

**IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT (SMC) BENCH
BEFORE SHRI DR. A. L. SAINI, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA Nos.628 & 629/SRT/2023

Assessment Years: (2010-11 & 2011-12)

(Physical Hearing)

Mukhtar Ramzan Shaikh 303, Imran Mension, Opp. Suman Auto, Godal Nagar, Vapi-396191	Vs.	Income Tax Officer, Ward-6, Vapi, Income Tax Office, Room No.808, Fortune Saquare- II, Daman Road, Chala Vapi- 396191
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AWLPS 0991 F		
(अपीलार्थी/Appellant)		(प्रत्यर्थी /Respondent)

निर्धारिती की ओर से /Appellant by	Shri Rajesh M Upadhyay, AR
निर्धारिती की ओर से /Respondent by	Shri Vinod Kumar, Sr. DR
सुनवाई की तारीख/Date of Hearing	02/11/2023
घोषणा की तारीख/Date of Pronouncement	12/12/2023

आदेश / O R D E R

PER DR. A. L. SAINI, AM:

Captioned two appeals filed by the assessee, pertaining to Assessment Years (AYs) 2010-11 and 2011-12, are directed against the separate orders passed by the National Faceless Appeal Centre, Delhi, [in short “NFAC/ld. CIT(A)”] both dated 15.03.2022, which in turn arise out of separate assessment orders passed by Assessing Officer u/s 143(3) r.w.s.144/147 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”), dated 15.12.2017 and 28.09.2018, respectively.

2. Since both these appeals relate to the same assessee, therefore these appeals have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

3. First, I shall take appeal of assessee in ITA No.628/SRT/2023, wherein the grounds of appeal raised by the assessee are as follows:

“1. Ld CIT(A), NFAC, Delhi has erred in law and on fact to pass ex-parte appeal order without providing adequate opportunity of being heard as well as to decide the appeal only on statement of fact and grounds of appeal raised in appeal Memo.

2. Ld. CIT(A),NFAC, Delhi has erred in law and on fact to upheld AO’s action for initiation proceedings u/s 148 of the Act when ITR was filed u/s139 and there was no cogent reason for reopening of assessment.

3. Ld CIT(A), NFAC, Delhi has erred in law and on fact to confirm AO’s assessment u/s 143(3) r.w.s.147 of the Act. Without rebutting appellants objection and without passing speaking order as required under the law and as per the guidelines of Hon’ble Supreme Court in the case of GNK DRIVESHAFT.

4. Ld.CIT(A), NFAC, Delhi has erred in law and on fact to uphold total addition of Rs.29,09,512/- / and / or AO’s addition u/s 69A at Rs.28,76,000/- ignoring the fact that the said amount is a gross receipts and not the income chargeable to tax.

5.Ld. CIT(A), NFAC, Delhi has erred in law and on fact to direct the AO to give telescoping effect of cash withdrawal against cash deposit during the year under appeal. He further erred in direct in the AO to apply percentage of profit on gross receipts appearing in the appellants record.

6. Ld. CIT(A),NFAC, Delhi has erred in law and on fact to uphold AO’s addition for bank interest at Rs.6,376/- as well as AO’s disallowed the deduction u/s 80C of the Act for Rs.27,136/-.”

4. Both these appeals filed by the assessee for AYs 2010-11 and 2011-12, are barred by limitation by 489 days each. The assessee has moved a petition requesting the Bench to condone the delay, in both these appeals. The contents of the petition for condonation of delay filed by the assessee, in case of appeal in ITA No.628/SRT/2023, are as follows:

“I, the undersigned, Mukhtar Ramzam Shaikh, aged about 59 years, occupation business and residing at 303, Imran Mension, Opp. Suman Auto, Godal Nagar, Vapi take oath and declare as under:

