

IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH : NAGPUR

[THROUGH VIRTUAL HEARING AT
INCOME TAX APPELLATE TRIBUNAL : PUNE BENCHES : PUNE]

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
DR. DIPAK RIPOTE, ACCOUNTANT MEMBER

Sl. No.	ITA.No.	A.Y.	Appellant / Cross Objector	Respondent / Respondent	CIT(A)'s order appealed against, case no. & Dated	Proceedings u/sec.
1.	400/NAG./2019	2009-10	The ACIT, Circle-1, Room No.508, 5 th Floor, MECL Bldg., Seminary Hills, Nagpur – 440 006 Maharashtra.	Smt. Disha Deven Malviya, L/H late Shri Deven Malviya, Plot No.K-6, 303, Janardhan Apts. Laxmi Nagar, Nagpur. PIN - 440 022 Maharashtra. PAN ABIPM5726E	CIT(A)-1/244/2016-17, dated 23.09.2019	143(3) r.w.s.147 of the Income Tax Act, 1961 (in short "the Act").
2.	401/NAG./2019	2009-10			CIT(A)-1/262/2016-17, dated 20.09.2019	
3.	402/NAG./2019	2010-11			CIT(A)-1/223/2017-18, dated 20.09.2019	
4.	C.O.No.05/NAG./2020 in ITA.400/NAG./2019	2009-10	Smt. Disha Deven Malviya, L/H Late Shri Deven Malviya, Plot No.-K-6, 303, Janardhan Apts. Laxmi Nagar, Nagpur – 440 022 Maharashtra. PAN ABIPM5726E	The ACIT, Circle-1, Room No.508, 5 th Floor, MECL Bldg., Seminary Hills, Nagpur – 440 006 Maharashtra.	CIT(A)-1/244/2016-17, dated 23.09.2019	
5.	C.O.No.06/NAG./2020 in ITA.No.401/NAG./2019	2009-10			CIT(A)-1/262/2016-17, dated 20.09.2019	

For Revenue :	Shri Kailash Kanojiya, Sr. DR
For Assessee :	Shri Kapil Hirani, C.A.

Date of Hearing :	30.08.2023
Date of Pronouncement :	25.10.2023

ORDER**PER SATBEER SINGH GODARA, J.M. :**

The instant batch of five appeals pertains to a single assessee Smt. Disha Devan Malviya L/H Late Shri Deven Malviya. All other particulars already stand are tabulated in the cause title hereinabove

Heard both the parties. Case file perused.

2. It emerges at the outset that the Revenue's "lead" appeal ITA.No.400/NAG./2019 raises the following substantive grounds in the instant appeal :

1. *"On the facts and circumstances of the case and in law; the Ld. CIT(Appeals), Nagpur has erred in not considering the fact that the assessee at the time of assessment has not submitted any explanation with regard to the sources of net deposits of Rs.688.16 Lakhs in the bank accounts of the assessee, hence it remained unexplained.*
2. *The decision of Ld. CIT(Appeals) deleting the addition of Rs.688.16 Lacs is perverse on facts and bad in law as the decision is based on assessment made by the assessing officer for the AY 2011-12 and res-judicata is not applicable to income tax proceedings.*
3. *The decision of Ld. CIT(Appeals) deleting the addition of Rs.688.16 lacs is perverse on facts in as much as the*

same has been reached on perverse appreciation of evidences on record.

