

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH (SMC), SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 410/Srt/2023 (Assessment Year 2009-10)

(Physical hearing)

Bhikhubhai Keshavbhai Mistry, 1, Kabirgam, Valiya, Ankleshwar, Bharuch, Gujarat-393135. PAN No. APNPM 1810 Q	Vs.	I.T.O., Ward-1(5), Bharuch.
Appellant/ assessee		Respondent/ revenue

Assessee represented by	Shri Rushi Parekh, C.A.
Department represented by	Shri Vinod Kumar, Sr. DR
Appeal instituted on	09/06/2023
Date of hearing	30/11/2023
Date of pronouncement	11/12/2023

Order under Section 254(1) of Income Tax Act

PER: PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by the assessee is directed against the order of National Faceless Appeal Centre, Delhi (NFAC)/learned Commissioner of Income Tax (Appeals) [in short, the Id. CIT(A)] dated 31/03/2023 for the Assessment Year (AY) 2009-10. The assessee has raised following grounds of appeal:

- (1) That CIT(A) erred that as in confirming addition of Rs. 10,60,330/-
- (2) That CIT(A) erred in not considering opening cash balance accumulated from agricultural income and past savings.
- (3) That the addition confirmed by CIT(A) of Rs. 10,60,330/- may kindly be deleted.
- (4) The appellant craves leave to add, amend, alter, vary and/or withdraw any or all the above grounds of appeal."

2. Perusal of record shows that the impugned order was passed on 31/03/2023, however the present appeal is filed on 09/06/2023, thus,

there is a delay of 6 days in filing appeal before the Tribunal. The assessee has filed application for condonation of delay in filing appeal. The learned Authorised Representative (Id. AR) of the assessee submits that the assessee received order of Id. CIT(A) on 04/04/2023 and he requested his Authorised representative V.I. Rudalal & Company, Chartered Accountants to prefer appeal before the Tribunal as on 05/06/2023 as assessee was busy in treatment of his Cancer disease. The Id. AR of the assessee submits that the delay in filing appeal is neither intentional nor deliberate but for the reasons beyond the control of assessee. The assessee is not going to be benefitted in filing appeal belatedly. The Id. AR of the assessee further submits that by considering the facts that the delay is only of six days, the Bench may adopt a pragmatic approach.

3. On the other hand, the learned Senior Departmental Representative (Id. Sr. DR) for the revenue submits that the Bench may take appropriate decision on the application of condonation of delay.
4. I have considered the contention of both the parties and perused the record carefully. As recorded above, there is delay of only 6 days in filing the present appeal. The Id. AR of the assessee vehemently argued that the delay in filing appeal is neither intentional nor deliberate and that the assessee is suffering from cancer and he was under treatment during that period and not going to be benefitted by filing appeal belatedly.

Considering the fact that the assessee is diligent in pursuing the appeal and the delay is only of 6 days, and adopting a liberal approach and further keeping in view the principle that when technical consideration is pitted against the cause of substantial justice, the cause of justice must be prevailed. Therefore, the delay of 6 days in filing appeal before the Tribunal is condoned. Now adverting to the merit of the case.

5. Brief facts, relevant to adjudication of grounds of appeal, are that the assessee is an individual. Case of assessee was reopened under Section 147 of the Income Tax Act, 1961 (in short, the Act) that there was cash deposit in the bank account maintained by assessee with ICICI bank of Rs. 30,36,511/- on different dates. The Assessing Officer on recording reasons issued notice under Section 148 of the Act dated 29/03/2016. The Assessing Officer noted that no return of income was filed in response to notice under Section 148 of the Act. The assessee was served various notices for seeking source of credit entry but no response was made. The Assessing Officer issued final show cause notice for proceeding under Section 144 of the Act on 09/12/2016 and asked to explain the source of credit. No response was made. The Assessing Officer on the basis of credit entry, treated the entire credit as an unexplained money under Section 69A of the Act.
6. Aggrieved by the additions in the assessment order, the assessee filed appeal before the Id. CIT(A) challenging the validity of reopening and

addition on merit. The assessee filed various submissions before the Id. CIT(A). The assessee stated that no notice under Section 143(2) of the Act was served upon the assessee, hence the reassessment proceedings itself is invalid. To support such contention, the assessee relied on various case laws. On validity of reopening, the assessee stated that the Assessing Officer reopened the case merely on the basis of information which was not independently verified. There is no nexus of reasons recorded with the belief formed for escapement of income. Reasons recorded was not provided to the assessee. The reopening was made for making fishing and roving enquiry. It was merely reopened on the basis of ITD Portal for credit entry. The Assessing Officer has not applied his mind independently by verifying the bank statement. Bank statement was not called for before issuance of notice under Section 148 of the Act. Entire cash deposit cannot be income of assessee as has been held by the Hon'ble Delhi High Court in the case of CIT Vs. Indo Arab Air Services (2016) 283 CTR 92 (Delhi). The assessee also relied on decision of Delhi Tribunal in Bir Bahadur Singh Sijwali in ITA No. 3814/Del/2011 68 SOT 197 (Delhi Trib). The assessee also submitted that the reasons recorded has no rational connection with the formation of belief. On merit, the assessee stated that the assessee has consistently withdrawn and redeposited cash in a short time intervals. The case withdrawn were redeposited in ICICI bank, Ankleshwar, copy of which was furnished.

Copy of Bharuch District Central Cooperative bank was also furnished. The assessee submitted that he is an agriculturist having agricultural land holding with justifiable opening cash balance of Rs. 7,90,680/- as on 01/04/2008. The cash flow statement was also furnished. On the basis of such contention, the assessee prayed to delete the addition and allowed appeal.