- 1- That appeal order of NFAC, Delhi for A.Y 2010-11 is dated 15.03.2022 has been served electronically through portal. So it is presume to be served on 15.03.2022. Appeal is file with the registry, ITAT, Surat on 14.09.2023, which is late by -489-days.
- 2- That I am a heart patient suffering from multiple disease. I had to implant stent twice in my body. I am under the medical treatment of doctors at Vapi, Valsad, Navsari, Surt etc., Due to the doctor's efforts and treatments, my life can be saved. I was under medical treatment right from 2016 to 2023. Even today also I am under the regular medical checkup by physician. I filed 1 Appeal on 20.01.2018. Notice of hearing from the office of the CIT(A), Valsad was issued on 22.12.2018, however hearing was not taken because many old appeals were pending with the Ld. CIT(A) Valsad. Thereafter, my appeal was migrated to the National Faceless Appeals Centre in terms of Notification No.80/2020 in F.No.279/Misc/66/2014-SO-ITJ(Pt.) dated 25-09-2020 issued by the CBDT, Ministry of Finance, New Delhi.
- 3- In between pandemic Covid-19 had took time and had disturb whole economy in the entire world. Honourable CBDT, New Delhi has extended time limit for making various compliance, assessments, as well as payment of normal tax and payment of taxes under VVS 2020 by issuing various notifications/circulars from time to time with following words:

'In view of the impact of the Covid-19 pandemic, taxpayers are facing inconvenience in meeting certain tax compliances and also in filing response to various notices. In order to ease compliances to be made by taxpayers during this difficult time, reliefs are being provided through Notifications nos. 74/2021 & 75/2021 dated 25th June, 2021 Circular no.12/2021 dated 25th June, 2021.'

Honourable Supreme Court of India has also granted substantial relief w.r.t. filing of appeals, petitions, various proceedings under different laws, compliances, reply to notices, assessment proceedings etc. Last of such orders is in MA No.21/2022 whereby period from 15.03.2020 to 28.02.2022 stands extended. Further 90-days period is allowed w.e.f. 01.03.2022 (i.e., upto 31.05.2022) vide their order dated 10.01.2022. Ld. CIT(A), NFAC, Delhi has decided my appeal on 15-03-2022 (i.e. during Covid-19 effected period) ex-parte on the ground of non-appearance/non-filing of supporting documentary evidences in response to his notices u/s 250 of the Act dated 09.12.2021, 20.12.2021 and 02.03.2022, which was neither in my knowledge nor in the knowledge of my CA Shri Jignesh Sha, who has filed appeal for me.

- 4- Thereafter, my family members have put strict restriction upon me for going outside the home. My auto consulting business was also closed in those days. Even they are not making me aware of any communications or letters received from anybody including Income tax Department by following doctors that I may not be given such news which creates mental and emotional pressure or tension. This is because of the fact of my heart disease as well as possible effect of pandemic Covid-19 upon such type of patients. As a result of multiple efforts, my life can be saved.

- 5- *After passing considerable time, I become well by health to some extent. So I can able to make contact of one of the retired officer from the Department and take his advice. By following his advice I have engaged Shri Rajesh M Upadhyay to file appeal with a prayer for condonation of delay as well as to represent my case before the Honourable Tribunal. I made payment of ITAT Appeal fees of Rs.10,000/- on 11-09-2023, as per his advice. Thus, the delay in filing of appeal for 489 days as well as non-participation in 1st appellant proceedings is on account of unfortunate and unavoidable circumstances beyond my control.*
- 6- *That the delay in filing the appeal for 489 days is neither willful nor deliberate but due to the above circumstances. Earlier, I had participated in assessment proceedings in past. Therefore, assessment was completed u/s 143(3) of the Act.*
- 7- *I have not been benefited, in any way, by filing of late appeal. On the contrary, I am carrying out huge burden of taxes, interest, penalty etc., on my shoulders.
This affidavit is prepared to file in the office of the Hon'ble ITAT, Surat Bench, Surat in the matter of condonation of delay in filing of my appeal for A.Y 2010-11. All contents of affidavit are true and correct and binding upon me. I have been explained that execution of false affidavit amount to an offence under the law."*

5. Based on the contents of the petition for condonation of delay, as stated above, the Ld. Counsel for the assessee stated that delay arose due to pandemic Covid-19 as well as ill health suffered by assessee. The Ld. Counsel argued that Hon'ble Supreme Court vide Writ Petition in MA No.21/2022 had condoned the delay in filing the appeal between the period from 15.03.2020 to 28.02.2022. Therefore, such delay in assessee's both appeals are covered by the judgment of Hon'ble Supreme Court vide Writ Petition in MA No.21/2022 (Supra). Further 90-days period is allowed w.e.f. 01.03.2022 (i.e., upto 31.05.2022) vide their order dated 10.01.2022.