4. Any other grounds which may be raised at the time of hearing with due permission of Hon'ble ITAT."

3. The assessee's twin cross-objections C.O.Nos.05 & 06/NAG./2020, the Revenue's as many appeals hereinabove I.T.A.Nos.400 & 401/NAG./2019 raise the following identical substantive grounds :

- 1. "On the facts and circumstances of the case and in law, the learned CIT(A)-1, Nagpur erred in holding the reopening of the assessment and the reassessment so framed to be legal. On the facts and circumstances of the case, the reopening of the assessment and the re-assessment as completed are illegal, invalid and against the principles of natural justice.*
- 2. On the facts and circumstances of the case and in law, learned CIT(A)-I, Nagpur erred in holding that the addition made by the AO was made U/s.69 of the IT Act, 1961 despite the AO having not specified any section as such. On the facts and circumstances of the case and in law, the addition as held to be made U/s 69 makes the entire addition made by the AO illegal and liable to be deleted as per law.*
- 3. The addition made by the AO, if held to be made U/s 68 of the IT Act, 1961 being solely based on the bank statements is illegal and liable to be deleted in full as per law.*

4. *The Respondent, not being a beneficiary of the transactions forming basis of the reopening and the additions, assessing the same or part thereof in the hands of the Respondent is illegal and the additions sustained by the CIT(A)-1 deserves to be deleted as per law.*
5. *Without prejudice, in case it is held that the Respondent is a beneficiary, then the addition sustained by the CIT(A)-1 deserves to be substantially reduced in the interest of justice.*
6. *The Respondent craves leave to add, amend, alter vary and/or withdraw any or all the above grounds of Cross Objection with the kind permission of the Hon'ble Tribunal."*

4. It further emerges during the course of hearing that the Revenue's latter twin appeals ITA.Nos.401 & 402/NAG./2019 also canvass the very substantive grounds as the only difference therein is qua the quantum of the impugned sec.68 unexplained cash credit addition(s) of Rs.624.07 and Rs.456.47; respectively.

5. Both the learned representatives next invited our attention to the CIT(A)'s detailed discussion in this Revenue's lead appeal ITA.No.400/NAG./2019 partly reversing the Assessing Officer's action adding the impugned cash credits / deposits of Rs.6,88,16,000/- to the extent of commission component therein only as follows :

5.0 The appellant during the course of hearing reiterated the above submissions which are duly considered. The appellant at the outset has challenged the entire assessment to be illegal and liable to be quashed. The appellant has challenged the assessment as being illegal on multiple grounds which are being discussed hereunder. The appellant has firstly challenged the assessment on the ground that the appellant having disclosed all the facts in the return of income, there was no failure on the part of the appellant warranting reopening U/s 147. The said ground challenging the reassessment is very general in nature and does not carry much weight. Merely stating that having disclosed all the facts in the return of income, reopening is not warranted is a bland statement and on the basis of the same the reassessment cannot be invalidated when the AO has categorically stated the reasons for reopening.

5.1 The appellant has further challenged the reopening to be in the nature of making roving enquiries and as such untenable. This ground of the appellant is also not acceptable as the appellant has not pointed out whether the issues based on which the assessment has been reopened have been addressed and adjudicated upon earlier. The AO is entitled to reopen the assessment based on material in his possession which can form basis for reopening.

5.2 The appellant has further challenged the reopening to being without independent application of mind and as such bad in law. As stated above, the AO is very much entitled to reopen the assessment based on the information in his possession and if the AO has so relied on the information in reopening it is presumed that he has satisfactorily applied his mind before reopening and upon coming to a conclusion that reopening is warranted, the case has been reopened. The reopening thus cannot be deemed to be without application of mind as has been contested by the appellant. In view of the above, the reopening is held to be valid

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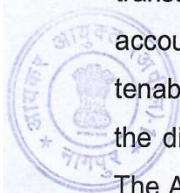
and in accordance with law and the ground challenging the reopening and the assessment so completed are hereby **dismissed**.

6.0 The assessment having been held to be valid, I now proceed to discuss the appeal on facts and merits of the case. The appellant has firstly challenged the additions on the ground that the AO has failed to establish whether the bank accounts referred actually belong to the appellant. This ground taken by the appellant does not hold much ground as the appellant himself has not refuted the bank accounts during the course of assessment proceedings. In case the appellant was of the view that the bank accounts do not belong to her, the same could have been brought to the notice of the AO during the course of assessment proceedings which has not been done in the present case. The objection of the appellant thus is not tenable on the facts of the case.

