

आयकरअपीलीय अधिकरण, जयपुरन्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL,  
JAIPUR BENCHES, "A" JAIPUR

श्रीसंदीपगोसाई, न्यायिकसदस्य एवंश्रीराठोडकमलेशजयन्तभाई, लेखा सदस्य के समक्ष  
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकरअपील सं./ITA No. 340/JP/2022  
निर्धारणवर्ष / AssessmentYear : 2012-13

Shri Chand Mohd. 505, Raja Ready Ajmer Road Madanganj, Ajmer (Raj) 305 801	बनाम Vs.	The ITO Ward 1(3) Ajmer
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: BDXPM 8066 M		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओरसे / Assesseeby : Shri Nikhlesh Kataria, CA  
राजस्व की ओरसे / Revenue by: Shri A.S. Nehra, Addl.CIT

सुनवाई की तारीख / Date of Hearing : 19/07/2023  
उदघोषणा की तारीख / Date of Pronouncement: 28 /08/2023

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal filed by the assessee is directed against the order of the Id. CIT(A) dated 12-07-2022, National Faceless Appeal Centre, Delhi [ hereinafter referred to as (NFAC) ] for the assessment years 2012-13 wherein the assessee has raised the following grounds of appeal.

“1. That on the facts and circumstances of the case, the notice issued u/s 148 of the Act by the AO is bad in law for various reasons and prayed for being quashed.

2. That on the facts and circumstances of the case, the Id. CIT(A) erred in confirming the action of the AO of reopening the assessment without having jurisdiction and also without having any reason to believe as on the date of issue of notice u/s 147/148

that income has escaped assessment. The assessment in pursuance of same is thus prayed for being quashed.

3. On the facts and circumstances of the case, the ld. CIT(A) erred in confirming the action of the AO of reopening of assessment without obtaining appropriate sanction as provided u/s 151 of the Act and thus assessment in pursuance of same is prayed for being declared void ab initio.

4. On the facts and circumstances of the case, the ld. CIT(A) erred in confirming the action of the AO of making addition in hands of assessee of an income which does not belong to the assessee at all ignoring the facts and circumstances of the case. Such an addition is invalid and hence prayed for being deleted.

5. On the facts and circumstances of the case, the ld. CIT(A) erred in confirming the action of the AO of addition in hands of assessee ignoring the fact that assessee was not indulged in any business activities and had no source from which such huge receipts can be obtained by him. Such an invalid and arbitrary addition is thus prayed for being deleted.

6. On the facts and circumstances of the case and without prejudice to other grounds of appeal, the ld. CIT(A) erred in confirming the action of the AO of assessing the income of assessee at Rs.56,86,440/- making an addition of Rs.5576,435/- which is in alternate excessive and unjustified. It is hereby prayed for reducing the addition thus made.

2.1 Brief facts of the case are that in this case no return was filed by the assessee u/s 139(1) of the Act. The AO mentioned in the assessment order that as per information available on record a report was received FIU (IND) in the case of Shri Chand Mohammad from office of DDIT (Inv)-1, Udaipur vide letter No. 647 dated 27-03-2014. The AO after going through the report and its enclosures gathered that the assessee Shri Chand Mohammad was holding bank account Nos. 3573002100033003, 18372020001122 and U16173060 in the name of Proprietary concern M/s. Chand Trading with Punjab National Bank, Cinema Road, Ajmer, HDFC Limited and Indusind Bank, Ajmer respectively. The AO noted that huge amount of cash was deposited in this account during the F.Y. 2011-12 on daily

basis and the cash was withdrawn by the assessee through ATM or self cheque from the base branch in Kishangarh. The AO further noted that during the year under consideration, total amount of Rs.5,76,64,348/- was deposited in the aforementioned bank account of the assessee. The AO thus from the entries of cash deposit in bank account of assessee noticed that the cash was deposited at different stations all over the India. The AO also noted that it is pertinent to mention here that Kishangarh is well known for Marble and Granite Trading but in plenty of cases, marble and granite is sold through under billing and in some cases no bills are issued at all. The AO further noted that in this case the sale proceeds of out of books cash sales of assessee were deposited by different parties in her own accounts of PNB, HDFC and Indusind at different stations. The AO also observed that on the exactly identical facts, ITAT Jaipur in the case of Smt. Anita Choudhary in ITA No. 733/JP/2009 dated 07-05-2010 upheld the addition of an amount equal to 10% of such deposits which was confirmed by the Hon'ble Rajasthan High Court in DBIT No. 289/2010 dated 14-10-2011. Thus the AO on the basis of above information available on record, notice u/s 148 of the Act was issued by his office on 25-03-2019 after obtaining necessary satisfaction of competent authority. In response to this notice, the assessee had e-filed his return of income on 12-04-2019 declaring the income of Rs.1.10 lacs vide acknowledgement No. 46313715112419. Notices u/s 143(2) of the Act was issued

on 08-09-2019. Notice u/s 142(1) of the Act was issued on 01-08-2019 and the assessee was asked to furnish certain details and documents and the case was fixed for making compliance on 13-08-2019 and thus nobody attended on the date and time given by the AO for which show cause notice was issued to the assessee on 11-10-2019 for making compliance on 21-10-2019 but no compliance was made by the assessee. Summon u/s 131 of the Act was issued to the assessee on 22-10-2019 and the case was fixed for hearing on 11-11-2019. In response to summon the assessee attended on 13-11-2019 and his statements were recorded on oath and the assessee was asked about his bank accounts and deposits in the bank account. The AO for the sake of clarity on the issue reproduced the statements of the assessee at pages 2 to 16 in the assessment order. Thus the AO conclusively noted that as per the statements given by the assessee, it is clear that whole amount deposited into the Bank account of the assessee pertain to the assessee. The relevant observation of the AO making the addition of Rs. 55,76,435/- in the hands of the assessee is reproduced at page 10 of AO's order is as under:-

“Moreover, the Id. CIT(A), Ajmer vide his order No. 313/2018-19 dated 20-08-2019 has dismissed the appeal of the assessee and upheld the order of the AO by confirming the addition of Rs.21,77,189/-. This means that whole deposits made into the bank account of the assessee during F.Y. 2010-11 as well as 2011-12 pertains to the assessee.

In view of above discussed facts of the case and relying upon the decision of Hon'ble Bench of ITAT, Jaipur in case of Smt. Anita Choudhary in ITA No.733/JP/2009 dated 07-05-2010 on the similar facts which was confirmed by the Hon'ble Rajasthan High Court in DBITA No. 289/2010 dated 14-10-2011 income of the assessee for the year under consideration is assessed at Rs.55,76,435/- which is 10% of the total deposits in the bank

account of the assessee i.e. 5,57,64,348/-. Also the Id. CIT(A, Ajmer has confirmed the assessment order of the assessee for the A.Y. 2011-12 on similar issue.’’

2.2 In first appeal, the Id. CIT(A), the Id. CIT(A) dismissed the appeal of the assessee by observing as under:-

‘‘7.1. Grounds of Appeal No.1 and 5

a) These GOA are routine and general in nature and do not require separate adjudication.

7.2 Grounds of Appeal No.2: Addition of Rs. 55,76,435/-.

a) The gist of addition made is outlined in para 2(a) to 2(d) of this order.

b) The undersigned has gone through the written submissions and assessment order. This GOA is discussed and decided in para 7.3 of this order.

7.3 Finding on GOA No. 2

a) In his written submission the Appellant has admitted that he has not done any marble trading and he was only an entry operator. He allowed his bank a/c to be used for depositing unaccounted cash of different marble traders of Kishangarh. In these bank a/c's cash was deposited at different stations and then withdrawn in cash vide ATM of self cheque and handed over to the actual owners (beneficiaries). For this facility, the Appellant charged commission (page 5 of written submissions). Thus, the Appellant has admitted the whole modus operandii as outlined by the AO in the assessment order.

b) The next question to be decided is that how the same is to be taxed in hands of Appellant.

.In the case of Appellant for AY-2011-12 the ITO. Ward-2. Kishangarh passed order u/s 143(3) r.w.s. 147 and made an addition @ 10% of Total cash deposits amounting to Rs. 21.77,189/- in hands of Appellant.

. In first appeal, the Ld. CIT(A), Ajmer vide order dated 20.08.2019 confirmed the addition made by AO by taxing @ 10% of Total cash deposits made in bank a/c of Appellant. Thus, the action of AO was upheld by first Appellate Authority in case of Appellant for AY-2011-12.

.The AO relied on the judgment of Hon'ble ITAT, Jaipur in case of Anita Chaudhary in ITA No. 733/JP/2009 dated 07.05.2010 and judgment of Hon'ble Rajasthan High Court in case of Anita Chaudhary in ITA No. 289/2010 dated 14.10.2011 where the addition made based on similar facts by the AO were confirmed. Addition was made @10% of Total cash deposits in case of Anita Chaudhary. In view of these facts the AO made addition of Rs 55,76,435/- in hands of Appellant as unexplained cash deposits(10% of Total cash deposits of Rs. 5,57,64,348/-).

