

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**
BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No.504/Ind/2023
(Assessment Year: 2012-13)

Lokesh Ghiya 27, Government Colony Nagda M.P.	Vs.	ITO Ujjain
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AOIPG2695D		
Assessee by	Shri Amit Choudhary AR	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	09.04.2024	
Date of Pronouncement	16.04.2024	

ORDER

Per Vijay Pal Rao, JM :

This appeal by assessee is directed against the order dated 09.10.2023 of the Commissioner of Income Tax (Appeal), National Faceless Appeal Centre, Delhi for A.Y.2012-13. The assessee has raised following grounds of appeal as under:

“1. On facts and circumstances of the case and in law, the order passed by the Hon'ble first appellate authority at National Faceless Appeal Centre (NFAC) is against the Law of Natural Justice as appellant was not given proper opportunity to represent its case. The order passed is required to be quashed and may kindly be quashed.

2. On facts and circumstances of the case and in law, the Hon'ble first appellate authority erred in upholding the action of the Ld. AO in assessing Income at Rs. 16,76,570/-."

2. Ld. AR of the assessee has submitted that the AO has passed ex-party order u/s 144 of the Act whereby the entire deposit in the bank account of the assessee has been added to the income of the assessee. Ld. AR has submitted that only profit elements in the amount deposited in the bank account could have been assessed to tax as per the provisions of section 44AB of the Act. He has submitted that the instead of treating the entire cash deposit in the bank account as income of the assessee the AO ought to have considered deposit as turnover of the assessee and only 8% of the said turnover could be treated as income of the assessee. Alternatively, he has submitted that there are regular deposits and withdrawal in the bank account of the assessee and therefore, only peak credit in the bank account can be considered for making an addition after giving credit of opening balance of Rs.78,345/-. Ld. AR has submitted that the peak credit in the bank account is on 07.02.2012 at Rs.4,41,928/- and after allowing the opening balance at the most the balance can be assessed income of the assessee.

2.1 In support of his contention he has relied upon various decisions on the point that it is not open to the AO to make best assessment u/s 144 otherwise then on the basis of all relevant material which he has gathered after giving opportunity of hearing to the assessee. The judgments relied upon the Ld. AR of the assessee are as under:

(i) (Brij Bhushan Lal Parduman Kumar, v. Commissioner of Income-tax [1978] 115 ITR 524 (SC)

- (ii) *Triyogi Narayan Singh Vs. Commissioner of Income- tax-X, Kolkata* [2015] 60 taxmann.com 351 (Calcutta)*
- (iii) *Dhakeswari Cotton Mills Ltd vs CIT (1954) 26 ITR 775 (SC),*
- (iv) *State of Kerala Vs. C. Velukutty [1966] 60 ITR 239 (SC)*
- (v) *V.B. Gadkari Vs. ITO (1985) 59 STC 362, 364 (M.P.)*
- (vi) *Shankar Khadsari Sugar Mills Vs. CIT 193 ITR 669 (Kar.) 1992 (*

3. On the other hand, Ld. DR has submitted that the assessee has not filed any return of income u/s 139 of the Act nor in response to notice issued by the AO u/s 148 of the Act. Therefore, the contention of the assessee can not be accepted that deposit made in the bank account representing the business turnover when the assessee has not declared any business or income from business. He has relied upon order of the authorities below.

4. We have considered rival submission as well as relevant material on record. There is no dispute that the assessee has not filed any return of income u/s 139 of the Act. Even in response to notice u/s 148 of the Act the assessee has not filed any return of income nor any reply or details explaining the source of deposit made in the bank account to the tune of Rs.16,76,570/- was furnished by the assessee. Therefore, the AO was having no option but to frame best judgment assessment u/s 144 r.w. section 147 of the Act. It is not the case that the assessee has filed a return of income declaring business income and the turnover declared by the assessee could be considered as source of deposit in the bank account so far as the cash sales in the total turnover declared by

the assessee is concerned. But in case in hands there is no declaration of any income or any business activity by the assessee therefore, raising this plea of business turnover of the assessee without producing any supporting evidence is nothing but an afterthought and the same cannot be accepted. However, as per the details of the bank account entries of deposit and withdrawals we find that there are regular deposits and withdrawals on daily basis and therefore, prior withdrawal from the bank account cannot be denied as source of the subsequent deposits until and unless something is found or brought on record to show that withdrawal was made for specific purpose and was not available with the assessee for subsequent deposit. Accordingly we find merits in the alternative plea of the Ld. AR that only the peak credit in the bank account of the assessee could have been considered for making addition on account of unexplained deposit in the bank account. This tribunal in case of *Vishal Balwani vs. ITO in ITANo.478/Ind/2023* vide order dated 20.03.2024 has considered an identical issue as under:

“5. We have considered rival submission as well as relevant material on record. Though initially the assessee denied to have deposited any money in the bank account however, subsequently the assessee filed reply and tried to explain the deposit made in the bank account. Since alleged reply was stated to be filed only on 18.10.2019 and AO passed the order on 19.10.2019 therefore, the possibility of not reaching the reply in time to the AO is not ruled out. Before the CIT(A) the assessee has produced the details of the deposit and statement of peak credit which has been reproduced by the CIT(A) in the impugned order however, the CIT(A) has rejected the contention of the assessee as under:

“The conduct on the part of the appellant as detailed above right from the date of filing the return of income prior to reassessment proceedings and filing the return of income in response thereto showing a higher income without showing the basis thereof and denying the entries in the ICICI bank account as not that of his and thereafter making out a claim of peak cash deposit do not persuade any adjudicating authority to accept the claim. And Peak Cash Deposit is a not something granted for and demanded by the appellant and that is subject to the proof let in by the appellant that the withdrawals and cash deposits constitute a cycle and therefore every withdrawal should offset the later deposit and any later deposit should be considered only if it is in excess of the prior withdrawals. For these reasons, I have no hesitation in upholding the addition made by the appellant.

All the grounds taken by the appellant viz., basis of reopening and basis of addition and ignoring the peak credit claim by the AO are dismissed.

In the result, the appeal is dismissed.”

6. Thus, the CIT(A) has declined to even considered details submitted by the assessee in respect of the peak credit in the bank account. It is evident from the details and transactions in the bank account of the assessee that there are regular deposit and withdrawals from the bank account on daily basis. Therefore, a withdrawal from the bank account cannot be denied as source of subsequent deposit on the same day or very next day or within a short span of time. Once the assessee has given the details of deposit/withdrawals and statements of peak credit then the CIT(A) ought to have considered the same instead of rejecting the claim of the assessee on the ground of conduct of the assessee. The order of the appellate authority ought to have been based on the facts and the conduct of the assessee can influence only the discretionary aspect of the proceeding. The Rajkot Bench of the Tribunal in case of *Navinchand Chande vs. ITO(supra)* has considered an identical issue in para 14 & 14.1 as under:

“14. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly, there was cash aggregating to Rs. 11 ,54,350/- deposited in the bank account of the assessee which was treated as income from undisclosed sources by the lower authorities. The assessee before the leaned

CIT-A explained the amount of cash deposit represent amount deposited by the customer to whom vehicle parts were sold and from this activity he earned only commission income and repaid the amount to the actual supplier after retaining commission. The explanation of the assessee was rejected by the learned CIT-A on reasoning that the detail of person to whom vehicle parts were sold and the person who supplied parts were not submitted. Further the assessee was only acting as an agent in the transaction then why customer deposited the purchase consideration to his bank account, was not explained. At the time of hearing, the learned counsel has not brought any material on record suggesting that the assessee was actually carrying out commission agency business as contended by him. Accordingly, we reject the contention of the assessee.

14.1 Be that as it may be, on perusal of the bank statement, placed on record, we note that there were regular deposits of money in cash which was withdrawn in cash. Thus the amount withdrawn from the bank was also available with the assessee for depositing the same in cash. Accordingly, the amount of cash deposited cannot be treated as income of the assessee without considering the corresponding withdrawal. In such a situation the principles of peak credit theory should be adopted for determining the income of the assessee. The concept of the peak credit proceeds on the fundamental premise that the money deposited and/or withdrawn from the assessee's bank account belongs to the assessee, or in respect of which ownership vests in the assessee. In the given facts and circumstances, there is no allegation of the revenue that the money withdrawn from the bank has either been utilized for incurring the expenses or for the purpose of the investments. Accordingly, the working of the peak credit works out at 1,49,727 which has not been challenged by the revenue. Thus we are of the view that in the given facts and circumstances, at the most the peak balance of 1,49,727.00 can be brought to tax under the peak credit theory. However we note that the assessee has declared an income of ₹ 1,02,710/- which is less than the amount determined under peak credit theory. Accordingly, we direct the authorities below to determine the income of the assessee at 1,49,727 only. In other words, there will be an addition of Rs. 47,017/- (Rs, 1,49,727-1,02,710/-) to the total income of the assessee which is over and above the income already disclosed by the assessee in the income tax return.”

4.1 Hence, in the facts and circumstances of the case and to maintain rule of consistency we restrict the addition on account of cash deposit in the bank account to the extent of peak credit of Rs.4,41,928/- minus opening balance Rs.78,345/- resulting net amount of Rs. 3,63,583/-.

5. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 16 .04.2024.

Sd/-
(B.M. BIYANI)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

Indore, _ .04.2024

Patel/Sr. PS

*Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File*

By order

*Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore*