affects substantive rights is presumed to be prospective, either expressly or by necessary intendment. In the year 2004, S. 111A had been amended with an amendment brought in the middle of the financial year making the same applicable to the entire financial year, but it was specifically stated therein, "the transaction of sale of such equity share or unit is entered into on or after the date on which Chapter VII of the Finance (No. 2) Act, 2004 comes into force" making the intention of the statute clear and unambiguous unlike the Tax Amendment in 2016."

ii) Therefore, the amendment of section 115BBE cannot operate from 01/04/2016 to 08/11/2016. Therefore, the transactions falling between these two dates cannot be subjected to amended section 115BBE. However, the AO has applied the same retrospectively and therefore the addition is not tenable in law.

iv) The Appellant would like to further point out that, Where amount withdrawn earlier to demonetization was part of cash balance in the hand of the Appellant, the AO cannot disbelieve a part of such cash balance as being not of specified denominations, when the books are not rejected. The same has been upheld in the Case Law of Lalchand Bhagat Ambica Ram vs. CIT [1959] 37 ITR 288(SC).

v) Additionally, when Cash is deposited on different dates, the Assessing officer cannot make any adverse inference to make the addition on the presumption that cash declared consists of only Rs. 1000 or Rs. 500 Notes. The same has been upheld in the case laws as below.

- Narendra G. Goradia v. CIT (1998) 234 ITR 571 (Bom) (HC)
- CIT v. Associated Transport Pvt. Ltd. (1995) 212 ITR 417 (Cal) (HC)
- CIT v. Laxmandas Bhatiya (1996) 217 ITR 878 (MP) (HC)
- Bal Velbal v. CIT (1963) 49 ITR 130 (SC)
- Lakshmi Rice Mills v. CIT (1974) 97 ITR 258 (Pat) (HC)
- ITO V. ITAT (1998) 229 ITR 651 (Pa) (HC)
- GK Padmaraju v. CIT (1964) 51 ITR 412 (AP) (HC)

vi) Additionally the Appellant would like to point out as under High Denomination Notes could not be treated as income from undisclosed sources just because it was not mentioned in books that cash balance consisted of High Denomination Notes, as upheld in the case law of ChunilalTikamchand Coal Co. Ltd. v.CIT (1955) 27 ITR 602 (Pat).

h) Addition on the basis of suspicion, presumption and surmises:

1. The Assessing Officer erred in adding 12,66,500 u/s 69A r.w.s 11588E only on the basis of suspicion, presumption and surmises. Addition u/s 68 to 69D without corroborative evidence and linkage of the assessee will fall in the domain of suspicion only Suspicion alone without there being evidence specific to a transaction cannot become the basis for creating charge for levying tax as each transaction has to be independently inquired into Suspicion howsoever strong cannot take the character of evidence.

ii. Suspicion is no basis for making additions: Reliance upon suspicion and surmises not supported by any evidence or partly inadmissible material is not proper [Dhirajlal Girdharilal v CIT [1954] 26 ITR 736 (SC)]. Suspicion, how so ever strong, cannot take the place of evidence or legal proof [Roop Singh Nagir v. Punjab National Bank [2009] 2 SCC 570. Lalchand Bhagat Ambica Ram's case (supra); Subramanian Swamy v. A. Raja [S.LP (Cr) No. 1688 of 2012 dtd. 24-8-2012 (SC)]. As such some positive evidence is needed and subjective opinion would be inadequate material for the Assessing Officer to constitute evidence before rejecting a reasonable explanation furnished by the assessee [CIT v. Agile Properties (P) Ltd. [2014] 45 taxmann.com 512/225 Taxman 107 (Delhi) (Mag.)].