7. The Id. CIT(A) on the issue of non-service of notice under Section 143(2) of the Act held that the Delhi Tribunal in Rakesh Aggarwal Vs ITO wherein it was held that when the assessee has not filed return of income in response to notice under Section 148 of the Act till passing of impugned order. The assessee cannot contest for issuance of notice under Section 143(2). On the validity of reopening, the Id. CIT(A) held that neither the assessee filed return of income nor responded to various notices. At the stage of reopening whether there is tangible material or not is sufficient and not to establish the fact of escapement of income. On the merit of addition, the Id. CIT(A) scrutinize the bank account of assessee and find that there were continuous deposit and withdrawal in cash. The Assessing Officer has not explained as to why the entire credit balance in the ICICI bank has been considered as income which cannot be accepted in toto. The analysis of bank account required to reach at the root of matter. The Id. CIT(A) prepared the summary of cash deposit and cash withdrawal from 01/04/2008 to 31/03/2009 as mentioned on

page No. 16 to 24 of his order. The Assessing Officer on the basis of such credit and debit entries, prepared the balance as on 31/03/2009. The Id. CIT(A) on the basis of such details held that the credit of past savings is not given, the assessee has sufficient evidence was not produced by the assessee that the assessee was having cash from earlier years which he was deposited from time to time in bank. The Id. CIT(A) on the basis of his summary of balance, confirmed the addition of peak balance of Rs. 10,60,330/- thereby granted substantial relief to the assessee. Further aggrieved, the assessee has filed present appeal before this Tribunal.

8. I have heard the submissions of Id. AR of the assessee and the Id. Sr. DR for the revenue. The Id. AR of the assessee submits that his prayer is only against the addition of Rs. 10,60,330/- on the basis of peak balance which was prepared on the basis of cash deposit and cash withdrawal and ultimately disallowed/restricted Rs. 10,60,330/-. The disallowance on the basis of peak credit theory, is based on patent irregularity in the matter. The Id. CIT(A) not considered the withdrawal from Bharuch district Central Cooperative Bank Ltd., Bharuch. The Id. CIT(A) taken cash withdrawal and cash deposit only to arrive at a peak balance in ICICI bank and was not having given benefit of other bank deposits by way of agricultural receipts. The Id. CIT(A) has not given benefit of accumulated cash in hand of Rs. 7,90,680/- being accumulated

from sale proceed of sugarcane received in earlier years from Shree Madhi Vibhag Khand Udyog Sahakari Mandli Ltd. and Shree Ganesh Khand Udyog Sahakari Mandli Ltd. Copy of accounts is filed, thus there was sufficient evidence to justify opening cash deposit of Rs. 7,90,680/- . The Id. AR of the assessee further submits that the Id. CIT(A) has not considered the withdrawal of Rs. 3,27,000/- from Shree Ganesh Khand Udyog Sahakari Mandli Ltd.. of Rs. 66,000/- on 05/01/2009 and Rs. 1.00 lacs on account of agricultural receipt on 12/01/2009, Rs. 66,000 from Shree Ganesh Khand Udyog Sahakari Mandli Ltd. on 28/01/2009.

9. The Id. AR of the assessee in his alternative and without prejudice submission, submitted that the peak balance in the accounts was of Rs. 2,57,000/- as on 12/03/2009 which can at the worst be sustained. The Id. AR of the assessee submits that the assessee was having more than 12 ½ hectare of land, copy of 7/12 extract are filed on record. The Id. AR of the assessee finally submits that though no addition is liable to be sustained yet in alternative addition if to be sustained may be restricted to the peak balance of Rs. 2,57,000/- on 12/03/2009. The Id AR for the assessee has also filed his written submissions on record, without seeking permission of the bench. Even otherwise at the time of submissions, the Id AR for assessee has nor pressed for such submissions.

10. On the other hand, the Id. Sr. DR for the revenue supported the orders of lower authorities. The Id. Sr. DR for the revenue submits that all the submissions of the assessee were duly considered by the Id. CIT(A) while granting substantial relief to the assessee. The assessee is not eligible for further relief.
11. I have considered the submissions of both the parties and have gone through the orders of the lower authorities carefully. I have also deliberated upon the various case laws relied by the Id. AR of the assessee. I find that the assessing officer made addition of the aggregate of credit in the bank account without considering the facts that there was regular withdrawal from the bank which is clearly evident the statement of account. The Id CIT(A) sustained the additions to the extent of Rs. 10,60,330/- on the basis of summary of balance prepared by him. No credit of other withdrawal of Rs. 3,27,000/- from Shree Ganesh Khand Udyog Sahakari Mandli Ltd., Rs. 66,000/- on 05/01/2009 and Rs. 1.00 lacs on account of agricultural receipt on 12/01/2009, Rs. 66,000 from Shree Ganesh Khand Udhog Sahakari Mandli Ltd. on 28/01/2009, as claimed by the assessee, was allowed to the assessee. Considering the account summery of assessee, copy of which is filed at page No. 29 of paper book, I find merit in the alternative submissions of Id AR for the assessee that only addition of Rs. 2,57,093/- is to be sustained which is the peak entry, thus, the additions made by assessing

officer is sustained to that extent. No other issue was pressed or argued before me. In the result, the grounds of appeal raised by the assessee is partly allowed.

12. In the result, this appeal of assessee is partly allowed.

Order announced in open court on 11th December, 2023.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat, Dated:11/12/2023

**Ranjan*

Copy to:

1. Assessee
2. Revenue
3. CIT
4. DR
5. Guard File

By order

Sr. Private Secretary, ITAT, Surat