

**IN THE INCOME TAX APPELLATE TRIBUNAL  
JODHPUR BENCH, JODHPUR**

**VIRTUAL HEARING**

**BEFORE: DR. S. SEETHALAKSHMI, JM  
&  
SHRI RATHOD KAMLESH JAYANTBHAI, AM**

**ITA No. 20/Jodh/2019**  
**(ASSESSMENT YEAR- 2013-14)**

The Asst. Commissioner of Income Tax, Circle-02, Bikaner	Vs	Sh. Naresh Kumar Jindal, Prop. M/s Jindal and Company, Pilibanga
<b>(Appellant)</b>		<b>(Respondent)</b>
<b>PAN NO. ADHPK 8715 C</b>		

**CO No. 06/Jodh/2019**  
**(Arising out of ITA No. 20/Jodh/2019)**  
**(ASSESSMENT YEAR- 2013-14)**

Sh. Naresh Kumar Jindal, Prop. M/s Jindal and Company, Pilibanga	Vs	The Asst. Commissioner of Income Tax, Circle-02, Bikaner
<b>(Appellant)</b>		<b>(Respondent)</b>
<b>PAN NO. ADHPK 8715 C</b>		

<b>Assessee By</b>	Sh. Rajendra Jain, Adv.
<b>Revenue By</b>	Sh. S. M. Joshi, JCIT-DR
<b>Date of hearing</b>	05/07/2023
<b>Date of Pronouncement</b>	31/07/2023

**ORDER**

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal filed by the revenue and the cross objection filed by the assessee arising out of the order of the Commissioner of Income Tax (Appeals)- Bikaner [hereinafter referred to as Id. CIT(A)'] for the assessment year 2013-14 dated 09.10.2018 which in turn arises from the order passed by the ITO, Ward-1, Hanumangarh passed under Section 143(3) of the Income tax Act, 1961 (in short 'the Act') dated 31.03.2016.

2. Since the issues involved in this appeal filed by the revenue and cross objections of the assessee relates the assessee for the same assessment year and the grounds of the appeal and CO are interconnected were heard together with the agreement of both the parties and are being disposed off by this consolidated order.

3. Before moving towards the facts of the case we would like to mention that the revenue has assailed the appeal in ITA No. 20/Jodh/2019 on the following grounds;

*“(i) Considering the facts and circumstances of the case, the Ld. CIT(A) has erred on facts and in law by reducing the fact based addition of Rs. 3,55,19,179/- made by the AO for unexplained transaction recorded in duplicate Khata Bhai to Rs. 67,66,456/-.*

*(ii) Considering the facts and circumstances of the case while admitting fresh evidence to invoke the peak credit theory for giving above relief, the Id. CIT(A) has erred on facts and in law by not giving reasonable opportunity to the AO under Rule 46A(3) of the Income Tax Rules, 1962.*

*(iii) Considering the facts and circumstances of the case, the Ld. CIT(A) has erred on facts and in law by reducing the trading addition of Rs. 10,06,320/- made by the AO to Rs. 2,00,000/-*

*(iii) Considering the facts and circumstances of the case, the Id. CIT(A) has erred on facts and in law by deleting the addition on account of expenses on marriage of Rs. 2,00,000/- made by the AO.”*

### **Grounds of Cross Objection in CO No. 06/Jodh/2019 for A.Y 2013-14**

3.1 The assessee has filed the cross objection against the appeal of the revenue and the grounds of the cross objections are reproduced here in below :

*“1. The assessee is aggrieved of the order of the Ld. CIT(A) who failed to give specific directions for excluding or giving set-off of Rs. 25.15 lac shown by the assessee himself and his other two relatives- Rs. 34 lac by his wife-Prakash Devi Jindal & Rs. 10.50 Lac by his brother Sh. Ram Gopal Jindal as of the year in their respective hands on the basis of highest peak of aforesaid non-tallying credit entries/ unexplained transactions of so called Duplicate Khata Bahi being Rs. 67,66,456/- despite an abstract showing aforesaid amounts declared and despite observations/findings in the order regarding treating the amounts belonging commonly to them, which may result into hardship of double taxation of aforesaid amounts.”*

4. The fact as culled out from the records is that the assessee has filed his e-return for the financial year 2012-13 relevant to A.Y 2013-14 on 31.03.2014 thereby declaring his total income at Rs.