- *Dhakeswari Cotton Mills Ltd. v. CIT [1954] 26 ITR 775 (SC),*
- *Lalchand Bhagat Ambica Ram v. CIT [1959] 37 ITR 288 (SC),*
- *CIT v. East Coast Commercial Co. Ltd. [1967] 63 ITR 449 (SC)*
- *Anil Tibrewala v. ITO [2004] 1 SOT 90 (Mum);*
- *CIT v. Daulatram Rawatmull [1964] 53 ITR 574 (SC);*
- *Umacharan Shaw & Bros. v. CIT [1959] 37 ITR 271 (SC);*

- *Pr. CIT v. Ajay Surendrabhai Patel [2016] 69 taxmann.com 309 (Guj.).*
- *Vijayrattan Balkrishan Mittal Vs. DCIT (2019) 33 NYPTTJ 740 (Mum.)(Trib.)*
- *Smt. Karuna Garg Vs. ITO (2019) 178 ITD 823 (Delhi) (Trib.)*
- *Chandra Prakash Jhunjunwala Vs. DCIT (2019) 201 TTJ 831 (Kol.) (Trib.) Smt. Madhu Killa Vs. ACIT (2019) 178 DTR 236 (Kol.) (Trib.)*
- *Ramprasad Agarwal Vs. ITO (2019) 174 ITD 286 (Mum.) (Trib.)*
- *DCIT VS. Saurabh Mittal (2018) 172 DTR 291 (Jaipur) (Trib.)*
- *Mahavir Jhanwar Vs. ITO (2019) 55 CCH 150 (Kol) (Trib.)*
- *Arun Kumar & Ors. Vs, ACIT (ITA No.457/Del/2018, 2825/Del/2018 and 2826/Del/2018 order dt. 05.11.2018)*
- *DCIT VS. Rakesh Saraogi & Sons (HUF)(2018) 32 NYPTTJ 1116 (Raipur) (Trib.)*

iii)Therefore, the addition made on the basis of suspicion is not tenable in law.

i) Past withdrawal from banks cannot be ignored even though no books are maintained:

i. Where the Appellant explained as the source of cash deposits the earlier withdrawals either from the same bank account or some other bank account, such explanation can't be rejected by merely disbelieving the same or by simply rejecting it as not acceptable or by stating that he has failed to produce positive evidence of the continuity of the availability of the amounts for making the later deposits or that there is unacceptable or substantial time gap between the earlier withdrawals and later deposits by speculating or surmising that it was not probable for him to have kept the amounts unspent in the intervening period. In

other words, once the Appellant discloses the source as having come from the withdrawals made on a given date from a given bank, it is not open to the Revenue to disbelieve the plea of the assessee merely on the surmise that it would not be probable for the him to keep the money unutilized.

ii) In the case of S.R. Venkata Ratnam v. CIT (1961) 6 Taxman 263 (Kar) it was held that, "Capital investment in a firm partially attributed to withdrawals from pigmy deposits more than two years prior to investment-to added the same as income from undisclosed sources without further investigation as to genuineness of such deposits or other documentary evidence-whether commissioner exercised his jurisdiction judicially and properly in confirming ITO's order-Held, on facts, no"

iii) In the case of Sudhirbhai Pravinkant Thaker v. ITO [2017] 88 taxmann.com 382 (Ahd-Trib.) it was held that, "When assessee had demonstrated that he had withdrawn cash from bank and there was no finding by authorities below that this cash available with assessee was invested or utilized for any other purpose, it was not open to authority to make addition on basis that assessee failed to explain source of deposits,".

iv) In the case of Gurpreet Singh v. ITO [2016] 40 ITR(T) 467 (Chd. - Trib.) it was held that, "Re-deposit of excess withdrawals made out of explained bank deposits can't be held as unexplained money."

v. In the case of Assit. CIT v. Baldev Raj Charla [2009] 121 TTJ 366 (Delhi)] it was held that, "Where there were sufficient cash withdrawals to cover cash deposits in question, merely because there was time gap between withdrawal of cash and cash deposits, explanation of assessee could not be rejected and addition on account of cash deposit could not be made."

vi. Similar view is also held in the following case laws:

Moongipe Investment Ltd. [2013] 30 taxmann.com 113 (Delhi - Trib.).