6. The Ld. Counsel further stated that balance delay in filing both the appeals are on medical ground. The ld Counsel explained that due to severe illness suffered by assessee and the assessee was treated in hospital and in fact Form No.36 (*appeal memo*) was signed by the assessee in hospital while sleeping on bed itself. Therefore,

considering the severe illness, the balance delay in filing the appeal may be condoned.

7. On the other hand, Ld. Sr-DR for the Revenue submitted that only part delay was covered by the judgment of Hon'ble Supreme Court in *suo motu* Writ Petition in MA No.21/2022 and the balance delay in filing both the appeals have not been explained by the assessee in a satisfactory manner. Therefore, delay should not be condoned and both the appeals of assessee should be dismissed.

8. I have heard both the parties on this preliminary issue. I note that Hon'ble Supreme Court of India has granted substantial relief w.r.t. filing of appeals, petitions, various proceedings under different laws, compliances, reply to notices, assessment proceedings etc. Last of such orders is in MA No.21/2022 whereby period from 15.03.2020 to 28.02.2022 stands extended. Further 90-days period is allowed w.e.f. 01.03.2022 (*i.e., upto 31.05.2022*) vide their order dated 10.01.2022. The Ld. CIT(A), (NFAC), Delhi has decided assessee's appeal on 15-03-2022 (*i.e. during Covid-19 effected period*), *ex-parte*, on the ground of non-appearance/non-filing of supporting documentary evidences in response to his notices u/s 250 of the Act dated 09.12.2021, 20.12.2021 and 02.03.2022, which was neither in assessee's knowledge nor in the knowledge of CA Shri Jignesh Shah, who has filed appeal of the assessee.

9. I also find that assessee was suffering from heart disease and assessee's family members have put strict restriction upon assessee for going outside the home. The assessee's auto consulting business was also closed in those days. This is because of the fact of assessee's heart disease as well as possible effect of pandemic Covid-19 upon

such type of patients, the assessee under consideration could not file the appeal on time and thus delay has occurred in filing both the appeals. I find that it is a general phenomenon that none should be deprived of an adjudication on merits unless the Court of law or the Tribunal/Appellate Authority found that litigant deliberately and intentionally delayed filing of appeal. While considering an application for condonation of delay, no *strait-jacket* formula is prescribed to come to the conclusion, if sufficient and good grounds have been made out or not. Each case has to be weighed from its facts and the circumstances in which the party acts and behaves. From the conduct, behaviour and attitude of the assessee it cannot be said that assessee had been absolutely callous and negligent in prosecuting the matter. The Hon'ble Supreme Court in B. Madhuri Goud v, B. Damodar Reddy (2012) 12 SCC 693, by referring various earlier decisions of Superior Courts, held that the following principles must be kept in mind while considering the application for condonation of delay:

- (i) There should be a liberal, pragmatic, justice oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.
- (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.
- (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

(iv) No presumption can be attached to deliberate cause of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behavior and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such litigation.

(xi) It is to be borne in mind that no one gets away with fraud, representation or interpolation by taking recourse to the technicalities of law of limitation.

(xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude."

10. Considering above circumstances as well as the law on the issue, I note that the reasons given in the affidavit for condonation of delay were convincing and these reasons would constitute reasonable and sufficient cause for the delay in filing these two appeals. Having heard both the parties and after having gone through the affidavit as well the delay condonation, application, I am of the considered opinion that in the interest of justice, the delay deserves to be condoned. I, accordingly, condone the delay in both appeals of the assessee.

11. Now coming to assessee's appeal in ITA No.628/SRT/2023, at the outset, Ld. Counsel for the assessee informs the Bench that assessee does not wish to press Ground No.1(*in ITA No.628/SRT/2023*), therefore, I dismiss ground No.1 raised by the assessee, as "not pressed".

