

आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH: CHENNAI

श्री मनु कुमार गिरि, न्यायिक सदस्य एवं श्री एस. आर. रघुनाथा, लेखा सदस्य के समक्ष
BEFORE SHRI MANU KUMAR GIRI, JUDICIAL MEMBER AND
SHRI S.R. RAGHUNATHA, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.695/Chny/2024
निर्धारण वर्ष /Assessment Year: 2017-18

Alagu Process,
S.F No.414,
Palavanjipalayam Ring Road,
Veerapandi Post,
Tirupur – 641 605.
[PAN: AAVFA 5147P]

The Income Tax Officer,
Vs. Ward-2(1),
Tiruppur.

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से /Respondent by

: Shri S. Sridhar (Erode), Advocate
: Shri D. Hema Bhupal, JCIT

सुनवाई की तारीख/Date of Hearing
घोषणा की तारीख /Date of
Pronouncement

: 26.06.2024
: 04.09.2024

आदेश / ORDER

PER S.R. RAGHUNATHA, A.M :

This appeal by the assessee is arising out of the order of the Commissioner of Income Tax (Appeals), (NFAC), Delhi [hereinafter "CIT(A)"] in DIN & Order No. ITBA/NFAC/S/250/2023-24/105992446(1), dated 19.01.2024. The assessment was framed by the Assessing Officer for the Assessment Year 2017-18 u/s.147 r.w.s

144B of the Income Tax Act, 1961 (hereinafter the 'Act'), vide order dated 24.09.2021.

2. The assessee has raised the following grounds of appeal:

1. *The impugned Order is illegal, unfair and liable to be quashed.*
2. *The Learned Commissioner (Appeals) erred in not considering the records pertaining to the appeal proceeding properly including the replies, explanations and evidences filed by the Appellant during the course of the First Appeal Proceeding.*
3. *Without prejudice, the Learned Commissioner (Appeals) erred in making separate addition of Cash Deposits made during the Demonetization Period, when, admittedly, the Return of Income was filed and Income was declared on Presumptive Basis under Section 44AD of the Income Tax Act, thereby making double addition.*
4. *Without prejudice, the Learned Commissioner (Appeals) erred in not considering the explanation of the Appellant that out of the Cash Deposits of Rs.13,85,000/- made during the Demonetization Period, there was an accumulated business receipts of Rs.4,00,000/- as on 09/11/2016, which was deposited on 11/11/2016.*
5. *Without prejudice, the Learned Commissioner (Appeals) erred in accepting the Income Returned as such and ignoring the underlying Turnover and the explanation that the initial Cash Deposit of Rs.4,00,000/- was out of Business Receipts.*
6. *Without prejudice, the Learned Commissioner (Appeals) erred in not considering the explanation that out of the Cash Deposits of Rs.13,85,000/-, the remaining sum of Rs.9,85,000/- deposited on 12/11/2016 and 14/11/2016 were given by the partners of the Appellant Firm on account of settlement of transaction for the disposal of Swaraj Mazda Vehicle owned by the Appellant during the impugned financial year, which was also duly supported by Affidavit dated 09/12/2023 filed before the appellate authority on 11/12/2023.*
7. *Without prejudice, the Learned Commissioner (Appeals) erred in rejecting the Affidavit filed at the behest of the partners of the Appellant Firm on flimsy grounds and without considering that the PAN of the partners were also mentioned therein.*
8. *Without prejudice, the Learned Commissioner (Appeals) erred in not considering that the impugned addition is unsustainable on the ground of erroneous and illegal invocation of Section 68 of the Act, which is inapplicable to the facts of the case, given that the Appellant did not maintain books of account and declared income on presumptive basis.*

9. *Without prejudice, the Learned Commissioner (Appeals) erred in construing that invoking Section 68 instead of Section 69A was a curable mistake, without considering the unique nature and scope of each such provision and the satisfaction to be arrived by the Assessing Officer before invoking each of them.*

And, for other reasons that may be adduced at the time of hearing, the Appellant humbly prays that the present appeal be admitted, considered and justice rendered.”