30,02,730/-. The case was selected for scrutiny on the basis of CASS, accordingly a notice u/s 143(2) of the Act was issued on 3.9.2014 fixing the hearing of the case on 17.09.2014. The notice was duly served upon the assessee. The case has been assigned to the undersigned by the Pr. CIT, Bikaner vide order u/s 127 of the Income Tax Act, 1961 dated 01.01.2016. Accordingly due to change in incumbent, fresh notice u/s 143(2)/142(1) was issued on 7.1.2016. The order is passed u/s 143(3) of the Act on 30.03.2016 where in the Id. AO has made trading addition of Rs. 10,06,320/-, Rs. 3,55,19,179 being the amount of unexplained transaction recorded in duplicate khata vahi and Rs. 2,00,000/- on account of expense on marriage.

5. Aggrieved from the order of the AO, assessee preferred an appeal before the Id. CIT(A). A propose to the grounds so raised by the assessee on three issues the relevant finding of the Id. CIT(A) is reiterated here in below:

Issue no. 1

4.6. As regards the application of NP rate of 5.08% i.e. average rate of last three years, I find that though there was sharp decline in GP rate, however, it is seen from the trading results that the appellant had declared GP rate in the immediate preceding year i.e. FY 2011-12, of 2.68% and 10.66% in FY 2012-13. The average of these rates including present year comes to 5.08%, which was applied by the AO to estimate net profit. However, I find that the AO while applying such rate, failed to consider the quantum of sales, which

was never comparable with last two years. The quantum of sales achieved in the year under consideration is of quite significance as far as profit rate is concerned. Even in the immediate preceding year, the GP rate declared by the appellant was only 2.68% in that case, the application of GP rate of 5.08% cannot be said to be justifiable action. It is quite common that when generally turnover increases, the GP/NP rate tends to fall down. In the instant case, the appellant's turnover increased manifold as compared to last two years, therefore, in my view it would not be fair to adopt average rate of last three years, particularly when in FY 2012-13. the appellant had declared only sales of Rs. 17,00,859/- and net profit of Rs. 1,81,279/- @10.66%. Obviously, if GP/NP rate of FY 2012-13 would be considered for working out the average profit rate, then average rate would be quite higher. Considering the overall facts and appellant's submissions, it is held that the AO was not justified in applying the average rate of 5.08% to estimate the net profit.

4.7.1. However, it is fact that the appellant's books of accounts suffered from various defects for which the appellant could not put forth any justifiable explanation. The Hon'ble ITAT Rajkot Bench 'E' in the case of ITO vs. Smt. Jayaben K. Ghelani [2017] 79 taxmann.com 249 (Rajkot - Trib.) held that where assessee failed to produce relevant books of account in scrutiny assessment, Assessing Officer was justified in rejecting book results and making addition on estimation basis under section 145(3). On overall appreciation of the facts of appellant's case, I find it would be justifiable to make an lump addition of Rs. 2,00,000/- to cover up discrepancies noted by the AO in the maintenance of books of account. In view of the above, the grounds of appeal regarding this issue are partly allowed.

## Issue no. 2

"5.3. I have considered the facts of the case and appellant's submissions and I find that the AO made the addition of Rs. 3,55,19,179/- by observing that the credit entries in the parallel bahi to that extent remained unexplained and unverifiable with regular books of accounts. The appellant contended that the AO while making the addition failed to consider similar non-tallying debit entries. It was contended by the appellant that the AO only considered non-tallying credit entries whereas fact that is that cascading cumulative effect as amounts remaining in business gets rotated multiple times during the year, therefore, it was not correct on the part of the AO to mix the entries i.e. tallying and non-tallying. It was contended that the AO failed to record finding that the appellant failed to reconcile or got them

reconciled with cogent proof. The appellant further stated that the AO did not exclude Rs. 11,21,950/- related to Smt. Prakash Devi, Prop. M/s. Jai Durga Int. Udhyog. Besides, the AO also failed to exclude Rs. 25.15 lacs, which was added separately. It is observed that due to their inability to explain all the entries recorded in the impounded books of accounts/ documents with support of corroborative cogent evidence, all unexplained non-tallying entries/ transaction were taken belonging commonly to them. The appellant and other two family concerns declared income after working out the same on the basis of peak of non-tallying entries and was bifurcated amongst them proportionately as illustrated in table below:-