Vinatha Madhusudan Reddy v. Asst. CIT IT Appeal No. 257 (Bang:) of 2018 dtd. 24-8-2018)

Gordhan v. ITO IT Appeal No 811 (Delhi) of 2015 did 19-10-2015).

Ram Lal (IT Appeal No. 587 (Chd) of 2008, 20 dated 13-9-2013

Dy. CIT v. Nikhil Nanda (IT Appeal No. 3644 (Delhi) of 2018 dtd. 18-3-2015]

Pawan Kumar v. ITO [IT Appeal No. 982 (JP) of 2019, dated 3-3-2020]

Ramalinga Prabhu Shinde's (IT Appeal No. 6668 (Mum.) of 2018 did. 5-2-2020]

Mallikarjun Siddagada Hosagana (IT Appeal No. 1582 (Bang) of 2019 dtd. 23-12- 2019)

vii. In the absence of any evidence to the effect that the sum was utilized by the Appellant in any other manner, the Revenue would not be justified in unreasonably rejecting a good explanation and adding the amount as income from undisclosed sources. [*Shivcharan Dass [1980] 4 Taxman 530 (Punj. & Har) and Nanalal Teli Kelwa [2008] 173 Taxman 460 (Raj)*]. Where the explanation, given by Appellant that deposit was made out of sum withdrawn earlier and kept with himself for personal needs, the same cannot be discarded and it was perfectly plausible, the addition was deleted. (*Jaya Aggarwal v. ITO [2018] 92 taxmann.com 108, Baljit Singh v. ITO [2019] 178 ITD 12 (Chd.-Trib.)*)

vii) It is noteworthy that, as yet, there is no law prescribing upper limit for holding cash or that the funds withdrawn from bank account(s) cannot be held or retained by the Appellant's on hand (*Baljit Singh (2019) 178 ITD 12 (Chd. - Trib)*]

ix) Also there is no law prohibiting frequent withdrawals and re-deposits of cash from banks [Dy. CIT v. Veena Awasthi IT Appeal No. 215 (Lucknow) of 2016 dtd. 30-11 2018] nor is there any law requiring the depositing back of the unused amounts withdrawn from banks immediately or as soon as possible [ITO v. Baburao K. Paisal (IT Appeal No. 6091 (Mum) of 2012 dtd. 22-12-2014)

x) Vide CIT v. K. Sreedharan (1993) 201 ITR 1010 (Ker) non-spending of money during the period between the date of the withdrawal of the amount and the date of its later deposit is a negative fact and hence, the Revenue can't ask the assessee to bring forth positive evidence regarding the non-spending of such amount(s). In other words. the Revenue can't place the negative onus on the assessee in this regard. (Rajiv Chandran v. ITO-2019-TIOL-231-ITAT-DEL; Thomas Eapen (supra)]

xi) The only way to disprove such an explanation by the Appellant is for the Assessing Officer to bring some material on record to show that the earlier withdrawals were utilized for some other purpose, In this regard, as stated earlier, the onus is on the Revenue and the Revenue cannot shift the same onto the Appellant. A glance through of the relevant decisions, as quoted supra, which are decided in the Appellant's favour in this regard shows that in some cases the gap is more than twelve months and in the other cases the gap is only for a few months if not for a few days.

xii) Obviously, there can be no hard and fast rule as to much lapse of time is acceptable, In the case of Sri Sri Nilkantha Narayan Singh CIT (1951) 20 ITR 8 (Pat) it was held that, "Where the assessee did not maintain and hence did not produce any Home Chest account though d was his case that the high denomination notes were. Savings from his

personal allowance there was no warrant for drawing an adverse inference. Assessee produced details of withdrawals for past 7 years, and claimed the amount encashed on demonetization as to be out of savings from such withdrawals. Such an explanation cannot be rejected by AO."

xiii) In the case of Kanpur Steel CO. Ltd v CIT [1957] [32 ITR 56 (AM) was held that, "High Denomination currency notes could be stored more easily and, at the time of accounting, they would have facilitated counting. Since the balance was increasing steadily, the assessee might not have felt if necessary to keep the balance in currency notes of low denomination. Such an explanation by assessee is not an unreasonable explanation."

xiv) In the case of Gur Prasad Hari Das vs CIT (1963) 47 ITR 634 (AR) it was held that, "Whether in view of aforesaid, there was no material before Tribunal for holding that assessee could not have been in possession of any of remaining thirteen notes also and that those notes or any part of them represented income of assessee from some undisclosed sources."

xv. In the case of Gordhan v Dy. CIT dated 19/10/2019 it was held that, "no addition can be made u/s 68 on the sole reason that there is a time gap of 5 months between the date of withdrawals from bank account and redeposit the same in the bank account. Unless the AO demonstrate that the amount in question has been used by the assessee for any other purpose. In my view addition is made on inferences and presumptions which is bad in law. Delhi ITAT"

xvi. Similar view was held in the case of Kulwant Rai [2007] 163 Taxman 585/291 ITR 36 cash flow statement must be considered.

xvii. Merely because the entire cash holding of HDNS as on 8.11.2016 was not deposited immediately or at once cannot by itself lead to the conclusion that the assessee did not have the corresponding cash. It can merely lead to suspicion but based on such suspicion no addition can be made without conclusively proving that the assessee did not have the HDNS as claimed [Agson Global (P.) Ltd. v. Asstt. CIT [2020] 115 taxmann.com 342 (Delhi - Trib.)]. In this case the assessee claimed that it could not deposit its huge cash at one go after demonetization as banks were not accepting huge amounts at once.

The Assessing Officer perused the said submissions. However, he did not find the same on the facts as well as tenable in law.

in view of above, the addition made by the assessing officer u/s.69A of the Income Tax Act amounting to Rs. 12,66,500/- be deleted."

8. After considering the detailed submissions of the assessee and assessment order Id.CIT(A), dismissed the appeal filed by the assessee with the following observation.

4.3.4 In the case of the appellant, the Assessing Officer already given relief of Rs.2,50,500/- out of cash deposit of Rs. 14,66,500/- as being cash withdrawal from bank in recent past. However, the appellant has not satisfactorily explained the source of cash of Rs.12,66,500/- deposited in bank account, therefore, addition of Rs.12,66,500/- made by the Assessing Officer u/s.68 in respect of cash deposit in bank account is upheld.

9. Aggrieved assessee is in appeal before us raising following grounds of appeal:

1. On the facts and in the circumstances of the case, the learned Assessing Officer (hereafter called AO) has erred in adding back the amount of Rs. 12,66,500/- being part of the total cash deposited by the Appellant in his Bank Account during the demonetization period as unexplained money and treated the same as income in the hands of the Appellant u/s 69A rws 115BBE of the Income Tax Act

a. Deposit was out of earlier cash withdrawn from bank account of the Appellant

b. Arbitrarily rejecting details of cash deposits even though each and every detail was submitted about the source and nature of receipt.

2. In the facts of the case and in Law, the learned CIT (A) erred in confirming the addition by rejecting all the grounds of appeal without considering detailed facts and case laws submitted by the Appellant.