3. The brief facts of the case are that the assessee is a firm engaged in the business of Dyeing of Hosiery fabrics and closed business during the Financial Year 2016-17. The assessee has filed its return of income belatedly on 28.02.2018 by declaring a total income of Rs. 1,25,330/- u/s. 44AD of the Act. The A.O based on the information that an amount of Rs. 13,85,000/- was deposited in the assessee's firm's account with Central Bank of India during the demonetization period reopened the assessment for A.Y 2017-18 by issuing a notice u/s. 148 of the Act on 17.03.2020. In response, the assessee has filed its return of income on 31.10.2020 declaring a total income of Rs.1,25,330/- as declared in the original return of income. The A.O has made addition of Rs. 13,85,000/- as unexplained money u/s. 69A of the Act by passing an order u/s.147 r.w.s 144B of the Act on 24.09.2021 by holding as under:

“3. On verification of the reply filed online it is observed that the assessee has not submitted any details called for vide notice u/s. 142(1) of Income Tax Act, 1961 dated 29.09.2020 and 02.02.2021. However, it has just replied that the business has been closed in the year 2016-17 and the cash deposited in the bank is its sale proceeds. The reply of the assessee is re produced as under:

"We have filed our Returns u/s.44AD and we have closed our business during the Financial year 2016-17. The-notified amount deposited in the Bank during Demonetization period is only our Sales Proceeds which we have already disclosed in our Return as Income and Paid Tax u/s. 44AD.We rely on the following Citation .:

- 1. CIT Vs Devi Prasad Vishwnath Prasad (1969) 72/TR 164 (SC)*
- 2. Smt.Harshila Chrodia Vs ITO (2008)298 ITR 349.*

We have closed our Business during the Financial year 2016 -17 and we request your goodself to lift the Proceedings initiated."

Assessee was given one more opportunity to submit documentary evidence to support its claim vide notice u/s.142(1) dated 23.08.2021, however, it did not comply with the said notice.

Show cause notice dated 13.09.2021 was issued to the assessee asking it to show cause why cash deposit of Rs.13,85,000/- should not be added to the total income. Assessee requested 7 days time for its reply. Assessee has replied on 20.09.2021, which is reproduced as under:

"We were doing business in Dyeing of Hosiery Fabrics and due to Pollution problem we were forced to quit the business. Due to closure of business we have not maintained any Books of Accounts and hence we could not furnish the Profit and Loss Account and Balance sheet as per your notice u/s. 142(1). We have opted u/s.44AD and discharged our Tax liability. In our reply we have explained the Sale Proceeds as our Source for the Deposits made in the Bank account during Demonetisation period. If you add the Deposits ws.68 second time, it will become Double Taxation which is against the Law. We object your Proposed Variation fully u/s.68 where Books of Accounts are not maintained. We request your goodself considering Our Cooperation given even after we were not in the business and already discharged our Tax liability per Provisions of Section 44AD to lift the proposed addition and do the needful."

Assessee's reply is considered, but is not tenable, because assessee has not submitted any documentary evidence to support its claim. Not even a bank statement was submitted by the assessee as required by the Notice u/s.142(1) of I.T.Act, 1961.

4. After going through the above, facts, cash of Rs.13,85,000/- deposited by the assessee in the bank during the demonetization period remained unexplained and therefore, the same is treated as unexplained cash deposit u/s.68 and the same is added to the total income of the assessee.

- 4. Aggrieved by the order of the A.O, the assessee has preferred an appeal before the Ld. CIT(A). The assessee stated that the source**

for cash deposits made in the account of the assessee during the demonetisation period was from accumulated business receipts of Rs.4,00,000/- deposited on 11/11/2016 and Sale of vehicle held as asset in the firm which was acquired out of borrowing from Cholamandalam Finance, to its partners for sale consideration of Rs.9.85 Lakhs and the same has been received Rs.4,85,000/- and Rs.5,00,000/- and deposited on 12/11/2016 and 14/11/2016 respectively. Since, the assessee had filed his return by declaring business income of 8% on its turnover U/s.44AD for the relevant assessment year and the books of accounts are not maintained by the assessee, the addition U/s.68 of the Act cannot be made as unexplained cash credit in the books of accounts. Therefore, he prayed for deleting the addition of Rs.13,85,000/- by setting aside the order of the AO by relying the plethora judicial pronouncements. After perusal of the submissions of the assessee upheld the action of the AO, passed an order on 19/01/2024 by holding as under:

“9.3 Though submissions are made by the appellant in support of the grounds raised by it, the same are however made as part of the grounds itself and not separately. Further, the arguments are found to be repetitive On perusal of the submissions filed by the appellant, the main arguments put-forth by it are seen to be two-fold, Cash deposits being out of business turnover and Cash deposits being out of cash sale receipts of vehicle sold, which are adjudicated as under:

1. 1. Cash deposits being out of business turnover:

9.4.1 The appellant has filed his return of income on presumptive basis u/s 44AD of the Act. wherein a total turnover of Rs.15,89,705/- is

declared, and as argued by the appellant the cash deposits of Rs. 4,00,000/-deposited on 11.11.2016 is part of sale turnover of the firm.