.c) In view of the facts and respectfully following the judgments of Hon'ble Jurisdictional ITAT and Hon'ble Jurisdictional High Court in case of Anita Chaudhary based on identical facts and respectfully following the order of CIT(A), Ajmer in case of Appellant for AY-2011-12 based on identical facts the addition made by AO of Rs. 55,76,435/- 10% of total cashdeposits in bank a/c's of Appellant is hereby upheld and confirmed, GOA No. 2 is dismissed.

7.4 GOA No. 3: Charging of interest u/s 234A and 234B.

Interest u/s 234A and 234B is mandatory and not discretionary as held by Hon'ble Supreme Court in the case of Anjum M.H. Ghaswala in 252 ITR 1 and CIT Vs. Hindustan Bulk Carriers in 259 ITR 449. For the purpose of statistics, this Ground of Appeal is hereby dismissed.

7.5 GOA No. 4: Penalty proceedings u/s 271(1)(c).

This GOA is premature as penalty u/s 271(1)(c) has not yet been levied and only notice has been issued. Even otherwise penalty proceedings are separate from assessment proceedings. Hence, this GOA No. 4 is dismissed.

8. In view of above facts the appeal is DISMISSED.’’

2.3 Being aggrieved by the order of the ld. CIT(A), the assessee carried the matter before this Bench of ITAT with the prayer that the circumstances, evidences on record and conduct of the department as to the addition made are unsustainable in the eyes of law which deserves to be deleted. It is also noted from the written submission of the assessee at para 1.3 1 that ***No independent enquiry or investigation made by the ld. AO: It is submitted that despite of contrary statement of Shri Ganesh Goyal on record, no independent enquiry was made by the ld. AO and ld. AO has simply relied on the report of the investigation wing. As already submitted that even the assessee has agreed for the cross examination of Shri Ganesh Goyal but still the ld. AO chose not to examine Shri Ganesh Goyal. In***

*absence of any such independent enquiry or investigation, no credibility can be given to the investigation wing report and accordingly whole addition become bad in law.* It is pertinent to mention the ld. AR of the assessee has filed detailed written submission containing pages 1 to 23 alongwith case laws countering the addition so made by the AO which is reproduced as under:

**‘Brief Facts:** The assessee is a power loom labourer and during the year under consideration i.e. AY 2012-13, he was working in a power loom factory at Madanganj-Kishangarh. The ld. AO noted that as per information available on record from DDIT (Inv.)-I, Udaipur vide letter dt.647 dt.27-3-2014 the assessee was having bank account with Punjab National Bank, HDFC Bank and Indusind Bank in which cash was deposited at various places all over India and later on withdrawn from ATM or through self cheque at the branches of the bank. Total of such cash deposit stood at Rs.55764348/- and the ld. AO was of the view that this is sale proceeds of cash sales of the assessee.

Therefore, on the basis of such information notice u/s 148 was issued on dt.25-3-2019 and in response to the same the assessee has filed his return of income on 12-4-2019 declaring income of Rs.110000/- from labour work. The copy of return of income and computation thereof is placed at **PB 19-20**. During the course of assessment proceedings, statement of the assessee was also recorded in which he explained that he was not aware of transactions in his bank account and these might have been done by one Mr. Ganesh Goyal. However, contention of the assessee was not accepted and following decision in case of Smt. Anita Choudhary in ITA no.733/JP/2009 dt.7-5-2010 (**PB**) which was later confirmed by the Hon’ble Rajasthan High Court in DBIT No.289/2010 dt.14-10-2011, the cash deposit made by the assessee was treated as trading turnover and income was assessed @10% of total cash deposit which came to Rs.5576435/-. Before the ld. CIT(A), besides challenging the reassessment proceedings and addition so made, the assessee also took alternative argument to assess commission income @Rs.100 to Rs.300/- per lac. However, the ld. CIT(A) following the decision of Hon’ble Rajasthan High Court in Smt. Anita Choudhary (*supra*) rejected the appeal of the assessee summarily and therefore the assessee has filed this second appeal before this Hon’ble Bench.

#### **Our Submission:**

**1.1.1 ITAT order in AY 2011-12:** At the outset it is submitted that the Hon’ble ITAT has decided the similar case of the assessee for AY 2011-12 and the copy of order is placed at **PB 127-135**. The Hon’ble ITAT has given finding at para 7 of the order (**PB 133**) which read as under:

*“7. We have heard both the parties and perused the materials available on record and judicial precedent relied upon by them to drive home to their contentions. From the records, the Bench noted that the assessee had bank account with PNB wherein transaction of depositing / withdrawing the amount was continuous. These financial*

*transactions were within the knowledge of the assessee as it is manifestly in the statement recorded and the clear findings of the lower authorities indicate that such transaction of depositing and withdrawing the amounts in the knowledge of the assessee. The ld. AR could not controvert the findings of the lower authorities which is based on the statement of the assessee recorded and, in that statement, nowhere it has been stated that he was not aware about having the bank account and has also not opposed the transaction done. The ld. AR of the assessee submitted that the action of the lower authorities is not correct and in fact the assessee has not earned so much of benefit as it is held by the lower authorities and the assessee being small tax payer the same may be considered accordingly. We find from the order of the ld. CIT(A) that he has already considered all the aspects and the decision cited by the assessee. The lower authorities has already granted the relief to the extent of 90 % of the amount deposited in the bank account and only considered the income to the extent of 10 % of the such deposit. The ld. AR of the assessee could not substantiate as to how and why the said relief is still not sufficient and has not submitted any comparative finding so as to deviate and grant more relief based on the stated facts. Since, the substantial relief has already been granted by the lower authorities recording the detailed finding of facts and in such a situation, we have no alternative except to confirm the action of the ld. CIT(A) as ld. AR did not controvert the findings of lower authorities.*

*8. Based on these observations the appeal of the assessee is dismissed.”*

**1.1.2 Order in earlier year i.e. AY 2011-12 not binding on Hon’ble ITAT:** We may submit that though in earlier year the Hon’ble ITAT has decided the case against the assessee in similar circumstances however the same is not binding on the assessee for the following reasons:

- a. Assessment order and CIT(A) order is passed on misinterpretation/ incorrect facts and also against the settled judicial principles which issues have not dealt with in the earlier order of ITAT
- b. Incorrect finding of fact recorded in the order of Hon’ble ITAT
- c. Principle of res judicata is not applicable to the assessment proceedings and each year is a separate unit

Now these aspects have been discussed in detail herein after.

**1.1.2.1 Assessment passed on misinterpretation of facts which was not considered in earlier year order:** It is submitted that the **present assessment has been passed by the ld. AO suffers from serious infirmities and misinterpretation of facts** which were not pointed out in the earlier year. ***These wrong facts as considered by the ld. AO are in the foundation of the addition made and consequently the entire addition and even the assessment order framed is bad in law. The incorrect facts on the basis of which the ld. AO framed the assessment has been discussed herein below:***

**1.1.2.2 Decision of Hon'ble ITAT and Rajasthan High Court in case of Smt. Anita Choudhary not applicable:** The entire basis of taxing of bank deposit as turnover was decision of Hon'ble Jaipur ITAT in case **Income Tax Officer, Kishangarh-Vs- Smt. Anita Choudhary in ITA no. 733/JP/2009(PB 122-126)** which was later confirmed by the Hon'ble Rajasthan High Court in DBIT Appeal no.289/2010 dt.14-10-2011. It is submitted that the above decision was entirely based on the specific fact of that case where the assessee was already carrying on the business of marble trading and it declared turnover of Rs.4434191/- on which gross profit was declared @8.78%. Considering the fact that the assessee is already carrying on the business and the bank deposit can be linked to the business of the assessee and accordingly the Hon'ble ITAT has directed to apply the GP rate @10% on the basis of comparison of history of the assessee. The finding of ITAT in case of Smt. Anita Choudhary (*supra*) is reproduced herein below:

“4. We have heard both the parties. The Tribunal vide order dated 29th May, 2009 in the case of Shri Ram Swaroop in ITA No.113/JP/2009 for the assessment year 2005-06 had an occasion to consider the cash deposits of Rs.22.86 lacs made in the account of Shri Ram Swaroop in IDBI bank. The deposits were similar of the nature as are available in this case. The Tribunal after considering the facts of case held that income of Rs 1.25 lacs to be estimated and accordingly directed the AO to add the same of Rs.1.25 lacs as against cash deposit during the entire year. The ld.AR has filed before us the copy of the bank account. The copy of the bank account contains 9 pages. There are number of entries in each month. The maximum credit balance in the bank account is to the extent of Rs.1,51,905/- as on 11-08-2004. The minimum balance is of Rs. 563/-. The credit balance as on 31-03-04 is Rs. 56,5581- while credit balance as on 31-03-05 is Rs. 566/. This shows that the amount deposited during the year is less as compared to the withdrawal made during the year. This is not the case of the Revenue that withdrawals made in this account have been utilized elsewhere. In case the amounts have been deposited by the assessee in the bank account then Revenue is required to consider the availability of such deposits from the withdrawals made from such bank account. It is true that the assessee has not been able to give the required details because such details have not been kept by the assessee. Under such circumstances, one has to consider the totality of the circumstances and accordingly one will have to consider income portion from the turnover as mentioned in the bank account. **It is an accepted position that the assessee is doing the business in marble and the assessee is not having any other source of income. Once the assessee has offered an explanation and the Revenue has not established that explanation is false then one will have to consider the income generated from the turnover as in the bank account. It is true that the assessee has shown gross profit in the marble business and the ld. CIT(A) has partly upheld the addition by applying the gross profit rate of 8.78%. We feel that in case where funds are received for the purchase of marble and the assessee has to render the services for purchases of marble and transportation then the gross profit rate will be slightly higher and we feel that the income from the turnover to the extent of Rs.25,20,2721/- should be estimated at Rs.2.52 lacs. After considering the excess income declared in the return to the extent of Rs.2.10 lacs, the balance addition will remain to the extent of Rs.42,0001/- as against Rs.11271/- confirmed by the ld. CIT(A). Thus the solitary ground of the Revenue is partly allowed.**”