10. at the time of hearing Id. AR submitted that the assessee is NRI and during demonetization period, Assessee has deposited cash which is nothing but assessee has re deposited the cash which was withdrawn by him in the earlier months he brought to our notice page 3 of the assessment order. Further, he brought to notice page 33 of the paper book wherein assessee has submitted all relevant information through ITBA portal. The Id.AR submitted that being NRI, assessee is not required to maintain any books of account. Therefore, the provision of section 68 to section 69C are not applicable to the assessee. He brought to our notice the submissions made by the assessee before the Id.CIT(A). Further, he submitted that the Assessing Officer has wrongly invoked section 115BBE of the Act, and he brought to our notice page 41 of the paper book wherein assessee has made detailed submission before Id. CIT(A) in this regard. Further, he brought to our notice page 44 of the paper book wherein assessee has submitted before Id. CIT(A),

that past withdrawal from bank cannot be ignored even though no books are maintained and he brought to our notice details submitted before Id.CIT(A).

11. On the other hand Id. DR brought to our notice page 20 of the appellate order and submitted that the lower authority have given substantial relief to the assessee, where he has given relief of withdrawal of last two months and at the same time, he justified the addition made by the AO, however not u/s 69A, but he rightly invoked section 68. Therefore, he submitted that he rely on the finding of Id. CIT(A), and relevant case laws relied by the Id. CIT(A) to sustain the addition.

12. Considered the rival submissions and material placed on record we observed that the assessee is a NRI and he worked on the ship with foreign shipping lines as a Marine Officer as per the information available on record when he visits India he resides with his parents in Mumbai. And it is also fact on record that due to demonetization assessee has deposited the cash available in hand, and on the same time we observed that assessee is habitually withdrawn cash in the range of 1,250000/- to 75,000/- and the above said cash is withdrawn by his father, it is also fact on record that there is no other source of income brought on record by the assessee nor by the revenue. As per the information available on record, assessee has habitual withdrawn cash from the bank and assessee has substantiated that the source of the income is cash withdrawal at the same time in another occasion, he submitted certain records to claim that he intend to purchase a new house and for the purpose of repair work he was withdrawing the cash. This line of argument was not found acceptance from the lower authority and even we are not inclined to accept the same. However, it is fact on record that assessee had cash balance during the period of demonetization and assessee

has deposited 14,66,500/-. Since, assessee is an NRI the source of income is already declared and no other information is submitted by the assessee nor unearthed by the revenue authorities. Considering the fact that the source of income of the assessee is employment in foreign shipping lines and the source declared by the assessee is also cash withdrawn by him in the earlier month. Since the cash withdrawn by the assessee alone is declared as a source of cash deposit wherein we inclined to accept that the cash is used to make the deposit during demonetization period. In our considered view the cash withdrawn by the assessee through his father is meant for maintenance of the family. Therefore, 50% of the cash withdrawn by the assessee are applied for the maintenance of the family still another 50% may be the source of the cash deposit in the bank. Therefore, in our considered view, the addition proposed by the Assessing Officer to the extent 12,66,500/- may be reduced to 50% of the same as a source of cash deposit as an explained source through above said withdrawals.

13. Coming to the next issue of invoking the provision of section 115BBE we observed that being NRI, assessee is not required to maintain any books of account and Assessing Officer has found the information which is available to him through ITBA portal and also the same was substantiated by obtaining the banks statement from the assessee. Therefore, it clearly shows that assessee has not maintained books of account as well as there is no need to maintain any record by him. Therefore, it is not proper on the part of the Id. CIT(A) to invoke the provision of section 68 r.w.s. 115BBE. The deposit made by the assessee during demonetization period is a onetime event and the addition was proposed and accordingly invoked section 68 in such special events, even though it is not required on the part of the assessee to maintain any books of account and a portion of cash which was not explained or substantiated to disclose the proper source the addition may be sustained u/s

68 and at the same time, he cannot be invoked section 115BBE of the Act. Wherein it is not required on the part of the Assessee to maintain any books of account. Therefore, we partly allowed the grounds raised by the assessee.

14. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 9th June, 2023.

Sd/-
(ABY T VARKEY)
JUDICIAL MEMBER

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Mumbai / Dated 09/06/2023

MS. URMILA,

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)

ITAT, Mum