6.1 The appellant has then challenged the additions on the ground that the AO failed to provide the copies of the bank statements to the appellant. It is noteworthy to mention here that the bank accounts belong to the appellant herself and she could have procured the same from the bank in case she felt the need to get the same. The objections of the appellant thus fail on this ground.

6.2 The appellant has then further argued that the AO has failed to determining the exact nature of credits in the bank account which make the additions based merely on assumptions and presumptions and thus deserving to be deleted. This ground of the appellant fails as well in as much as the onus to prove the nature of credits is on the appellant.

6.3 The appellant has then challenged the additions so made as not tenable as the additions have been made u/s 68 of the Act solely relying on the information and transactions in bank accounts and that the bank accounts do not constitute books of accounts, as contemplated U/s 68 of the Act. The contention of the appellant is not tenable as on a perusal of the assessment order the AO has made the addition of the difference of deposits and withdrawal as unexplained income of the appellant. The AO has not specified that the addition is made U/s 68 of the Act. However, the addition is to be made under some section of the Act and considering that the addition is restricted to the difference of deposits and withdrawals what has actually



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been taxed is the net investment in bank accounts which would be covered u/s 69 of the Act. The ground of the appellant challenging the addition so made u/s 68 is thus untenable and liable to be rejected.

6.4 The AR of the appellant during the course of hearing further argued that the AO has not refuted the fact that the appellant had no idea about the transactions in the bank account which as per the statement of the appellant were undertaken by her late husband. The addition, if any, is to be made in the case of the husband of the appellant and not the appellant per se. I am unable to agree on the same. The appellant apart from a bland statement that she had no idea about the transactions in the bank account as the same were carried on by her husband, she has not been able to bring on record any other evidence in support. The presumption is thus that the transactions in the bank account belong to the appellant unless proved otherwise which as mentioned earlier the appellant has not been able to satisfactorily prove. The objection of the appellant on this ground is thus rejected.

6.5 Basis above, the additions are warranted. However, I am unable to agree on the quantum of the addition so made in all the assessment years. The revenue has categorically accepted and relied on the fact that the appellant and her husband were engaged in the business of accepting money from the public by promising high rate of returns on commission basis.

6.6 The AO at para 3.3 of the assessment order for AY 2011-12 in the case of the Appellant has held as under :

"3.3 In this case, since there is nothing on record except the figures of deposit and withdrawal and also the assessee submitted that his husband who is no more and was handling all the business affairs and she does not know any thin about these deposits and withdrawals; there is no other option than to complete the case of the estimate basis. However, from the information available on record and also from the plain reading of the submission of the assessee it is clear that the late husband of the assessee was engaged in the business of collecting money from the public at large and to give them returns after getting some commission income from it. Therefore, it is clear that the assessee was engaged in the business of getting commission on investment in securities. The money collected at large was the gross turnover of the assessee. In this case, the assessee from the present AY i.e AY 2011-12 had received a total amount of Rs. 2,32,75,000/- which is estimated as the total turnover of the assessee. Since, while doing assessment in cases of such similar facts; I have seen that usually there is 3 to 5% happens the receipt of such broker. Further, I have also seen that there is 15 to 20% of the total receipts is the net profit of the assessee. Since, there is nothing on recor to explain or clarify anything further in this case; I



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estimate that 5% of the total turnover is the gross receipts of the assessee and further 20% of total such gross receipt is the total profit of the assessee. Thus, the total profit of the assessee for the relevant AY, i.e AY 2011-12 is estimated at Rs. 2,32,750/- (20% of 5% of Rs. 2,32,75,000-). Since, the assessee has not offered this amount in return of income the amount of Rs. 2,32,750/- is added back to the total income of the assessee."