**The Hon'ble Rajasthan High Court has confirmed the case based on facts which were arrived at by the ITAT and no law was laid down that unexplained bank deposit can be treated as turnover in case of any assessee.**

**1.1.2.3 No history of the assessee – no comparison available to apply g.p. rate:** As already submitted that *the dominant aspect in the case of Smt. Anita Choudhary (supra) was that the assessee already carried on the business activity and a substantial turnover and gross profit thereon was declared.* However, In the present case the assessee is daily wage earner and that too in a power loom factory. The return filed for the current year AY 2012-13 along with computation of total income is placed at **PB 19-20**. In the computation of total income which was also submitted before the lower authorities, it has specifically been mentioned that the assessee a daily wager.

Thus there being no history of trading, the decision of Hon'ble ITAT as confirmed by the Hon'ble High Court in case of Smt. Anita Choudhary (supra) has no applicability on the facts of the present case. Therefore, both the lower authorities completely erred in interpreting the order of high court by relying on the order and treating the bank deposits as turnover of the assessee.

**1.1.3 No contradiction in the statement of the assessee – baseless fact finding of the AO:** It is submitted that from the very start of the proceedings, the stand of the assessee was that it was not aware of the transactions in its bank account in which alleged amounts were deposited and withdrawn. It has been stated by the Id. AO that there is contradiction in the statement of the assessee and that in its statement the assessee has accepted that the transactions were being carried on with his knowledge. The consistency of the stand of the assessee can be seen from the following:

**1.1.3.1 No business or other income declared on account of such transactions:** We may submit that even in response to the return filed u/s 148, the assessee has not declared any income on account of transactions in the alleged bank accounts for the reason that it was not at all aware of any such transactions being carried out. The copy of return and computation of total income is placed at **PB 19-20** in which only the income from daily wages have been declared.

**1.1.3.2 Clearly stated in the statement recorded u/s 131:** It is submitted that the statement of the assessee was recorded by the Id. AO on 13-11-2019. In the statement so recorded the assessee (**AO page 3 onwards**) has clearly stated that he was not aware of any transactions in his bank account.

प्रश्न सं. 1:—कृपया अपना पूर्ण परिचय दें।

उत्तर:— मेरा नाम चांदमोहम्मदपुत्र श्रीछोटू खान है। मैं 33 वर्ष का हूँ पता 505, राजारेडी, अजमेररोड, महबगज—किशनगढ मे रहता हूँ। मैं पांचवी कक्षा पास हूँ। हिन्दी पढ—बोले और समझ लेता हूँ।

प्रश्न सं. 2:—आपने आय के समस्त साधनों के बारे में ज्ञानकारी दें।

उत्तर:— मैं लगभग 21 वर्ष से पाबरलूग मे नौकरी करता हूँ, फिलहाल मैं हॉलीमैक्सहोटल के पीछे वाली गली में सकेषजीमहेता के यहाँ शर्टलवाली लूम चलाता हूँ। यहापर एक आदमी लगभग 4 लूम चलाता है मैं भी बार लूम चलाता हूँ। 12 घन्टे की शिफ्ट के लगभग रुपये 500/- प्रतिदिन के हिसाब से मिलते है। इसके अलावा और कोई काम नही करता हूँ।

## SHRI CHAND MOHAMMAD VS ITO, WARD 1(3), AJMER

प्रश्न सं. 4:—रिकार्डपरउपलब्ध ज्ञानकारी के अनुसारआपकेपंजाबनेशनलबैंकसिनेमारोड, अजमेर, एच.डी.एफ.सी. बैंककिशनगढ, इण्डसइण्डबैंकअजमेर के खातानम्बर 357302100033001 (चांद ट्रेडिंग) 18372020001122 (चांद मोहम्मद) तथा 0129न16173060 (चांद ट्रेडिंग) है, जिसकास्टेटमेन्टमैंआपकोदिखा रहाहूँ। ये खातेआपकेहैंजिनकीजानकारीआप ने नहीं दीहैकृपयाबतायेंकि ये खाते कब खुलवायेथेतथाइन की जानकारीआप ने क्यों नहीं दीहै।

उत्तर :- इन खातों के बारे मे मुझे ज्ञानकारी नहीं है।लेकिन मुझे यह अच्छीतरह यादहैकिवर्ष 2010 या 2011 मेंमेरेसेठजीश्रीगणेशगोयलजिनकीफेक्ट्री मिल कॉलोनीमेंहै, वहाँमैंकामकरताथा वो मुझे यह कहकरअजमेरलेगयेथेकिबैंक खाते खुलवानेहैऔरमैं उनके साथगयाथाऔरअपनापरिचय पत्र भीलेकरगयाथा, वहाँजाकरउन्होंनेकुछकागजोंपरमेरे हस्ताक्षरकरवायेथे।उन्होंनेअजमेरमें मुझे 50 रुपयेकिराये के किशनगढजाने के लिए दिये।शायदउसी समय उन्होने ये खाते मेरे से धोखे से खुलवालिये।

प्रश्नसं.5:—उपरोक्त

खातोंमेंजोपैसाजमाहोताथाऔरनिकलताथावोंकोनकरताथाअर्थातकौनजमाकरताथाऔरकौननिकालताथा ?

उत्तर :- मुझे इस बारेमेंकोईजानकारीनहीं है।

प्रश्न सं. 6:—आपकोपहलीबार कब पता चलाकिआपके नाम से ये बैंक खातेथेजिनमेनकदजमाहुआथा।

उत्तर :- मार्च 2018 मेंजब मुझे आपकानोटिसमिलाउसकेकुछदिन के बादमें मुझे पता चलाकिमेरे खातेमेंबहुतसारे रूपयेंजमाकरवाकरनिकालेगयेहै।

प्रश्न सं. 8:—श्रीगणेशगोयल के बयानआयकरउपनिर्देशक (अ.वें.)—प्रथम, उदयपुर द्वाराआयकरअधिनियम की धारा 131 के तहत 05.07.2012 कोलियेगयेथेजोमैंआपकोपढकरसुनारहाहूँ।इनबयानोंमें यह कहागयाहैकिआपगणेशगोयल के कहनेपरकिशनगढ के विभीन्न मार्बलव्यवसाइओकी नकदबिक्रीजोकिलेखा बहीयोंमेंदर्ज नहीं होतीअपने खातेमेंजमाकरवातेथेतथाउसकेबादसेल्फचैकअथवा ए.टी.एम. से निकालकर उन व्यापारियोंकोलौटादेतेथेतथाकमीशन के पेटे 100 रुपयेप्रतिलाख चार्जकरतेथ।क्या यह बातसहीहै ?

उत्तर :- श्रीगणेशगोयल के बयानजोआपने मुझे पढकरसुनायेहै वो सुनलियेहैतथाफाईलपर देख भीलियेहैं। इस संबंध में यह कहनाचाहताहूँकिगणेशगोयल ने बयानोंमेंजोभीकहाउससेसहमत नहीं हूँ।

(AO page 3 onwards)

**From the reading of above questions and answers of the assessee thereon, it is clear that the assessee had no knowledge of the transactions in the bank account in his name**

**1.1.3.3 Statement to be read in totality and not in pieces:** It is also a well settled law that any statement of the assessee or the third party cannot be read in pieces and rather the complete statement should be read as a whole. The revenue cannot pick and choose the part of the statement which suits it and ignore the other parts of the statement. In the present case, the Id. AO has referred to just two questions and then concluded that the assessee has accepted the transactions. However this fact finding is completely incorrect and in the entire statement the assessee has repeatedly stated that it was not aware of the transactions carried out in the bank statement.