12. Now, I take ground Nos. 2 and 3 which relate to technical issue challenging the re-assessment proceedings u/s 147 r.w.s. 148 of the Act.

13. Brief facts *qua* ground nos. 2 and 3 are that assessee is an individual and filed his return of income on 31.03.2011, declaring total income of Rs.1,62,500/-. The said return was processed u/s

143(1) of the Act, accepting the returned income. Thereafter, based on the information available with the assessee's case, the assessment for A.Y. 2010-11 was reopened after recording reasons and getting prior approval. The notice u/s 148 of the Act was issued on 28.03.2017 which was duly served upon the assessee on 31.03.2017. In response, the assessee, vide his letter dated 12.07.2017 stated that return of income originally filed for A.Y. 2010-11, on 31.03.2011 may treated as return filed in response to notice issued u/s 148 of the Act. Further notice u/s 143(2) of the Act has been issued on 18.08.2017 and duly served and reasons recorded for reopening of assessment has been provided to the assessee vide letter dated 18.08.2017.

14. On verification of bank statement, it was noticed by the Assessing Officer that during the relevant A.Y. 2010-11, the assessee has deposited following amount in his above said bank accounts:

Sl.No.	Name of bank	Account No.	Amount of cash deposited	Amount other than cash deposited
1	HDFC Bank Vapi	01701000054723	14,55,300/-	7,21,200/-
2	Bank of Baroda, Fansa Br.	10050100007221	1,42,000/-	
3	Dena Bank, Fansa Br.	SB-3745	53,250/-	
4	ICICI Bank	017901501413	5,04,250/-	
			21,54,800/-	7,21,200/-

During the course of assessment proceedings, the assessee was asked to explain the source of the said amount deposited in his bank accounts with supporting evidence. The assessee explained that the cash was deposited out of receipt from his clients since he claimed to have been engaged in auto consultancy and hiring of vehicle. On being asked, the assessee has failed to submit name and address of his client from whom cash amount was claimed to have been received. In absence of details, assessee's claim is not verifiable. Therefore, the

assessee was requested to show cause vide notice dated 07.12.2017 as to why Rs.28,76,000/- should not be treated as his unexplained money u/s 69A of the Act and treated as his income and taxed accordingly. The said notice is duly served upon the assessee. However, the assessee did not submit proper reply. Therefore, considering the above facts, the Assessing Officer made addition to the tune of Rs.28,76,000/- (Rs.21,54,800 + Rs.7,21,200) u/s 69A of the Act. The Assessing Officer also made addition on account of interest income to the tune of Rs.6,376/-. The Assessing Officer also disallowed the deduction claimed by the assessee u/s80C to the tune of Rs.27,136/-.

15. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the NFAC/ld. CIT(A), who has confirmed the addition made by Assessing Officer. The ld CIT(A) observed that the information received was authentic and reliable, therefore the reopening cannot be said to have been made wrongly as alleged by the assessee. There was a tangible information and a 'reason to believe' by the assessing officer and it was his independent opinion because of the information in his hand. Further opportunities were given by the AO during the assessment proceedings, which the assessee partially availed by filing details, and there is no violation of principles of natural justice. Therefore, reopening of assessment was found to be in order and was upheld by ld CIT(A). On merit also, the ld CIT(A) confirmed the addition made by the assessing officer.

16. Aggrieved by the order of ld CIT(A), the assessee is in further appeal before us.

17. Shri Rajesh Upadhyay, Learned Counsel for the assessee, vehemently argued on the technical issue, stating that reasons recorded by the Assessing Officer was not in accordance with law.

The Assessing Officer in his reasons recorded mentioned that assessee has deposited an amount in his bank account to the tune of Rs.14,55,300/-, whereas the amount deposited in the bank account by the assessee was to the tune of Rs.21,54,800/- hence reasons were recorded on arbitrary basis and there is no application of mind by the Assessing Officer.