Name of Person	Ass. Year 2013-14			Ass. Year 2014-15		
	Income (Regular)	Income (Non Tally Entries)	Income Returned	Income (Regular)	Income (Non Tally Entries)	Income Returned
Naresh Kumar Jindal	Rs. 487730	Rs. 25.15 Lac	Rs. 3002730	Rs. 66710	Rs. 16.80 Lac	Rs. 1746710
Parkash Devi Jindal	Rs. 1847140	Rs. 34 Lac	Rs. 5247140	Rs. 898730	Rs. 21.956 Lac	Rs. 3094730
Ram Gopal Jindal	Rs. 82510	Rs. 10.50 Lac	Rs. 1232510	Rs. 43090	Rs. 10 Lac	Rs. 1043090
Total	Rs. 2417380	Rs. 69.65 Lac	Rs. 9482380	Rs. 1008530	Rs. 48.76 Lac	Rs. 5884530

The appellant has furnished summary of total of daily trial balance for FY 2012-13 with reconciling total debit and credit entry in jindal joint books. There appears to be Rs. 67,66,456.18 as Highest peak balance as on 01.04.05.12. From the AO's findings, it is clear that while adding Rs. 3,55,19,179/, he did not consider the simultaneous debit entries, which should have been considered while treating the credit entries in Khata bahi as unexplained. Considering the facts of the case and appellant's explanation furnished in this regard, it is held that the AO shall only Rs. 67,66,456/- being highest peak credit, which is reconciled by the appellant after considering the debit entries also and amount that remained to be set off after making the addition of Rs. 3,55,19,179/-. The appellant gets partial relief on this account. The grounds regarding this issue are partly allowed.

### Issue no. 3

06. The next ground of appeal is directed against the AO's action in estimating the marriage expenses at Rs. 5 lacs as against Rs. 3 lacs declared by the assessee, thereby making an addition of Rs. 2 lacs. I find the AO while estimating the marriage expenses at Rs. 5 lacs failed to bring any single iota of evidence to justify his action. The appellant has furnished capital account of himself and his wife. The appellant explained that his daughter who got married was educated girl and employed in some job and marriage ceremonies were carried out in Mandi Rampura Phool (Punjab) in the house of groom in presence of limited persons from both sides without any pomp & show. I find that the AO did not conduct any enquiry to establish that the appellant had incurred more than what has been declared by him.

Considering the appellant's submissions and case laws relied on by him, it is held that the AO was not justified in estimating the marriage expenses at Rs. 5 lacs. The addition made at Rs. 2 lacs on this account is hereby deleted. The ground of appeal is allowed.

6. The Id. AR of the assessee relied on the submission made before the Id. CIT(A) and submitted that the Id. CIT(A) while dealing with huge addition of Rs. 3,55,19,179/- by the Assessing Officer for non tallying credits entries after excluding Rs. 1,73,80,515 for tallying credit entries, Rs. 11,21,950/- accepting to be relating to assessee's wife Smt. Parkash Devi, though it was not excluded which appears to have occurred due to unintended mistake and Rs. 10,56,565/- accepting to be relating to assessee's deceased brother Sh. Ram Gopal from total credit entries of Rs. 5,60,56,259 on merit had contended mainly that AO was not justified in not excluding similar non-tallying entries of debit side and further disapproval of peak theory in such cases entailing rotation of money/fund not tallying or reconcilable frequently in the name of single person and/or different persons stressed since beginning though subscribed to be right approach in later year by the AO during the course of assessment concluded u/s 143(3) for Assessment Year 2014-15 and therefore, the action of Assessing Officer taking a different view in the A.Y 2013-14 is

not correct. In this regard relying on the decision of Hon'ble Supreme Court in RadhasoamiSatsang vs. Commissioner of Income-Tax , where in the observation of the court is that :

*"We are aware of the fact that strictly speaking res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."*

So, relying on the finding that Id. CIT(A) has rightly allowed the peak theory in the year under consideration when the AO himself has in the subsequent year taken the same view the appeal filed the revenue is not correct and the revenue cannot take a pick and choose approach while making the assessment of the same assessee and on same set of facts.

7. Per contra, the Id. DR heavily relied upon the order of Assessing Officer and contended that in this case was based on the survey action wherein loose papers and parallel account was maintained by the assessee was found. The Id. AO has made addition rightly on the credit balance amount to Rs. 3,55,19,179/- and Id.CIT(A) has given relief of balance amount and sustained only a sum of Rs. 67,44,456/-

without giving an opportunity under rule 46A under the Income Tax Rules and therefore, the order of the Id. CIT(A) is prejudicial to the interest of the revenue and therefore, Ground Nos. 1 and 2 raised by the revenue, he has supported the finding of the AO. As regards Ground Nos. 3 and 4, the Id. DR relying on the finding of the Id. AO submitted that there is no justification of Id. CIT(A) reducing, the addition of Rs. 10,06,320/- for ground no. 3 and for ground no. 4 he supported the order of the assessing officer.

8. We have heard the rival contentions and perused the material placed on record. The bench noted that material collected in the survey action is already on record of the AO and Id. AR of the assessee based on that material has carried out reconciliation of working of peak credit before the Id. CIT(A). It is also practice of issuing notice to the AO when the Id. CIT(A) fixe the hearing of the appeal filed by the assessee. It is also not in dispute that the assessee has produced any additional evidence before Id. CIT(A). Therefore, the contention of the revenue in Ground No. 2 that the AO was not allowed reasonable opportunity before the Id. CIT(A) under rule 46A(3) of the Income Tax Rules is not correct and therefore, this ground of

appeal No. 2 devoid of any merits and the Id. DR did not present any written arguments on the issue and therefore, the ground no. 2 raised by the revenue is dismissed.

9. Apropos to the Ground No. 1, the bench observe that before us also the Id. AO through Id. DR did not controvert working of peak as supported by the submission of the assessee and finding of the Id. CIT(A) in his order at Rs. 67,66,456/-. The Id. CIT(A) considering the various judgment of the Jurisdictional High Court as discussed in the order and considering the working of the peak as confirmed the addition to that extent of the peak. The relevant observation on these issue from the order of the Id. CIT(A) is reproduced here in below :

“21 Tax World 213 (Jaipur Tribunal) in the case of Lal Chand Agarwal v. ACIT; 22 Tax World 675 Anil Tantia vs. ACIT and (2015) 234 Taxman 39 (Rajasthan)-CIT vs. Jagdish Narain Rattan Kumar where two diaries indicating credit sales out of books were found & seized during search and partners surrendered amount representing entries for unaccounted credit sales in two diaries on peak basis (2015) 117 DTR (Rajasthan) 78 (Jaipur Bench of Rajasthan High Court) Sind Medical Stores vs. CIT- it was observed that any amount is paid/withdrawn from the bank would be available for recycling or rotation unless otherwise established as invested else whereby the Revenue. Assessee was entitled to the benefit of peak

credit which ought to have been allowed instead of making separate addition of entire amount.”

9.1 As we already held that Ground No. 2 of the revenue is not maintainable and the Id. AO through Id. DR did not controvert to the working out of peak credit at Rs. 67,66,456.18/-. We did not find any infirmity in the finding of Id. CIT(A) who has considered various judgments as stated in above para which are binding in nature and therefore, we did not find any infirmity in holding that the assessee has furnished based on the daily trial balance with reconciliation of total debit and credit entries in Jindal joint books wherein it appears to be at Rs. 67,66,456.18 as highest peak. The Id. CIT(A) also categorically stated that while adding Rs. 3,55,19,179/- the Id. AO did not consider the simultaneous debit entries, which should have been considered while treating the credit entries in Khata bahi as unexplained. Based on these details working and verifying the addition of the Id. AR of the assessee, he has finally determined peak credit based on various binding decisions of the jurisdictional High Court at Rs. 67,66,456/- for which in the absence of any contradictory finding from the revenue, we do not find any infirmity in the order of Id. CIT(A) and therefore, Ground No. 1 raised by the revenue is dismissed.