This is also a settled judicial principle that the revenue cannot blow hot and cold in the same breath and even Hon'ble Jodhpur ITAT has given similar finding in the matter of **Ashok Kumar Bantia-Vs- DCIT, Bikaner in ITA no. 297/JODH/2019** which are being reproduced herein below:

*Statement of Shri Bhaskar Poddar, who is an accountant in M/s Lux Industries Ltd. was also recorded and in his statement, Sh. Bhaskar Poddar also stated that the amount belongs to Lux Industries Limited. The statement of Bhaskar Poddar also established that the amount belongs to Lux Industries Limited. In view of the above statement, we can say that the amount seized from the assessee does not belong to him but belonged to the Lux Industries Limited. However, as per facts of the present case, the A.O. adopted the method of pick and choose certain words from the statement of Sh. Bhaskar Poddar and reached to a contrary conclusion. The A.O. has chosen only those words which were more favourable to the Revenue whereas it is a settled law that any statement recorded by the Revenue authorities is to be read as whole and no pick and choose method should be adopted which favours the revenue.*

**1.1.3.4 Fact of no knowledge of transactions stated before the Id. AO in written submissions:** It may be noted that in all the written submissions filed before the Id. AO it has clearly been stated that the assessee had no knowledge of the transactions in his bank account. These written submissions are placed from **PB 12-18**. Specific reference may please be made to **PB-12, 15 & 16** wherein it has been stated that the transactions have been done without the knowledge of the assessee.

**1.1.3.5 Sworn in affidavit furnished by the assessee:** It is important to note that the assessee has also submitted a sworn in affidavit dt.18-12-2019 was also submitted before the Id. AO mentioning all the facts which were stated in the statement as well as the written submissions given during the course of assessment proceedings. The affidavit is placed at **PB 21-22**. In the affidavit so submitted the assessee has clearly stated at sr. no. 5 & 6 that it has no knowledge of the transactions in the bank statement.

**1.1.3.6 Affidavit not just a self-serving declaration:** We may submit that the affidavit submitted in the present case is not just a self-serving declaration and rather if the contents of the affidavit are found false then as per section 193 of Indian Penal Code, 1860 the same is punishable offence as being a false evidence. Therefore, it becomes a vital supporting evidence and the authenticity of the same cannot be rejected holding it just a self serving declaration unless some contrary facts are found.

Therefore, there is complete consistency in the statement of the assessee and no contradiction as wrongly mentioned by the lower authorities.

**1.1.4.1 No contrary evidence brought on record by the Id. AO – no cross examination of Shri Ganesh Goyal:** We may also submit that there is no contrary evidence on record to suggest that the statement made by the assessee is incorrect. **Though the Id. AO has referred to the statement of Shri Ganesh Goyal but the credibility of the statement was not verified by issuing him notice for statement or cross examination and as such no value could be assigned to such third party statement.** Even after submission of affidavit, the Id. AO did not bother to cross examine Shri Ganesh Goyal even though the statement of Shri Ganesh Goyal was little contrary. *It is also notable that the assessee in response to question no.12 has clearly stated that it has no objection on cross examination in front of Shri Ganesh Goyal.*

प्रश्न सं. 12. क्या यह बयान आपगणेशगोयल की उपस्थितिमें भी दे सकते हैं।

उत्तर :- मैं उपरोक्त बयानों में जो भी कहा है वह सब कुछ सही है और मैं किसी के भी सामने उपरोक्त बयान दे सकता हूँ।

Therefore, in absence of any action on the part of the ld. AO no value or credibility can be given to the statement of Shri Ganesh Goyal.

**1.1.4.2 Averment in affidavit to be treated as correct unless rebutted with evidence:** We may also point out that contents of the affidavit has not been found to be false with the evidence. Long back hon'ble Supreme Court has held that averments shown in the affidavit has to be treated as correct unless there is some contrary evidence on record. Hon'ble Jodhpur Bench has dealt with the similar situation in the case of **Ashok Kumar Banthia-Vs- DCIT, Bikaner in ITA no. 297/JODH/2019 dt.6-9-2021 (PB 136-154)** and the relevant finding given by the bench is as follows:

*“10. Although, the assessee had also filed an affidavit in support of his contention but he was never cross examined by the A.O. Therefore, the averments contained in duly sworn affidavit are to be accepted as a correct unless the same are rebutted by the evidence. On this proposition, we found support from the decision of Hon'ble Supreme Court in the case of **Mehta Parikh & Company Vs CIT 30 ITR, 181 (SC)**, **Dr. Prakash Rathi Vs ITO 36 TW 1 (Jodh ITAT)**, **ITO Vs Doctor Tej Gopal Bhatnagar 20 TW 368 (Jodh ITAT)**, **Labh Chand Bohra Vs ITO 219 CTR 571 (Raj)**, **Shrikumar Vs ITO 36 TTJ 538**, **Smt. Savitri Devi Vs ITO 11 ITD 422 Delhi**, **CTO Vs Kewal Ram SunnomalCavanduspur 92 STC 629 (Raj)**, **ITO Vs Vardhaman Industries 99 TTJ 509 (Jodh ITAT)**, **ACTO Vs Kishore Shyam Brajesh Kumar 93 STC 213 (Raj)**, **Indo Malwa United Mill Limiked Vs State of MP 60 ITR 41 (SC)**, **Late Mangilal Agarwal Vs ACIT 208 CTR 159 (Raj)**, **CIT Vs Daulat Ram Rawat Mull 87 ITR 349 and Union of India Vs Kamalaxmi Finance Corporation 92 Taxmann 43.....” (PB 153)***

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**CIT vs. Silver Streak Trading Pvt. Ltd. 326 ITR 418 (Del) (PB 155-157)**

*“11. In so far as the present case is concerned, it is not the case of the assessee that it ever received notice dt. 28th Nov., 1998. In fact, its case has been that the only notice ever received by it was the one dt. 21st Oct., 1999. In the duplicate copy of the notice dt. 21st Oct., 1999, learned counsel for the assessee had made an endorsement that he has received the time barred notice. This was followed by an affidavit by the assessee stating that it had not received any notice prior to the notice dt. 21st Oct., 1999. In a case such as this, the onus is clearly upon the Revenue to show that the notice dt. 28th Nov., 1998, was in fact served on the assessee within the time prescribed by law. The Revenue has not been able to discharge its onus either before the Tribunal or before us. We, therefore, find that no substantial question of law arises and the appeal is dismissed.” (PB 157)*

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**Mehta Parikh & Co. vs. CIT 30 ITR 181 (SC) (PB)**

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In the present case the affidavit has not been found to be false and the assessee has also confirmed the facts in its statement and even further the assessee was ready for cross examination but no efforts were made by the ld. AO to call shri Ganesh Goyal to make statement

***Therefore, in the present case also the contentions of the assessee were to be accepted in absence of any cross examination of the statement of Shri Ganesh Goyal by the ld. AO as also nothing contrary being found to the statement or affidavit given by the assessee***

**1.1.5 Even in case of Smt. Anita Choudhary (supra) Hon'ble Bench & High Court has held that the explanation of the assessee to be accepted unless found to be false:** It is notable that even the hon'ble ITAT has categorically mentioned that explanation of the assessee is to be considered unless there is any contrary evidence on record:

*"...It is an accepted position that the assessee is doing the business in marble and the assessee is not having any other source of income. Once the assessee has offered an explanation and the Revenue has not established that explanation is false then one will have to consider the income generated from the turnover as in the bank account."*

**(PB 125)**

Therefore, the hon'ble Bench has not principally held that the bank deposit is to be assessed as turnover instead it was the explanation of the assessee that it was not his own money which was not found to be false and then the addition was made following the past history of the case.

**1.1.6 Incorrect finding recorded by the Hon'ble ITAT in its order for AY 2011-12:** In concluding and final para the Hon'ble ITAT has observed the following:

*"-----The ld. AR could not controvert the findings of the lower authorities which is based on the statement of the assessee recorded and, in that statement, nowhere it has been stated that he was not aware about having the bank account and has also not opposed the transaction done...." (PB 134)*

We may submit that the above finding which is also one of the basis on which the Hon'ble ITAT has rejected the appeal of the assessee in earlier year is incorrect and contrary to the facts on record. We have already reproduced the extract of the statement of the assessee wherein it has clearly been stated that the transactions in the bank account were done without its knowledge and this has been stand of the assessee from the initiation of the reassessment proceedings. ***Therefore, there being inconsistency in the facts on recorded and as considered by the Hon'ble ITAT, the order passed for AY 2011-12 becomes not binding and a fresh appreciation of the evidences on record is required to be done.***

**1.2 Principle of res judicata not applicable to the assessment proceedings:** It is humbly submitted that it is a very well settled judicial proposition that principle of res judicata is not applicable to the assessment proceedings and each assessment year is a separate and distinct year. An assessment for a particular year is final and conclusive between the parties only in relation to that year. Decisions given in an assessment order for an earlier year are not binding either on the assessee or on the Department in a subsequent year. For this proposition please refer:

***Agricultural Income Tax Officer &Ors. Vs. Puthumoole Krishna Bhat (1982) 133 ITR 532 (KER)***

9. A Division Bench of this Court expressed almost the same view in a reverse context, namely, where the assessee contended that the Tribunal was wrong in relying upon the prior assessment orders and in basing its conclusion on those orders. The case is ***E. V. Koradu vs. Commr. of Agri. IT (1980) 122 ITR 615 (Ker)***, where it was pointed out that it is open to the Tribunal to rely upon the previous order of the Tribunal "as a piece of evidence on which" it may rest its present conclusion and that the rule of exclusion of the doctrine of res judicata in tax cases does not go to the extent of requiring the taxing officers to ignore the earlier proceedings. The Division Bench relied on the decision of the Supreme Court in ***M. M. Ipoh vs. CIT (1968) 67 ITR 106*** at p. 118, where it was held as follows :

*"The doctrine of res judicata does not apply so as to make a decision on a question of fact or law in a proceeding for assessment in one year binding in another year. The assessment and the facts found are conclusive only in the year of assessment: the findings on questions of fact may be good and cogent evidence in subsequent years, when the same question falls to be determined in another year, but they are not binding and conclusive."*

15.....Then, as regards the second pillar on which that doctrine of res judicata is rested, namely, private justice: it is achieved to the extent of giving finality and attributing conclusiveness to what is decided in one assessment, so far as that assessment is concerned, and only to that extent. Such confinement of the operation of the principle of res judicata to the particular assessment in which the decision is given is a necessary consequence of accepting the fact that it is in public interest that there be no bar or prohibition in examining a question afresh each time that question recurs, recurrence of the same question for a decision in assessment after assessment being an inevitable feature of taxation”

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***Tamil Nadu Chlorates Vs. Joint Commissioner Of Income Tax (2006) 98 TTJ 1 (Chennai) : (2006) 99 TTJ (Chennai) 80***

“11. Adverting to the objection of the Learned Counsel for the assessee that deduction was allowed in the initial year of assessment, therefore, it cannot be withdrawn in later year, we find that there is no merit in this contention. The claim is not maintainable under the law. As a general rule, the principle of res judicata is not applicable to decisions of income-tax authorities. An assessment for a particular year is final and conclusive between the parties only in relation to that year. Decisions given in an assessment order for an earlier year are not binding either on the assessee or on the Department in a subsequent year. This rule was laid down in the case of *CIR vs. Sneath [1932] 17 TC 149 CA*. In the case of *M.M. Ipoh &Ors. vs. CIT (1968) 67 ITR 106 (SC)*, the Hon’ble Supreme Court has held that the doctrine of res judicata does not apply so as to make a decision on a question of fact or law in a proceeding for assessment in one year binding in another year. The assessment and the facts found are conclusive only in the year of assessment; the findings on question

*of fact may be good and cogent evidence in subsequent year, when the same question falls to be determined in another year, but they are not binding and conclusive. We, therefore, decide this issue in favour of the revenue and against the assessee.*

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***Deeplok Financial Services Ltd. Vs. Commissioner Of Income Tax Source (2017) 151 DTR (Cal) 267 : (2017) 393 ITR 395 (Cal)***

13. *So far as the formulated question relating to res judicata is concerned, in answering the same reference may be had to the decision in **Amalgamated Coalfields Ltd. & Anr. vs. Janapada Sabha Chhindwara AIR 1964 SC 1013** in which the Supreme Court said, inter alia, as follows :*

*" ..Where the liability of a tax for a particular year is considered and decided does the decision for that particular year operate as res judicata in respect of the liability for a subsequent year ? In a sense, the liability to pay tax from year to year is a separate and distinct liability; it is based on a different cause of action from year to year, and if any points of fact or law are considered in determining the liability for a given year, they can generally be deemed to have been considered and decided in a collateral and incidental way. The trend of the recent English decisions on the whole appears to be, in the words of Lord Radcliffe, 'that it is more in the public interest that tax and rate assessments should not be artificially encumbered with estoppels (I am not speaking, of course, of the effect of legal decisions establishing the law, which is quite a different matter), even though in the result, some expectations may be frustrated and some time wasted.' [vide **Society of Medical Officers of Health vs. Hope Valuation Officer (1960) 2 W.L.R. 404, 563**]. The basis for this view is that generally, questions of liability to pay tax are determined by Tribunals with limited jurisdiction and so, it would not be inappropriate to assume that if they decide any other questions incidental to the determination of the liability for the specific period, the decisions of those incidental questions need not create a bar of res judicata while similar questions of liability for subsequent years are being examined."*

14. *That apart, this assessee lost its right of appeal to this Court on the question arising in the previous assessment year on account of delay in preferring the same. There was no adjudication on merits, of its claim of conversion, on appeal to the High Court. The only reason given by the Tribunal in rejecting the claim of the assessee for the previous assessment year, as would appear from its order dt. 13th May, 2011 (copy handed up), is that to the Tribunal it appeared there is no provision in the Act in respect of conversion of stock-in-trade into investment and its treatment. Hence, it held that the lower authorities rightly made the addition as there was understatement of income by analyzing the assessee's trading and investment account in shares. Thus, before us there is no impediment for the assessee to seek adjudication on the point. The question formulated is answered accordingly and in favour of the assessee.*

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**1.3.1 No independent enquiry or investigation made by the Id. AO:** It is submitted that despite of contrary statement of Shri Ganesh Goyal on record, no independent enquiry was made by the Id. AO and Id. AO has simply relied on the report of the investigation wing. As already submitted that even the assessee has agreed for the cross examination of Shri Ganesh Goyal but still the Id. AO chose not to examine Shri Ganesh Goyal. In absence of any such independent enquiry or investigation, no credibility can be given to the investigation wing report and accordingly whole addition become bad in law.

**1.3.2 Action taken by the Id. AO after 5 years:** As would be noted from the perusal of the assessment order that even the report of investigation was received on 27-3-2014 itself and notice for reassessment was issued on 25-3-2019. This delay in taking action has not been explained by the Id. AO in the assessment order and that give rise to doubt on the entire proceedings itself as delay in the action caused evidences hard to be collected either by the assessee or the department.

**1.4 Nothing on record to suggest that any trading of marble ever done by the assessee:** We may also submit that the Id. AO could not bring even a single piece of evidence to prove if any trading was done by the assessee so as to treat the bank deposit as the turnover of the assessee. Even the entire circumstances clearly indicate that by far no trading in marble could have been done by the assessee and the Id. AO proceeded merely on its own assumptions and presumptions without any supporting evidences on record. In these circumstances the complete addition was bad in law.

*Without prejudice to above*

**1.5 Totality of facts and circumstances indicate the assessee might have earned commission income only even if the transactions were done with his knowledge:** It is submitted that though the stand of the assessee is very much clear that the transactions were done without his knowledge but even if presuming that transactions were within the knowledge of the assessee, still only addition on account of commission income could be made. This is clear from the facts and circumstances of the case which are being discussed in detail herein after. There are many case laws supporting the proposition that question of human probabilities is on the factor to be considered while dealing in the tax matters:

**Jaya Agarwal vs. ITO 302 CTR 241 (Del)**

*8. We find it difficult to accept the approach and findings recorded for several reasons. The brief order does not examine and consider the entire explanation and material on record as withdrawal of Rs. 2,00,000 in cash was undisputed. Naturally, the huge withdrawal was for a purpose and objective. From the beginning the explanation given was that withdrawal was to pay earnest money for purchase of immovable property, which deal did not fructify. Explanation given was not fanciful and sham story. It was perfectly plausible and should be accepted, unless there was*

*justification and ground to hold to the contrary. Delay of some months in redeposit of part amount is the sole and only reason to disbelieve the appellant. Persons can behave differently even when placed in similar situations. Due regard and latitude to human conduct and behaviour has to be given and accepted when we consider validity and truthfulness of an explanation. One should not consider and reject an explanation as concocted and contrived by applying prudent man's behaviour test. Principle of preponderance of probability as a test is to be applied and is sufficient to discharge onus. Probability means likelihood of anything to be true. Probability refers to appearance of truth or likelihood of being realised which any statement or event bears in light of the present evidence (Murray's English Dictionary). Evidence can be oral and cannot be discarded on this ground. Assessment order and the appellate orders fall foul and have disregarded the preponderance of probability test. (PB 158-160)*

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Other judgements on similar proposition

**Sumati Dayal vs. CIT 224 ITR 801 (SC) (PB 161-165)**

**CIT vs. Durga Prasad More 82 ITR 540 (SC) (PB 166-169)**

**1.5.1 Assessee a mere power loom labour – return filed accordingly:** As already submitted that the assessee is daily wage earner working in a power loom. Even in the return (PB filed (PB 19-20) in response to the notice issued u/s 148 of the Act, the assessee has -declared income from daily wages.

**1.5.2 No contrary finding of the Id. AO:** In the entire order, there is not a single line which contradict the declaration made by the assessee with regard to his source of income. The Id. AO nowhere alleged that the source of income declared by the assessee is incorrect or falsely declared.

**1.5.3 Assessment of income declared by the assessee made by the Id. AO:** It is very important to note that the Id. AO himself has accepted the income declared by the assessee in its assessment order. During the year under consideration the assessee declared income of Rs.110000/- from daily wage earning and the Id. AO duly assessed the same on the last page of the assessment order.

**1.5.4 Show cause notice issued by the Id. AO speaks of amount to be belonging to third parties:** It is extremely important to note for this hon'ble Bench that even the final show cause notice issued by the Id. AO clearly states that the amount deposited were with respect to the other traders.

*“...As per the details available on record, you have utilized your Bank account for routing the unaccounted receipts of marble traders. The modus has been that the unaccounted receipts of marble traders are deposited in your bank account which is then withdrawal through cheque or ATM and the same is handed over to the marble trader. You are therefore requested to show cause as to why the cash deposits*

of Rs.5,57,64,348/- in your various bank accounts may be treated as receipts of marble trades routed through your bank accounts.

It may further be stated that in the case of Smt. Anita Choudhary, the Hon'ble ITAT vide its order dated 7.5.2010 in ITA No. 733/JP/ 2009, has held that 10% of the unexplained deposits to be the income. This decision of Hon'ble ITAT has been upheld by the Hon'ble Rajasthan High Court is to be treated the income of the assessee vide its order dated 14.10.2011.

You are therefore, requested to show cause as to why 10% of total deposits of Rs.5,57,64,348/- may not be treated as your income which comes to Rs.55,76,435/-. Thus, you are requested to show cause as to why the amount of Rs.55,76,435/- may not be treated your income for A.Y. 2012-13."

(show cause notice dt.11-10-2019 (PB 170-171))

**Thus the ld. AO was himself of the view that it is not the trading done by the assessee but he merely acted as facility provider.** In such circumstances the reliance placed on the decision in case of Smt. Anita Choudhary was factually incorrect. **Accordingly, there was no reason for making assessment of trading income as no such trading was ever done by the assessee.**

**1.6 Assessment in case of Basant Kumar Jain completed assessing commission income:** It is submitted that in the statement of Shri Ganesh Goyal which has been relied upon by the ld. AO, Shri Ganesh Goyal stated name of two persons in respect of which commission work was done. The relevant extract of the statement of Shri Ganesh Goyal taken on 5-7-2012 as has been reproduced in the assessment order at **page 8 onwards** is as follows:

प्रश्न सं. 10 :-कृपयाबताए कि क्या आप श्रीचांदमोहम्मद प्रो. मैसर्स ट्रेडिंग को जानते है, यदि हां तो कैसे ?

उत्तर :- जिस प्रकार श्री बंसंत कुमार जैन मेरे निर्देशानुसार काम करते थे उसी प्रकार श्रीचांदमोहम्मद भी कमीशन का काम करते थे।

प्रश्न सं. 11:-कृपयाबताए कि श्रीचांदमोहम्मद द्वारा कमीशन का काम किस प्रकार किया जाता था।

उत्तर :- जिस प्रकार श्री बंसंत कुमार जैन की फर्मों द्वारा मार्बल कमीशन का कार्य किया जाता था उसी प्रकार से श्रीचांदमोहम्मद तथा उनकी फर्मों द्वारा मार्बल कमीशन का कार्य किया जाता था।

प्रश्न सं. 12:-श्रीचांदमोहम्मद के बैंक खाते किस-किस बैंक में है व कहाँ-कहाँ है?

उत्तर:- श्रीचांदमोहम्मद से संबंधित निम्न बैंक खाते हैं:-

क.सं.	खाता धारक का नाम	बैंक	खाता संख्या
1	श्रीचांदमोहम्मद	एचडीएफसी बैंक लि. किशनगढ़	18372020001122
2	मैसर्स चांद ट्रेडिंग (प्रो. चांद मोहम्मद)	आईडीबीआई बैंक किशनगढ़	55102000028015
3	मैसर्स चांद ट्रेडिंग (प्रो. चांद मोहम्मद)	इण्डस इण्ड बैंक, अजमेर	0129-16173060

प्रश्न सं. 16:-कृपयाबताए कि आपके एवं आपकी फर्मों श्री बंसंत कुमार जैन एवं उनकी फर्मों तथा श्रीचांदमोहम्मद की फर्मों के द्वारा संचालित बैंक खातों में किन-किन मार्बल व्यवसायियों द्वारा खरीददारों से नगद राशि जमा करवायी जाती है?

उत्तर :- उपरोक्त खातोंमेंनिम्नफर्मो/व्यक्तियों का पैसाजमाहुआहै।

मैसर्सगौरीमार्बल, मार्बल एरिया, किशनगढ।

मैसर्सबोरावडमार्बल, किशनगढ।

झोममार्बल, किशनगढ।

प्रश्न सं. 20:-कृपयाबताए किमैसर्सराधेट्रेडिंगकिससेसंबंधितहै ?

उत्तर:- जिसप्रकारश्रीबंसतकुमारजैनतथाचांदमोहम्मदमेरेनिर्देशानुसारकमीशन का कामकरतेहै, उसीप्रकारश्रीरमेशचन्द्रजोकिमैसर्सराधेट्रेडिंगकम्पनी के प्रोपराइटरहैभीमेरेनिर्देशानुसारमार्बलकमीशन का कामकरतेहै।इनकाबैक खाता एचडीएफसीबैक, किशनगढमेंहै।

प्रश्न सं. 23 :-आपकेआपकीफर्मो के श्रीबंसतकुमारजैन की तथाइनकीफर्मो के एवंश्रीचांदमोहम्मदतथाइनकीफर्मो के बैक खातोंको देखनेपर यह पायागयाकिइनसभी खातोंमेंराशियोंनगदमेंआरटीजीएस के तहततथाइलेक्ट्रॉनिक माध्यम से जमाहुईहै, साथहीसेल्फपेडचैक, एटीएमतथाआरटीजीएस के तहतराशियोंडेबिटहुईहै।कृपयाइसकोस्पष्टकरे?

उत्तर:- मेरी, मेरीफर्मो के श्रीबंसतकुमारजैन की तथाइनकीफर्मो के एवंश्रीचांदमोहम्मदतथाइनकीफर्मो के सभीबैक खातेमार्बलकमीशनहेतु खुलवाए गए थे।इसकेअलावाइनमेंअन्य कोई एन्ट्रीज नहीं है।

**(Page 8 Assessment order)**

From the above statement it is clear that the case of assessee is identical to the case of Shri Basant Kumar Jain.

***In case of Shri Basant Kumar Jain for the same assessment year i.e. AY 2012-13, commission income has been assessed. The copy of order dt.25-12-2017 is placed at PB 23-25.***

**Therefore, there is complete u-turn or contradictory stand of the department in case of assessee despite both being identical matters which is not acceptable and accordingly addition made is bad in law.**

**1.7 No resources for the assessee to have engaged in the trading of marbles:** We may submit that there are no resources with the assessee to have engaged in the trading of marble. Some of the notable facts which were submitted before the lower authorities also are as follows:

- No establishment or infrastructure to carry on business of marble trading
- Not registered with sales tax department
- Not registered with excise department
- No depreciable assets with the assessee
- No books of accounts maintained
- No SSI registration

In above situation, it is beyond comprehension that the assessee could have done any trading in marble

***Therefore, considering the above facts and circumstances, clear evidence on record and also considering the aspect of human probabilities, trading addition could not have been made and without prejudice only commission income could be taxed and not the gross profit***

**1.8 Case laws on similar issue:** It is submitted that there are various judgements in which it has been held that in the circumstances as in the case of the assessee, only the commission income can be assessed. Some of the judgements have been highlighted herein below:

***Income Tax Officer vs. Girishkumar Mohanlal Puruswani ITA no.405-407/RJT/2016 dt.31-1-2023 (PB 26-42)(PB 38 onwards)***

*“7.2. On identical issue of Shroff business, the Co-ordinate Bench of this Tribunal in the case of Anirudh J. Solanki in ITA No. 454/Rjt/2018 held as follows:*

*“6.2. .... The Co-ordinate Bench of the Tribunal dated 04.02.2022 in ITA No. 193/Rjt/2016 on identical facts and dismissed the revenue’s appeal as follows:*

*6. We have gone through the relevant records and impugned order. The question before us is whether cash depositing in aggregate amount of Rs.5,88,43,806/- made in his A/c. No.015305002632 belongs to the Ceramic Industries/Tiles Manufacturing Companies of Morbi who are the clients of ShaileshbhaiMarvania or not. In this case, assessee is working as a shroff and as per CIT(A) it is not a disputed fact. The shroff acts as a channel between two parties. It is apparent from the bank account in question that the cash were deposited and withdrawn from time to time. During the proceedings, the assessee recorded his statement and categorically explained the nature of transaction that he is getting a commission at Rs.0.25 paise on transaction of Rs. one lakh. In our considered opinion, in such a case, all deposits in the bank account cannot be treated as income of the assessee. During the assessment proceedings, the learned AO came to know that assessee is working as shroff which means commission agent. After going through the bank statement, it was revealed that cash deposited and withdrawals were made regularly during the year under consideration. We do not find any ambiguity in the order passed by the learned CIT(A) and he has rightly directed the learned AO to compute the commission income @ 0.25 paise per lakh deposited in the bank account.*

*6.3. Further the Ld. Counsel drawn our attention to the Jurisdictional High Court Judgment in the case of Shree Sidhnath Enterprise vs. ACIT reported in [2016] 71 taxmann.com 55 wherein Hon’ble High Court held as follows:*