6.7 The fact that the appellant was only entitled to commission income is a fact which has been accepted by the AO for AY 2011-12. For AY 2009-10 and 2010-11 also, this fact was known and has been relied upon by the AO and the AO has further relied on the assessment completed of various persons who have said that the beneficiary of the transactions in their bank accounts was the husband of the appellant. ***It is thus a matter of record that the department has accepted the fact that the appellant was not the beneficiary of all the credits in his bank accounts but was engaged in the business of accepting money from public for various reasons based on which she was entitled to commission income.*** I am in agreement with the AO for AY 2011-12 wherein he has held that the appellant was engaged in the business of getting commission and has estimated the net income based on percentage on total deposits in the bank account. The AO for AY 2011-12 has held that basis of assessment on similar facts, usually there is 3% to 5% commission and that further 15% to 20% of such commission is the net profit. The AO has thus while finalizing the assessment for AY 2011-12 has considered 5% of total deposits as commission and further 20% of such commission as net profit of the appellant which transpires to 1% {20% of 5%} of gross deposits as income of the appellant. The estimation done by the AO seem to be on a very high side, however, considering that the commission income earned by persons engaged in such business is not 5% which is very high. I therefore find that the interest of justice would be served by estimating the commission income at 2% of the turnover which is considered to be the total deposits. Further, I find that the net profit percentage as estimated by the AO of 20% is extremely high and I find it justified to reduce the same to 10% resulting in the income thus being assessed at 0.2% {10% of 2%} of total deposits as against 1% done by the AO for AY 2011-12.

6.8 The counsel of the assessee, during the course of hearing placed reliance on **Sanjay Kumar Garg Vs. ACIT (2012) 144 TTJ 77 (ITAT Delhi)** wherein the Hon'ble ITAT has estimated the commission income by applying 0.2% net commission on



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turnover as against 1%. The estimation of income hereinabove thus finds support from the order of the Hon'ble ITAT and is in accordance to the percentage of income estimated herein.

6.9 Following the above discussions, I direct the AO to restrict the additions so made for AY 2009-10 and 2010-11 as under:

AY	Total Deposits	Income estimated @0.2% (2% commission income x 10% Net Profit)
2009-10	Rs. 3060.67 lacs	Rs. 612134/-
2010-11	Rs. 367.14 lacs	Rs. 73428/-

6.10 The appellant has further during the course of assessment argued that the difference of deposits and withdrawals should be considered as turnover on which the income should be estimated. I am unable to agree to this theory as the estimation of income at a specific percentage takes care of the withdrawals so made and as such the net difference cannot be treated as turnover of the appellant. The ground so taken by the appellant is thus rejected and the income is estimated as mentioned above.

This is what leaves the Revenue aggrieved seeking to revive the Assessing Officer's action making the impugned addition in entirety.

6. We have given our thoughtful consideration to the vehement rival stands. The Revenue's case before us is that once the Assessing Officer had found the assessee; or her deceased husband/predecessor in interest Shri Deven Malviya; as the case may be, to have made the impugned deposits in their respective bank accounts, the same had been rightly assessed in entirety than the impugned commission component only. We wish to make it clear that the assessee has not even bothered to file the corresponding bank

statements before us which could even remotely indicate her withdrawals followed by deposits for the purpose of granting telescoping benefit. All what she has done is to place on record Assessing Officer's assessment order dated 29.12.2018 in assessment year 2011-2012 allegedly assessing the commission component itself @ 5% of the turnover concerned. Learned counsel sought to highlight the fact that it was the assessee's deceased husband Shri Deven Malviya who was looking after all the banking transactions and therefore, once it is found that he had taken deposits from various customers in lieu of promising higher returns, the impugned commission rate has rightly been assessed in this taxpayer's hands.

6.1. We find no merit in assessee's stand before us. This is for the precise reason that once she has sought to treat all the impugned cash deposits in her bank account(s) as part of the turnover, it was her bounden duty only to place on record the corresponding details of the customers concerned vis-à-vis the withdrawals from her bank account(s) along with the alleged project details. All this has never seen light of the day till date. Her reliance on the assessment findings for A.Y. 2011-12 is without any substance therefore. Faced with the situation, we see no other option but to accept the Revenue's contentions as the assessee has failed to explain the source of the impugned deposits along with identity, genuineness and

creditworthiness in light of *Sumati Dayal vs. CIT* [1995] 214 ITR 801 (SC) and *CIT vs. Durga Prasad More* [1971] 82 ITR 540 (SC) and *PCIT vs. NRA Iron & Steel Pvt. Ltd.* [2019] 412 ITR 461 (SC); all pertaining to the similar addition of unexplained cash credits u/sec.68 of the Act.

7. Learned counsel at this stage sought to highlight assessee's cross objections and argued that the Assessing Officer had not even quote the correct provision of law as to whether it was a case inviting sec.68 or 69 of the Act. We reject the assessee's contentions as even if a wrong provision is quoted as per *PCIT vs. N R Portfolio Pvt. Ltd.*, [2014] 264 CTR 258 (Del.) and *CIT vs. Nova Promoters & Fin Lease (P) Ltd.*, [2012] 342 ITR 169 (Del.) (HC), it does not vitiate the impugned additions.

8. Learned counsel at this stage referred to assessee's twin cross objections that the impugned addition based solely on the assessee's bank statements is also not liable to be sustained. We first of all find that no such bank statement has been filed before us at the assessee's behest to buttress the point that the Assessing Officer's action amounts to double addition or it goes against the facts on record. Suffice to say, the Assessing Officer herein had recorded his reopening reasons based on the tangible material that the assessee's

taxable income liable to be assessed had escaped assessment. She has also not placed on record before us the corresponding reopening reasons as well which could suggest any illegality or infirmity, as the case may be, in the impugned additions. Her cross objection(s) are declined in very terms therefore.

9. It is noticed at the outset that these assessee's twin cross objections C.O.Nos.05 & 06/NAG./2020 suffer from 102 day's delay, is condoned since falling under Covid-2019 pandemic outbreak period between 15.03.2020 to 28.02.2022 as per hon'ble apex court's directions in *Cognizance for Extension of Limitation, In re 438 ITR 296 (SC)* read with judgment in *Cognizance for Extension of Limitation, In re 432 ITR 206 (SC)* dated 08-03-2021 and 421 ITR 314, excluding the covid-19 pandemic outbreak period from for all intents and purposes under the limitation law.

10. To sum-up, the Revenue's "lead" appeal ITA.No.400/NAG./2019 succeeds and the assessee's cross objection no.5/NAG./2020 is declined in above terms.

11. Same order to follow in Revenue's latter twin appeals ITA.Nos.401 & 401/NAG./2019 which are accepted and assessee's latter C.O.No.6/NAG./2020 is rejected, in very terms since involving identical facts.

12. To sum-up, these Revenue's three appeals ITA.Nos.400, 401 & 402/NAG./2019 are allowed and assessee's C.O.Nos.05 & 06/NAG./2020 are dismissed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open Court on 25.10.2023.

Sd/-
[DR. DIPAK P. RIPOTE]
ACCOUNTANT MEMBER

Sd/-
[SATBEER SINGH GODARA]
JUDICIAL MEMBER

Pune, Dated 25th October, 2023

VBP/-

Copy to

1.	The applicant
2.	The respondent
3.	The CIT(A)-1, 216, Aayakar Bhavan, Telangkhedi Road, Civil Lines, Nagpur – 440 001.
4.	The Pr. CIT-1/2/3, Nagpur.
4.	D.R. ITAT, Nagpur Bench, Nagpur.
5.	Guard File.

//By Order//

//True Copy //

Assistant Registrar, ITAT, Pune Benches,
Pune.