10. Apropos to the Ground No. 3 raised by the revenue, finding of Id. AO wherein the addition of Rs. 10,06,320/- made by rejecting books of accounts u/s 145(3) of the Act. The Id. AO observed that there is a sharp decline in net profit rate and the same has not been explained by the assessee. The Id. AO therefore, taken the average rate of net profit loss 3 years which computed at 5.08 % applied on the alleged sale of 3 crores which computed approximately at 15 lakhs and had reduced the profit declined by the assessee at Rs. 4,93,680/- and thereby main addition of Rs. 10,06,320/- as trading addition. The Id. CIT(A) has considered the argument of Id. AR of the assessee that though there was a sharp decline in GP rate but it is seen from the trading result that the assessee had declared GP rate in the immediately preceding year i.e. F.Y 2011-12 of 2.68% and 10.66% in F.Y 2012-13. The average of this rate including present years comes to 5.08% which offered by the AO to estimate the net profit. However, Id. CIT(A) noted that AO while applying such rate, failed to consider the quantum of sales, which was never comparable with last 2 years. The quantum of sales achieved in the year under consideration is of quite significance as far as profit rate is concerned. Even in the immediately preceding year, the GP rate declared by the appellant

was only 2.68% in that case, the application of GP rate of 5.08% cannot be said to be justifiable action. The Id. CIT(A) further observed that when generally turnover increases, the GP/NP rate tends to fall dawn. In the instant case, the appellant's turnover increased manifold as compared to last two years, therefore, in his view it would not be fair to adopt average rate of last three years, particularly when in F.Y 2012-13 would be considered for working out of the average profit rate, then average rate would be quite higher. Considering the overall facts and appellant's submissions, it is held that the AO was not justified in applying the average rate of 5.08% to estimate the net profit and therefore, considering the overall facts and disclosure made by the assessee the estimate of profit at Rs. 2 crores sustained is justified by him. Before us the revenue did not controvert and support the reasoning as to why the said view of the Id. CIT(A) is wrong we see no infirmity in the finding of Id. CIT(A) on merits. Therefore, the Ground No. 3 raised by the revenue is dismissed.

11. Apropos to Ground No. 4 raised by the revenue, the finding of Id. AO is that the assessee has not maintained any details of expenses incurred on marriage of his daughter vis a vis to expense incurred and

withdrawal made being very low and made addition of Rs. 2 lac. On these aspects, the finding of Id. CIT(A) is that the assessee has furnished the capital account of himself and his wife. The assessee explained that his daughter who got married was educated girl and employed in job and marriage ceremonies were carried out in Mandi Rampura Phool, (Punjab), in the house of groom in the presence of limited persons from both sides without any pomp & show, the Id. CIT(A) further observed that Id. AO did not conduct any enquiry to establish that the assessee has incurred more than what is supported by withdrawal made for marriage ceremony. The Id. CIT(A) therefore considering the plausible submission of and reasoning given dealt the addition of Rs. 2 lakhs. Before us, the Id. AO through the Id. DR did not place on record any contrary finding or submission on facts i.e. written in the order of Id. CIT(A) and considering the reasoned order of Id. CIT(A), we did not find any infirmity in the order of Id. CIT(A) and therefore, Ground No. 4 raised by the revenue stands dismissed.

12. So, far as regards to the cross objections of the assessee, the Id. AR of the assessee fairly admitted that the peak has correctly computed at Rs. 67,66,456/- and gross profit also. The relief granted

by the Id. CIT(A) is not agitated further and fairly admitted that he do not want to pursue this cross objection and therefore, the cross objection filed by the assessee stands dismissed based on the oral arguments advanced before us.

13. In terms of this observations the appeal filed by the revenue stands dismissed and cross objection on that appeal filed by the assessee also stands dismissed.

In the result, appeal of the revenue is dismissed and cross objection of the assessee stands dismissed.

Order pronounced under rule 34(4) of the Income Tax Appellate Tribunal Rules, 1963, by placing the details on the notice board.

Sd/-  
(Dr. S. Seethalakshmi)  
Judicial Member

Sd/-  
(Rathod Kamlesh Jayantbhai)  
Accountant Member

Dated : 31/07/2023

\*Ganesh Kumar, PS

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Assistant Registrar  
Jodhpur Bench