18. Shri Rajesh Upadhyay further stated that in the reasons recorded, the Assessing Officer stated that assessee has filed the return of income showing total income of Rs.1,62,500/-. However, in fact, the assessee has filed his return of income showing total income to the tune of Rs.1,43,560/-, hence reasons were recorded based on arbitrary basis. The Ld. Counsel also stated that during assessment stage assessee requested Assessing Officer that reopening of assessment is not valid and assessee objected the reopening of assessment, despite of this, the Assessing Office did not dispose of the objection raised by the assessee in respect of reopening of assessment u/s 147 r.w.s. 148 of the Act. Therefore, it is against the judgment of Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. vs. ITO And Ors. in Civil Appeal No.7731 of 2002 dated 25.11.2002. Since the Assessing Officer without disposing of the objections raised by the assessee, framed the re-assessment proceeding, which is invalid and hence, reopening of assessment should be quashed.

19. On the other hand, the Ld. DR for the Revenue submitted that there is no infirmity in the reasons recorded by the Assessing Officer. The Ld DR also pointed out that the assessee was not serious in getting objection disposed of regarding reopening of assessment proceedings and therefore, the Assessing Officer did not dispose of the objection raised by the assessee in respect of reopening of assessment u/s 147

r.w.s.148 of the Act, and therefore, reopening of assessment is not invalid.

20. I have heard both the sides and gone through the relevant material on record. It is seen that assessee has demanded during the assessment proceedings, by way of a letter (*vide paper book page-6*), stating that he was filing Income Tax Return regularly and therefore reopening of his case under section 147/148 of the Act, is not valid. Hence, I find that assessee had objected reopening of assessment u/s 147/148 of the Act. Therefore, it was the duty of the Assessing Officer to dispose of the objections raised by the assessee in respect of reopening of his case u/s 147/148 of the Act. However, I note that Assessing Officer did not dispose of the objection raised by the assessee, by way of passing speaking order, in writing and therefore re-assessment proceedings should be quashed on this count only. The objections raised by the assessee, during the assessment stage, are placed at paper book page-6, which are reproduced below for ready reference:

*“Sub: submission of details for scrutiny assessment proceedings
With reference to above captioned subject, abide by law, I hereby make my humble submission before your goodself as under:*

I acknowledge the receipt of reasons for re-opening of scrutiny assessment proceedings for A.Y 2010-11.

On perusal of the same, it is noted that the reason for re-opening of scrutiny proceedings is deposit of cash of Rs.14,55,000/- in the bank account.

In response to same, I submit that since I am regularly filing the return of income and hence the re-opening of the case is not valid and I respectfully object the same.

I am enclosing herewith following documents for your goodself kind consideration-

- a. Copy of acknowledgment of return of income for A.Y 2009-10 (Annexure 'A')*
- b. Copy of assessment order u/s 143(3) of the AC A.Y 2009-10 (Annexure 'B')*

21. I have observed that above objections raised by the assessee during the assessment stage have not been disposed of by the Assessing Officer. I note that the proper course of action for the notice u/s 147/148 is to file return of income and if assessee so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the assessee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. In the assessee's case, the Assessing Officer has not disposed of the objections raised by the assessee by passing a speaking order, therefore reassessment proceedings u/s 147/148 of the Act are *void*, for that reliance can be placed on the judgment of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. (supra), *wherein* it was held as follows:

"We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the notice is to file return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the notice is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order before passing with the assessment in respect of the above said five assessment years.

Insofar as the appeals filed against the order of assessment before the Commissioner (Appeals), we direct the appellate authority to dispose of the same, expeditiously.

*With the above observations, the civil appeals are **dismissed**. No costs."*

22. I also find that reasons were recorded by the Assessing Officer in an arbitrary manner and there is no application of mind by the Assessing Officer. For example, the reasons stated that assessee has deposited an amount in his bank account to the tune of Rs.14,55,300/-, *whereas* the actual amount deposited in the bank account by the

assessee was to the tune of Rs.21,54,800/- hence reasons were recorded on arbitrary basis and there is no application of mind by the Assessing Officer.

23. Therefore, respectfully following the binding precedent of Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. (supra), I quash the reassessment proceedings.

24. As the re-assessment itself is quashed, all other issues on merits of the additions, in the impugned assessment proceedings, are rendered academic and infructuous therefore I do not adjudicate them.