*14. It may be noted that in the affidavit-in-reply filed by the respondent, it is the case of the respondent that the petitioner is engaged in the business of cheque discounting and shroff. The firm charges commission for cheque discounting facility provided to its customers. The firm receives cash from the beneficiary and gives cheque in lieu thereof. The cheque is drawn in favour of the beneficiary. For arranging this transaction, the firm charges commission. Reference has been made in the reply to instances where the petitioner has received cash from parties and has issued cheques in lieu thereof which were deposited by such parties in its account and the cheques were cleared at Rajkot. Based on this, the Assessing Officer had stated that she had reason to believe that income chargeable to tax has escaped assessment on account of the failure on the part of the petitioner to disclose fully and truly all material facts. Thus, while it is the case of the respondent that it is the business of the*

*petitioner to accept cash and issue cheques in lieu thereof, it is also the case of the respondent on the basis of the instances cited in the affidavit, that the cash deposits received by the petitioner are in the nature of undisclosed income, despite it being the specific case of the respondent that the petitioner had issued cheques in lieu of cash received by it which had been encashed by the concerned party by depositing the same in its bank account. It may be noted that it is not the case of the respondent that the beneficiary after encashing such amount had returned the same to the petitioner nor has any material been unearthed in this regard. Insofar as the petitioner is considered, as stated in the affidavit-in-reply, it is its business to receive cash and issue cheques in lieu thereof for which it charges commission. Under the circumstances, in the absence of any material to show that the cash in respect of which the cheque had been issued travelled back to the petitioner, one fails to understand as to how such amount may be said to be the undisclosed income of the petitioner. Under the circumstances, on the facts as recorded in the reasons as well as in the affidavit-in-reply, in the opinion of this court, the Assessing Officer could not have formed the belief that income chargeable to tax has escaped assessment.*

6.4. *The Ld. Counsel further drawn our attention to the decision of the Coordinate Bench of this Tribunal in the case of Sidhnath Enterprise in ITA No. 374/Rjt/2017 dated 29.06.2022 wherein held as follows:*

7. *We have gone through the order of the ld. CIT(A) and find no infirmity in the same. The ld. CIT(A) has deleted the addition on account of cash deposits of Rs. 224.53,23,993/-. In the back account of the assessee. Noting that identical issue had come up before the Hon'ble Gujarat High Court in the case of the assessee itself in a writ petition filed by the assessee against reopening of the case for A.Y. 2008-09 and the Hon'ble High Court had noted the fact that the assessee being in the business of Shroff, the cash deposits related to its business and did not represent any unaccounted income of the assessee. Ld. CIT(A), we find also took note of the fact that reopening resorted by the A.O. for the impugned year also subsequent to passing of the assessment order was dropped by him taking note of the decision of the Hon'ble Gujarat High Court.*

8. *Moreover even Assessment Year 2006-07, the ITAT found no merit in the reopening resorted to in that year also for an identical reason following the decision of the Hon'ble Gujarat High Court in the case of the assessee. Therefore, it is clear that the issue of cash deposits in the bank account of the assessee has been examined exhaustively at various levels and no merit has been found in the contention of the revenue that it represented by any undisclosed income of the assessee. Noting the fact that the assessee into business of Shroff and earned only commission on the mandatory transactions carried out by it, the cash deposits representing money belonging to his customers.*

9. In view of the above, we see no reason to interfere in the order of the Ld. CIT(A) deleting the addition made of cash deposits amounting to Rs. 224,53,23,993/-. The grounds of the appeal raised by the revenue is dismissed.

8. We have given our thoughtful consideration and perused the materials available on record. It is seen from the Co-ordinate Bench Judgment in the case of Samir Kamruddin Makhani, the Co-ordinate Bench held that even though the assessee is doing the activity of Shroff without obtaining any license from Competent Authority but what is mandated under the provisions of the Income Tax Act is to tax income of the assessee, whether it was from legal or illegal source. Therefore the principles for determining the income will remain the same even the source of income is illegal in nature as held by the Hon'ble High Court of Madras in the case of CIT vs. K. Thangamani. Thus the Co-ordinate Bench held that after considering the facts in totality it was held that the assessee was acting as money transfer agent on behalf of the parties engaged in ceramic manufactures. Accordingly allowed the assessee's appeal and dismissed the Revenue's appeal.

8. We have given our thoughtful consideration and perused the materials available on record. It is seen from the Co-ordinate Bench Judgment in the case of Samir Kamruddin Makhani, the Co-ordinate Bench held that even though the assessee is doing the activity of Shroff without obtaining any license from Competent Authority but what is mandated under the provisions of the Income Tax Act is to tax income of the assessee, whether it was from legal or illegal source. Therefore the principles for determining the income will remain the same even the source of income is illegal in nature as held by the Hon'ble High Court of Madras in the case of CIT vs. K. Thangamani. Thus the Co-ordinate Bench held that after considering the facts in totality it was held that the assessee was acting as money transfer agent on behalf of the parties engaged in ceramic manufactures. Accordingly allowed the assessee's appeal and dismissed the Revenue's appeal.

8.1. It is further seen in assessee own case in ITA No. 193/Rjt/2016 relating to the Assessment Year 2006-07, the Co-ordinate Bench of this Tribunal dismissed the Revenue appeal by holding "during the assessment proceedings, the assessee recorded his statement and categorically explained the nature of transaction that he is getting commission at Rs. 0.25 paise on transaction of Rs. 1 lakh. Therefore the cash deposit in the bank account cannot be treated as the income of the assessee. It was further observed that cash deposits and withdrawals were made regularly during the year under consideration. Therefore the Co-ordinate Bench of this Tribunal held that no ambiguity in the order passed by the Ld. CIT(A) and he has rightly directed the Assessing Officer to compute the commission income at 0.25 per lakh deposited in the bank account of the assessee.

8.2. It is appropriate to follow the ruling of the Jurisdictional High Court in the case of Shree Sidhnath Enterprise (cited supra), it is the business to receive cash and issue cheques in lieu thereof for which the assessee charges commission amount. In the absence of any material to show that the cash in respect of which the cheque had been issued travelled back to the assessee, one fails to understand

*as to how such amount may be said to be the undisclosed income of the assessee and the Assessing Officer could not have charged the same as escaped assessment under the provisions of Income Tax Act.*

*7.3. Thus the grounds raised by the Revenue are devoid of merits and the same is hereby rejected.*

*8. In the result, the appeal filed by the Revenue is hereby dismissed.*

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***Sanjay Kumar Garg vs. ACIT 134 ITD 82 (Del) (Tri) (PB 60-81)***

*48. We have heard both the parties and gone through the material available on record. During the course of survey operations, statement of the assessee was recorded wherein it has been categorically admitted that no purchase and sale activities are undertaken in the names of firms. The assessee was using the firms for the purpose of providing sale bills for which he was collecting commission. The assessee was depositing cash in the bank accounts of the dummy firms as well as his own firms through which he was carrying out accommodation entry business. At the time of survey no evidence was found to suggest that the assessee was engaged in real commission business. No other source of income was also found. It is also the case of AO that the assessee was carrying on business of entry provider. The assessments were reopened for this purpose only. The learned CIT(A) has given a finding of fact that the assessee was engaged in the business of providing accommodation entries and, therefore, the amounts deposited in the accounts of dummy concerns were to be treated as total receipts on which commission was to be determined.*

*Therefore, we are in agreement with the view of the learned CIT(A) that only commission can be determined on the deposits made in the bank accounts of the dummy concerns. Therefore, we do not find any infirmity in the order passed by the learned CIT(A) that the amount deposited in the account of dummy concerns cannot be treated as income of the assessee. Therefore, the learned CIT(A), in our considered opinion, is justified in treating the cash deposited in various bank accounts controlled and operated by the assessee as the turnover of the accommodation entry business and commission income has to be estimated thereon.*

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*-Other case laws:*

***DCIT vs. Siddhartha Enterprises ITA No. 374/Rjt/2017 dt.29-6-2022 (PB 43-49)***

***Manoj Aggarwal vs. DCIT 113 ITD 377 (Del) (Tri) (PB 82-92)***

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Therefore considering the totality of the facts and circumstances, evidences on record and conduct of the department the addition made are unsustainable in the eyes of the law and hence the same deserves to be deleted.”

Alternatively and without prejudice to above, only commission income can be charged in such circumstances and as held by the ld. AO himself in the case of Shri Basant Kumar Jain (**PB 23-25**) an amount @Rs.300/- per lac can be assessed as commission income. The assessee has also filed two paper book index containing pages 1 to 175 for information and record”

2.4 On the other hand, the ld. DR supported the order of the ld. CIT(A).

2.5 We have heard both the parties and perused the materials available on record including the case laws cited by the respective parties. Brief facts of the case are that in this case no return was filed by the assessee u/s 139(1) of the Act. The AO mentioned in the assessment order that as per information available on record a report was received FIU (IND) in the case of Shri Chand Mohammad from office of DDIT (Inv)-1, Udaipur vide letter No. 647 dated 27-03-2014. The AO after going through the report and its enclosures gathered that the assessee Shri Chand Mohammad was holding bank account Nos. 3573002100033003, 18372020001122 and U16173060 in the name of Proprietary concern M/s. Chand Trading with Punjab National Bank, Cinema Road, Ajmer, HDFC Limited and Indusin Bank, Ajmer respectively . The AO noted that huge amount of cash was deposited in this account during the F.Y. 2011-12 on daily basis and the cash was withdrawn by the assessee through ATM or self cheque from the base branch in Kishangarh. The AO further noted that during the year under consideration, total amount of Rs.5,76,64,348/- was deposited in the aforementioned bank account of the assessee. The AO thus from the entries of cash deposit in bank account of assessee

noticed that the cash was deposited at different stations all over the India. The AO further noted that in this case the sale proceeds out of books cash sales of assessee were deposited by different parties in her own accounts of PNB, HDFC and Indusind at different stations. The AO also observed that on the exactly identical facts, ITAT Jaipur in the case of Smt. Anita Choudhary in ITA No. 733/JP/2009 dated 07-05-2010 upheld the addition of an amount equal to 10% of such deposits which was confirmed by the Hon'ble Rajasthan High Court in DBIT No. 289/2010 dated 14-10-2011. Thus the AO on the basis of above information available on record, notice u/s 148 of the Act was issued by his office on 25-03-2019 after obtaining necessary satisfaction of competent authority. In response to this notice, the assessee had e-filed his return of income on 12-04-2019 declaring the income of Rs.1.10 lacs vide acknowledgement No. 46313715112419. Notices u/s 143(2) of the Act was issued on 08-09-2019. Thus the AO conclusively noted that as per the statements given by the assessee, it is clear that whole amount deposited into the Bank account of the assessee pertain to the assessee. The relevant observation of the AO making the addition of Rs. 55,76,435/-in the hands of the assessee is reproduced at page 10 of AO's order is as under:-

“Moreover, the Id. CIT(A), Ajmer vide his order No. 313/2018-19 dated 20-08-2019 has dismissed the appeal of the assessee and upheld the order of the AO by confirming the addition of Rs.21,77,189/-. This means that whole deposits made into the bank account of the assessee during F.Y. 2010-11 as well as 2011-12 pertains to the assessee.

In view of above discussed facts of the case and relying upon the decision of Hon'ble Bench of ITAT, Jaipur in case of Smt. Anita Choudhary in ITA No.733/JP/2009 dated 07-05-2010 on the similar facts which was confirmed by the Hon'ble Rajasthan High Court in DBITA No. 289/2010 dated 14-10-2011 income of the assessee for the year under consideration is assessed at Rs.55,76,435/- which is 10% of the total deposits in the bank account of the assessee i.e. 5,57,64,348/-. Also the Id. CIT(A), Ajmer has confirmed the assessment order of the assessee for the A.Y. 2011-12 on similar issue.'

In first appeal, the Id. CIT(A), the Id. CIT(A) dismissed the appeal of the assessee by observing as under:-

“7.1. Grounds of Appeal No.1 and 5

a) These GOA are routine and general in nature and do not require separate adjudication.

7.2 Grounds of Appeal No.2: Addition of Rs. 55,76,435/-.

a) The gist of addition made is outlined in para 2(a) to 2(d) of this order.

b) The undersigned has gone through the written submissions and assessment order. This GOA is discussed and decided in para 7.3 of this order.

7.3 Finding on GOA No. 2

a) In his written submission the Appellant has admitted that he has not done any marble trading and he was only an entry operator He allowed his bank a/c to be used for depositing unaccounted cash of different marble traders of Kishangarh. In these bank a/c's cash was deposited at different stations and then withdrawn in cash vide ATM of self cheque and handed over to the actual owners (beneficiaries). For this facility, the Appellant charged commission (page 5 of written submissions). Thus, the Appellant has admitted the whole modus operandii as outlined by the AO in the assessment order.

b) The next question to be decided is that how the same is to be taxed in hands of Appellant.

.In the case of Appellant for AY-2011-12 the ITO. Ward-2. Kishangarh passed order u/s 143(3) r.w.s. 147 and made an addition @ 10% of Total cash deposits amounting to Rs. 21.77,189/- in hands of Appellant.

. In first appeal, the Ld. CIT(A), Ajmer vide order dated 20.08.2019 confirmed the addition made by AO by taxing @ 10% of Total cash deposits made in bank a/c of Appellant. Thus, the action of AO was upheld by first Appellate Authority in case of Appellant for AY-2011- 12.

.The AO relied on the judgment of Hon'ble ITAT, Jaipur in case of Anita Chaudhary in ITA No. 733/JP/2009 dated 07.05.2010 and judgment of Hon'ble Rajasthan High Court in case of Anita Chaudhary in ITA No. 289/2010 dated 14.10.2011 where the addition made based on similar facts by the AO were confirmed. Addition was made @10% of Total cash deposits in case of Anita Chaudhary. In view of these facts the AO made addition of Rs 55,76,435/- in hand's of Appellant as unexplained cash deposits (10% of Total cash deposits of Rs. 5,57,64,348/-).

.c) In view of the facts and respectfully following the judgments of Hon'ble Jurisdictional ITAT and Hon'ble Jurisdictional High Court in case of Anita Chaudhary based on identical facts and respectfully following the order of CIT(A), Ajmer in case of Appellant for AY-2011-12 based on identical facts the addition made by AO of Rs. 55,76,435/- 10% of total cash deposits in bank a/c's of Appellant is hereby upheld and confirmed, GOA No. 2 is dismissed.

7.4 GOA No. 3: Charging of interest u/s 234A and 234B.

Interest u/s 234A and 234B is mandatory and not discretionary as held by Hon'ble Supreme Court in the case of Anjum M.H. Ghaswala in 252 ITR 1 and CIT Vs. Hindustan Bulk Carriers in 259 ITR 449. For the purpose of statistics, this Ground of Appeal is hereby dismissed.

7.5 GOA No. 4: Penalty proceedings u/s 271(1)(c).

This GOA is premature as penalty u/s 271(1)(c) has not yet been levied and only notice has been issued. Even otherwise penalty proceedings are separate from assessment proceedings. Hence, this GOA No. 4 is dismissed.

8. In view of above facts the appeal is DISMISSED.’’

The Bench has taken into consideration the submissions of both the parties including the written submission of the Id. AR of the assessee wherein the main thrust of the Id. AR of the assessee is that the assessee is power loom labourer and during the year under consideration he was working in a power loom factory at Madanganj, Kishangarh. The AO noted that as per information available on record from DDIT (Inv.)-1,Udiapur the assessee was having bank account with PNB,

HDFC Bank and Indusind Bank in which cash was deposited in various places all over India and later on withdrawn from ATM or through self cheque in the branches of the Bank. Thus the total deposits in the bank was to the tune of Rs.5,57,64,348/- and thus the AO was of the view that this is sale proceeds of cash sales of the assessee. Hence the AO made the addition of Rs.55,76,435/- in the hands of the assessee which has been confirmed by the Id. CIT(A). The Bench noted that it is a hugger mugger case which appears from the submission Id. AR of the assessee at para 1.3.1 that "no independent enquiry or investigation was made by the AO and the same is reproduced as under:-

"It is submitted that despite of contrary statement of Shri Ganesh Goyal on record, no independent enquiry was made by the Id. AO and Id. AO has simply relied on the report of the investigation wing. As already submitted that even the assessee has agreed for the cross examination of Shri Ganesh Goyal but still the Id. AO chose not to examine Shri Ganesh Goyal. In absence of any such independent enquiry or investigation, no credibility can be given to the investigation wing report and accordingly whole addition become bad in law

The Bench has taken into consideration the view points of both the parties and feel that the AO should deeply enquire into the matter and give justice to the assessee in accordance with law. The Bench does not want to come into fuss and feel that justice should be provided to the assessee by taking into consideration again all the facts of the case and submissions of the assessee (supra). Hence, in this view of the matter, the appeal of the assessee is restored to the file of the AO to decide it afresh taking into consideration the written submission placed before us (supra)

and necessary documents, if any, filed by the assessee. The assessee is directed not take any adjournment in the case on frivolous ground.

2.6 Before parting, we may make it clear that our decision to restore the matter back to the file of the AO shall in no way be construed as having any reflection or expression on the merits of the dispute, which shall be adjudicated by AO independently in accordance with law.

3.0 In the result, the appeal of the assessee is allowed for statistical purposes

Order pronounced in the open court on 28 /08/2023

Sd/-

(संदीप गोसाई)

(Sandeep Gosain)

न्यायिकसदस्य / Judicial Member

Sd/-

(राठोडकमलेशजयन्तभाई )

(Rathod Kamlesh Jayantbhai)

लेखासदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 28 /08/2023

\*Mishra

आदेश की प्रतिलिपिअग्रेषित / Copy of the order forwarded to:

1. The Appellant- Shri Chand Mohammad, Ajmer
2. प्रत्यर्थी / The Respondent- The ITO, Ward 1(3), Ajmer
3. आयकरआयुक्त / The Id CIT
4. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्डफाईल / Guard File (ITA No.340/JP/2022)

आदेशानुसार / By order,

Asstt. Registrar