9.4.2 It is pertinent to mention that the original Return of Income for AY 2017-18 was filed u/s 44 AD of the Act and that too belatedly on 28.02.2018. Therefore, any reliance placed solely on the Return of Income to substantiate the sources of the cash deposits loses its credence especially in the absence of any documents to support the business activities carried out by, the firm. The fact that the Return of Income is filed on presumptive basis does not necessarily give a tax- free ride to the tax-payer to explain the cash deposits as being out of the declared turnover

9.4.3 Admittedly, the appellant may not be required to maintain its books of accounts, however, it is unfathomable that it would not be in possession of any document, be it the bills raised, labour registers, records pertaining to payments made to the labourers for dyeing of fabrics, bills of purchase of colour and dyes instructions received and issued for the dyeing job, list of customers with heir names and address etc., which could substantiate the carrying out of the business operations by the appellant firm. Thus, in the absence of any underlying supporting documents, the appellant has not only failed to substantiate the source of the cash deposits of Rs.4,00,000/ made on 11.11.2016 but has in fact failed to prove that it had even carried out any business activities during the year under consideration.

9.4.4 The appellant also relied on certain decisions to augment his argument that once the cash deposits are shown to be out of business turnover, the deposits cannot be treated as unexplained. However, the facts of the cases relied upon are distinct from those of the appellant's case as discussed in the subsequent part of this order.

9.4.5 In view of the above, the appellant's submission that the cash deposits of Rs.4,00,000/- made on 11.11.2016 were out of its business turnover is rejected and the AO's action of treating the same as part of the appellant's unexplained income is hereby confirmed.

9.7.4 In fact, perusal of the /appellant's submission made during the appellate proceedings further cemented the fact that despite the mentioning of the section as section 68 of their Act 1961, for making the, addition of Rs. 13,85,000/-, the appellant was aware that the addition is, in fact u/s 69A of the/ Act. The relevant part of the submission highlighting the said observation is reproduced-

"Relying on above case laws, the appellant request your goodselves to delete the addition made 'u/s 69A-of the Act 1961 and taxing the same u/s 115BBE of the Act. "

"In view of the above submissions the appellant hereby request your goodselves to cancel the order passed /s 147 r.w.s

144 B of the Income Tax Act, 1961 on 24/09/2021 by making an addition of Rs.13, 85, 000/- towards unexplained money U/s 69A of the Income Tax Act, 1961 for the AY 2017-18."

9.7.5 Therefore, irrespective of the fact that the AO inadvertently proceeded to make the addition under the wrong section, it would not vitiate the entire assessment. The above view finds support in the decision rendered by the Hon'ble ITAT Delhi Bench, in the case of ACIT Vs M/s KMG Rolling Pvt. Ltd. in ITA no. 3876/Del/2016, order dated 16.07.2020 and decision rendered by the Hon'ble ITAT Bangalore Bench in the case of Arif Nehru Nagar Vs. ACIT ITA No. 976/Bangalore/ 2022, wherein the Hon'ble Member held that, "6. I have heard the rival contentions and perused the material on record. In this case the main contention of the learned A.R. is that the Assessing Officer (AO) is precluded from making addition under Section 68 Of the Act with respect of the unexplained bank deposits. Unexplained bank deposits cannot be considered under Section 68 of the Act and it falls under Section 69A of the Act. However, mentioning a wrong section by the AO is not fatal. We have to see the substance and not the form. Accordingly, I reject this ground of appeal of the assessee. "

9.7.6 Reliance is also placed on the Hon'ble Supreme Court's decision in the case of Ram Sunder Ram vs Union of India & Ors.(2007) 13 SCC 255, wherein after referring to the Apex Court's decision in the case of N Mani Vs Sangeetha Theatres & Ors(2004) 12 SCC 278, the Hon'ble Court held that "It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law [see N. Mani v. Sangeetha Theatre & Ors. \026 (2004)12 SCC 278]. "

9.8 Thus, in view of the above discussion, the AO's action of treating Rs,13,85,000/-, being the cash deposited in the appellant's bank account during the demonetization period, as unexplained money is confirmed albeit u/s 69A of the Act instead of section 68 as applied by the AO. Thus, the Grounds no. 3, 4, 5)6, 7, 9, 11, 12 of the original Grounds and the additional Ground of appeal raised by the appellant are treated as DISMISSED."