25. In the result, appeal filed by the assessee in ITA No.628/SRT/2023, is allowed.

26. Now coming to the assessee's appeal in ITA No.629/SRT/2023 for A.Y. 2011-12, *wherein* assessee has raised following grounds of appeal:

"1. Ld. CIT(A), NFAC, Delhi has erred in law and on fact to pass ex-parte appeal order without providing adequate opportunity of being heard as well as to decide the appeal only on statement of fact and grounds of appeal raised in Appeal Memo.

2. Ld. CIT(A), NFAC, Delhi has erred in law and on fact to upheld AO's action for intimation proceedings u/s 148 of the Act only on the presumption and surmises.

3. Ld.CIT(A), NFAC, Delhi has erred in law and on fact to confirm AO's assessment u/s 144 r.w.s 147 of the Act. Appellant prays that he may be allowed one more opportunity of being heard.

4. Ld. CIT(A), NFAC, Delhi has erred in law and on fact to uphold total addition u/s 69A of Rs.6,85,838/- ignoring the fact that the said amount is a gross receipts out of appellant's auto consultation business and not the income chargeable to tax.

5. Ld.CIT(A), NFAC, Delhi has erred in law and on fact to direct the AO to give telescoping effect of cash withdrawal against cash deposit during the year under appeal. He further erred in directing in the AO to apply percentage of profit on gross receipts appearing in the appellant record.

6. Ld.CIT(A), NFAC, Delhi has erred in law and on fact to uphold AO's addition for bank interest at Rs.983/-. Further the appellant is also eligible for deduction u/s 80C and 24b of the Act, which may be directed to be allowed to the appellant."

27. At the outset, Ld. Counsel for the assessee informs the Bench that assessee does not wish to press ground No.1, therefore, I dismiss ground No.1, as 'not pressed'.

28. Succinct facts qua the issue are that during the assessment proceedings, on verification of bank statement of bank account No.01701000054723 maintained with HDFC bank Vapi, the Assessing Officer noticed that during the financial year 2010-11 relevant to assessment year 2011-12, the assessee had deposited cash aggregating to Rs.2,64,500/-, similarly an amount of Rs.4,20,355/- was deposited by way of cheques in the bank maintained with HDFC bank Vapi. The Assessing Officer issued notice to the assessee to explain the amount deposited in cash and by way of cheque in the bank maintained with HDFC bank Vapi. In response, the assessee did not file reply before the Assessing Officer, therefore Assessing Officer made addition at Rs. 6,84,855/- [Rs.2,64,500 +Rs.4,20,355] u/s 69A of the Act.

29. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before Ld.CIT(A), who has confirmed the action of Assessing Officer. The ld CIT(A) has adjudicated the assessee's appeal on merit as well as on technical issue pertaining to reopening of the assessment under section 147/148 of the Act and dismissed the appeal of the assessee.

30. Aggrieved by the order of NFAC/Ld.CIT(A), the assessee is in further appeal before this Tribunal.

31. Shri Rajesh Upadhyay, Learned Counsel for the assessee, pleaded that assessee has deposited the amount in his bank to the tune of Rs.6,84,855/- and also not disclosed the interest income of Rs.983/- therefore total of these two additions comes to Rs.6,85,838/- (Rs.6,84,855 + Rs.983/-). The Id Counsel contended that considering the smallness of cash deposited in the bank account, a suitable *ad hoc* addition may be made in the hands of assessee. The Id Counsel further contended that assessee had deposited cash aggregating to Rs.2,64,500/- only. The amount deposited by cheques is to the tune of Rs.4,20,355/-, thus being a small assessee, the assessee should not be penalized for the amount deposited by cheque in bank account, as it is not his undisclosed income. Hence the amount deposited by way of cheques in the bank account maintained with HDFC bank Vapi should be excluded. Therefore considering the smallness of the amount of cash deposit a suitable addition, say, @ 5% of the total cash deposit in the bank account of assessee may be sustained in the hands of assessee.

32. On the other hand, Ld. Sr-DR for the Revenue argued that entire addition made by the Assessing Officer, may be sustained in the hands of the assessee, as the assessee has failed to explain the source of the money, so deposited in the bank.

33. I have heard the rival arguments made by both the sides and perused the material available on record. Admittedly, the Assessing Officer during the assessment proceedings made addition on account of cash deposited aggregating to Rs.2,64,500/-, as well as amount deposited by cheques is to the tune of Rs.4,20,355/-. The amount deposited by way of cheques in the bank account is out of known

sources, hence addition should not be made in the hands of the assessee, hence addition to the tune of Rs.4,20,355/- is hereby deleted.

34. So far cash deposit of Rs.2,64,500/- is concerned, I note that issue under consideration is longer *res integra* and Co-ordinate Bench of this Tribunal in the case of Mukesh K. Lakahni v. ITO, in ITA No.20/SRT/2023 A.Y 2010-11, order dated 04.09.2023 *wherein* it was held that ad hoc addition at the rate of 5% of cash deposited in the bank account, is fair addition in the hands of the small assessee considering the smallness of the amount. The findings of the Tribunal are reproduced as follows:

“11. I note that the total credit in the bank statement, after eliminating contra-entries, comes to Rs.23,24,831/-. Therefore, I am of the view that to meet the end of justice an addition at the rate of 5% on total credit in the bank statement of Rs.23,24,831/- may be a reasonable addition in the hands of the assessee. For this, I rely on the judgment of Co-ordinate Bench of ITAT, Surat in the case of Smt. Krushangi Keyur Bhagat vs ITO, in ITA No.2706/Ahd/2015 for AY.2008-09, order dated 26.09.2018, wherein the Tribunal sustained the addition at the rate of 5% of total deposits. The findings of the Co-ordinate Bench of ITAT, are reproduced below:

“7. We have heard the rival submissions and perused the relevant material on record. We find that the assessee is a salaried person and deriving salary from Kalyani Multilink Pvt. Ltd. The deposits appearing in the bank account under consideration has not been disclosed. However, the pattern of deposits in bank account would show that these are there are some transaction in which cheque has been issued. There are debit entries in this bank account. The assessee has claimed that this bank account pertained to her business in trading. Ongoing through bank statement and facts of the case we observe that there are frequent transaction of cash as well as cheques. On careful consideration of facts, we are of the view that entire deposits in bank account cannot be considered for addition. Since the bank account is reflecting deposits as well as withdrawals, hence, there is every likely that bank account has been used for unrecorded business transactions as claimed by the assessee. Therefore, it would be in the interest of justice that only profit eliminate @ 5% is considered for tax of total deposits of Rs. 18,32,079. Therefore, the assessing officer is directed to consider net profit @ 5% of total deposits of Rs.18,32,079 which worked out

to Rs. 91,600. Accordingly this addition of Rs.14,76,614 is restricted to Rs. 91,600. This ground is therefore, partly allowed.”

12. Based on these facts and circumstances, as narrated above, I direct the Assessing Officer to make the addition in the hands of the assessee to the tune of Rs.1,16,242/- (5% of Rs.23,24,831/-). Hence the assessee's appeal is allowed partly.”

35. Therefore, considering the above facts, I am of the view that it would be in the interest of justice that only profit eliminate @ 5% should be considered on total cash deposits of Rs.2,64,500/-. Therefore, the Assessing Officer is directed to consider net profit @ 5% of total cash deposits of Rs.2,64,500/-, which worked out to Rs.13,225/-. Accordingly, the addition is restricted in the hands of the assessee to the tune of Rs.13,225/-. This assessee's appeal is therefore, partly allowed in above terms.

36. In the result, assessee's appeal in ITA No.629/SRT/2023, is partly allowed in above terms.

37. In combined result, assessee's appeal in ITA No.628/SRT/2023 is allowed *whereas* assessee's appeal in ITA No.629/SRT/2023 is partly allowed.

A copy of this order be placed in the respective case file(s).

Order is pronounced on 12/12/2023 in the open court.

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

सूरत / Surat

दिनांक/ Date: 12/12/2023

Dkp Outsourcing Sr.P.S.

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

// True Copy //

Assistant Registrar/Sr. PS/PS
ITAT, Surat