Aggrieved by the order of the Ld.CIT(A), NFAC, the assessee preferred an appeal before us.

5. The Ld.AR of the assessee argued that the Ld.CIT(A), NFAC, has erred in confirming the order of the AO without considering the records, replies, explanations during the course of appeal proceedings. The Ld.CIT(A), NFAC, has not appreciated the fact that there is no need to maintain the books of accounts by the assessee under the provisions of section 44AD of the Act, thereby making double addition on account of turnover already declared and another addition u/s.68 of the Act. The Ld.AR argued that the Ld.CIT(A), erred in not considering the explanation that the cash deposits of Rs.13.85 Lakhs has been made out of accumulated business cash balance of Rs.4.00 lakhs and balance Rs.9.85 Lakhs is out of the sale consideration received from partners on account of sale of business asset (vehicle swaraj mazda) during the impugned assessment year, which was supported by the affidavit dated 09/12/2023. The Ld.AR relied on the following decisions of the Tribunal in support of his grounds of appeal and prayed for allowing the appeal of the assessee:

- i) Vijay Bajaj Vs. ACIT – [2023] 152 taxmann.com 402 – (Chandigarh Trib)
- ii) Thomas Eapen Vs. ITO – [2020] 113 taxmann.com 268 – (Cochin Trib)

6. Per contra the Ld.Senior DR submitted that the assessee has failed to substantiate with documentary evidences that the cash deposits made in the bank account are out of business transactions. Regarding non-acceptance of affidavit as a proof of sale of vehicle, the

assessee has failed to furnish any documentary evidences in support of sale from the RTO. Regarding turnover, the assessee failed to establish the turnover of the assessee's business claimed in the submission. Further stated that there is a mistake in making addition u/s.68 instead of section 69A of the Act. Hence, he prayed that assessee's appeal be dismissed by confirming the addition.

7. We have heard the rival contentions and gone through the orders of the lower authorities below. The assessee offered income U/s.44AD of the Act, and the assessee was a small business firm carrying on the business of dyeing of hosiery fabrics. There is no dispute that the assessee is eligible for provisions U/s.44AD of the Act, since the turnover of the assessee is less than Rs.1.00 crore during the relevant assessment year. It is also fact that the AO has accepted the return filed by the assessee and computed the assessed income by considering the total income declared i.e. Rs.1,25,330/- and thereafter made an addition U/s.68 of the Act. In other words the AO has not at all rejected the books of account of the assessee.

8. In the present facts and circumstances of the case and relying on the decision of the Tribunal(Supra) we are of the view that as far as cash of Rs.4.00 Lakhs deposited in assessee's bank account, stated

as deposit made out of the business receipts declared U/s.44AD of the Act, cannot be termed as unexplained and we direct the AO to delete the same. In respect of cash deposit of Rs.9.85 Lakhs, as explained by the assessee that the cash was received from partners towards sale consideration for sale of 'swaraj mazda vehicle' shown as business asset by filing an affidavit, we remit back this issue to the file of the AO for verification of the details and decide the issue based on merit and directed the assessee to file details and documents relating to the sale of vehicle.

9. In the result the appeal of the assessee is partly allowed.

Order pronounced on 04th September, 2024.

Sd/-

(मनु कुमार गिरि)

(Manu Kumar Giri)

न्यायिक सदस्य / Judicial Member

Sd/-

(एस. आर. रघुनाथा)

(S.R. Raghunatha)

लेखा सदस्य /Accountant Member

चेन्नई/Chennai,

दिनांक/Dated: 04th September, 2024.

JPV

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant

2. प्रत्यर्थी/Respondent

3. आयकर आयुक्त/CIT, Chennai

4. विभागीय प्रतिनिधि/DR

5. गार्ड फाईल/GF