

IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH KOLKATA

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI RAKESH MISHRA, ACCOUNTANT MEMBER**

**ITA No. 1081/KOL/2024
Assessment Year: 2017-18**

Ashok Kumar Gupta, 23/3, M D Road, Barra Bazar, Kolkata - 700007 (PAN: AJRPG4792K)	Vs	Income Tax Officer, Ward-43(1), Kolkata, Income Tax Department, 3, Government Place, Kolkata - 700001
(Appellant)		(Respondent)

Present for:

Appellant by : Deep Agarwal, Advocate
Respondent by : Pradip Kumar Biswas, Addl. CIT

Date of Hearing : 22.07.2024
Date of Pronouncement : 18.10.2024

ORDER

PER RAKESH MISHRA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi (hereinafter referred to as "the Ld. CIT(A)" passed u/s 250 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for AY 2017-18, dated 31.08.2023, which has been passed against the assessment order u/s 143(3) of the Act, dated 10.12.2019.

2. The appeal is barred by limitation of time by 196 days. In the written submission on page 2, it has been submitted as under along with an affidavit for seeking condonation of delay:

In April 2024, the appellant discovered a notice under section 133(6) for the assessment year 2021-22 in his registered email, which prompted him to check the Income Tax Portal. It was then that he realized the appellate order for the assessment year 2017-18 had been passed long ago, on 31st August 2023. Upon downloading the order,

he found that the Commissioner (Appeals) had issued four hearing notices in quick succession (17th July 2023, 26th July 2023, 4th August 2023, and 14th August 2024) without any response noted from the appellant, leading to the appellate order being finalized without his representation.

This oversight resulted in a delay of approximately 196 days in filing his appeal before the Income Tax Appellate Tribunal (ITAT), Kolkata Bench.

The appellant asserts that this delay was inadvertent and beyond his control due to his severe health issues and lack of awareness about the appellate notices. The appellant earnestly requests the ITAT to condone the delay, emphasizing that denying him this relief would be a miscarriage of justice given his circumstances. The appellant argues that the principles of natural justice were not upheld during the appellate proceedings due to the lack of a fair opportunity to present his case.

The appellant has filed his affidavit swearing the said difficulties faced by him and pledges to fully comply with all future proceedings of the Tribunal. The document serves as a testament to his ongoing struggles and his plea for a fair opportunity to defend his case comprehensively before the tribunal.

Further the appellant relies on the principles of natural justice; It being a fundamental principle that no person should be condemned unheard (audi alteram partem). The opportunity to be heard must be real and effective. Thereby the case of the appellant being decided against the principles of natural justice is bad in law.

The appellant could not respond to notices from the CIT (Appeals) due to severe health issues (cancer) and financial difficulties. This lack of response should not be construed as non-cooperation.

The appellant underscores the necessity of this condonation to ensure a fair hearing and proper justice, contending that the appellant's serious ailment and resultant financial and logistical constraints justify the delay. The appellant requests the Hon'ble Tribunal to consider these extenuating circumstances and provide an opportunity to present his case.

2.1 In view of the submissions made and on perusal of the affidavit, there is found to be sufficient cause and justification for the delay. The delay is hereby condoned and the appeal is admitted for adjudication. It is mentioned in the affidavit at para 17 that if the matter is set aside before the Ld. CIT(A) for passing of fresh order after providing reasonable opportunity of being heard, the assessee shall duly comply and respond

before the Ld. CIT(A) for fresh proceedings and make proper compliances to all hearing notices issued in the portal by the Ld. CIT(A).

3. The grounds of appeal raised by the assessee are reproduced as under:

"1 For that on the facts and in the circumstances of the case, the Ld. CIT(A)/NFAC, grossly erred in confirming the order of the Ld. A.O. without providing adequate and meaningful opportunity of hearing to the appellant, is devoid of merits & Principles of Natural Justice which is arbitrary, bad in law and is liable to be quashed.

Relief claimed: Addition confirmed in the appellate order amounting to Rs 26,94,500/- is liable to deleted.

2. For that on the facts and in the circumstances of the case, the Ld. CIT(A)/NFAC, was vehemently wrong and unjustified in confirming the addition made by the Ld. AO in his assessment order of amount of Rs. 26,94,500/- invoking the provision of section 69A of the Income Tax Act, 1961, even though the sine qua non conditions for the applicability of the impugned section is not applicable in the present case. Order passed with a predetermined mindset, without laying credence on the submissions made and without recording proper justification before confirming the addition made by the Ld. AO is devoid of natural justice, bad in law and is liable to be quashed.

Relief claimed: Addition confirmed in the appellate order amounting to Rs 26,94,500/- is liable to deleted.

3. For that on the facts and in the circumstances of the case, the Ld. AO as well as the Ld. CIT(Appeals)/NFAC, grossly erred and failed to appreciate the fact that the cash deposits in SBN found in the bank account of the appellant during the demonetization period falls within the normal course of the nature of business of the appellant and therefore is already offered for taxation. Treating the same as income would lead to double taxation which is highly unjustified and not the intention of law.

Relief claimed: the addition of Rs. 26,94,500/- invoking the provision of section 69A should be deleted."

4. Brief facts of the case are that the assessee is a businessman residing in Kolkata and had filed his return of income for the AY 2017-18 on 01.07.2017 declaring total income of Rs. 3,29,000/-. The assessee derived income from managing business of mobile wallet service provider through a network of retailers as Distributor of M/s. Idea Mobile Commerce Service

Ltd. There were cash deposits in eight bank accounts during the period of demonetisation. The case was selected for scrutiny and notices under sections 143(2) and 142(1) of the Act were issued and served upon the assessee. The assessee furnished written submissions along with a copy of agreement of distributorship, Bank statements and explanation on different issues. The Ld. AO considered the view that the assessee received Rs. 32,85,000/- from his retailers and did not disclose with evidences whether the sum of Rs. 32,85,000/- was accumulated cash received from the customers for transferring via mobile wallet from his retailers' end. On perusal of submission filed with necessary details and documents, the Ld. AO considered the receipts in Specified Bank Notes (SBNs) worth Rs. 5,90,500/- as explained. The balance SBNs deposited amounting to Rs.26,94,500/-(Rs. 32,85,000/- - Rs. 5,90,500/-) were treated as unexplained investment u/s 69A of the I.T. Act and the sum was added back to the total income.

5. Aggrieved with the assessment order, the assessee preferred an appeal before the Ld. CIT(A), who vide order dated 31.08.2023 dismissed the appeal and has held as under:

5.3 As stated earlier, although various opportunities were granted during the appellate proceedings, the appellant has not complied. Therefore, the fact remains that the appellant has not controverted the findings of the AO as per the assessment order. Further, the appellant has also not furnished any written submission or documentary evidence to support the grounds of appeal.

5.4 As regards cash deposits, the onus is solely on the appellant to establish the source of the cash deposit by establishing the identity, genuineness and creditworthiness for the cash credits appearing in the books of account of the appellant. The appellant has failed to discharge

the onus cast upon him under the law by establishing the same both during the assessment as well as appellate proceedings. The AO stated that there was no order of relaxation in the case of operation of mobile wallet for acceptance of old demonetized currency notes and even during the appellate proceedings, the appellant has not furnished any order of Government of India for accepting the old demonetized currency notes. Therefore, I am in agreement with the AO that the appellant has failed to explain the source of the cash deposits. Therefore, I do not find any reason to interfere with the findings of the AO and hence the addition of Rs 26,94,500/- u/s 69A is hereby confirmed. Therefore, the grounds of appeal are dismissed.

5. Aggrieved with the order of the Ld. CIT(A), the assessee has filed the appeal before the Tribunal.

6. Rival contentions were heard and the record and the submissions made were examined.

7. In the written submissions filed before us, the assessee has explained as under:

Your Honour, all the four grounds are inclined to the sole issue of addition of Rs 26,94,500/- us 69A as Unexplained Investments; our submission is as follows:

This instant appeal is against the order passed by the Commissioner of Income Tax (Appeals) dated 31/08/2023, confirming the addition of Rs.26,94,500 under Section 69A of the Income Tax Act, 1961, for the Assessment Year 2017-18.

The appellant, Ashok Kumar Gupta, was operating as a distributor for Idea Mobile Commerce Services Ltd (IMCSL) in the relevant financial year. The business involves collecting cash from various retailers, which is subsequently deposited in the appellant's bank account and then transferred to IMCSL

The amount in question (Rs 26,94,500/-) represents legitimate business collections from retailers, intended for onward transmission to IMCSL. The appellant earned a commission of 0.2% on these transactions, which has been duly accounted for and reported and accepted by the assessing officer, which is as per the agreement as attached.

The Income Tax Return (ITR-3) was filed on July 1, 2017, declaring a total income of Rs.3,29,000/-. Subsequently, the case underwent scrutiny assessment under Computer Assisted Scrutiny Selection (CASS). Notices under sections 143(2) and 142(1) were duly issued and served to the assessee. The assessee provided submissions, including a distributorship agreement and bank statements, on October 12, 2019, and further explanations on various matters on November 5, 2019.

The assessee earned income from managing the business of a mobile wallet service provider through a network of retailers acting as distributors for M/s Idea Mobile Commerce Service Ltd. The assessing officer raised concerns regarding the receipt of Rs.32,85,000 from these retailers, asserting that the assessee failed to provide evidence to clarify whether this sum constituted cash accumulated from customers for mobile wallet transfers at the retailers' end.

Upon careful examination of the submissions and accompanying documents, the Assessing Officer accepted receipts in specified bank notes amounting to Rs.5,90,500. The remaining amount of specified bank notes deposited, totaling Rs.26,54,500 (computed as Rs.32,85,000 minus Rs.5,90,500), was treated as unexplained investments under Section 69A of the Income Tax Act, 1961, and consequently added back to the total income.

The assessing officer made an addition of Rs.26,94,500/- under section 69A of the Income Tax Act, 1961, treating it as unexplained investment. This was done without proper appreciation of the complete facts and evidence submitted by the appellant.

Section 69A of the Income Tax Act, 1961 states:

"Where in any financial year the assessee is found to be the owner of any money, bullion jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion jewellery or other valuable article, or the explanation offered by him is not in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion jewellery or other valuable article may be deemed to be the income of the assessee for such financial year."

Section 69A of the Income Tax Act pertains to "unexplained money, etc. and applies in circumstances where an assessee is found to be in possession of money, bullion, jewellery, or other valuable articles, which are not recorded in the books of accounts, and the source of which the assessee is unable to explain satisfactorily.

The appellant, humbly submits that the transactions in question were fully disclosed in his books of accounts. Consequently, the invocation of Section 69A of the Income Tax Act, 1961, is not applicable to the facts of this case.

It was clarified that the sum of Rs.26,94,500/ represented collections from the retailers. These funds were collections on account of retailer collections; and were subsequently deposited in specified bank notes on various dates into both the current and savings accounts of the assessee as per the terms and conditions of the agreement with IMCSL during the demonetization period.

The appellant provided comprehensive details of the retailers from whom the funds were received, including their PAN or addresses, ensuring complete transparency and traceability. Furthermore, the appellant diligently filed the Cash Transactions 2016 form, depicting the cash deposited during the demonetization period, with the income tax department. In this form, the appellant explicitly disclosed in the remarks column that the funds were received specifically for the purpose of Idea Money transfers. (The form has been duly attached)

This documentation serves to clarify the nature and origin of the funds, demonstrating the appellant's compliance with regulatory requirements and reinforcing the legitimacy of the transactions under scrutiny. This thorough approach underscores the appellant's commitment to transparency and accurate reporting

The appellant meticulously maintained and disclosed all relevant transactions in the regular course of business. These transactions included:

Cash Receipts from Retailers: The cash receipts amounting to Rs.38,50,000/- were collected from various retailers as part of the appellant's distributorship for Idea Mobile Commerce Services Ltd. (IMCSL) out of which Rs. 26,94,500 have been disallowed by the assessing officer.

Bank Deposits: The amounts collected were subsequently deposited into the appellant's bank accounts, which were duly recorded in the books of accounts.

Transaction Records: Detailed transaction records were maintained, reflecting each retailer's contribution and the purpose of the collections.

The appellant's business as a distributor for IMCSL involved the collection of funds from retailers, which were then transmitted to IMCSL. The appellant earned a commission of 0.2% on these transactions. This nature of business was transparently documented in the books of accounts, and the relevant records were provided to the assessing officer and duly accepted by him.

(Copy of the agreement and certificate of distributorship with IMCI. duly attached.)

The service provided entailed collecting cash from retailers and forwarding it to the designated destination. Through this service, the assessee generated commission income amounting to Rs.4,08,614/- duly reported under 26AS under section 194H. The amount collected

as an agent on behalf of IMCSL, in accordance with the agreement, does not constitute turnover in this scenario.

The appellant's agreement with IMCSL is duly attached. Upon reviewing the agreement, your honor will clearly see that IMCSL (Idea Mobile Commerce Services Ltd) is a wholly-owned subsidiary of Idea Cellular Ltd. The company has received a "Certificate of Authorization" from the Reserve Bank of India for a "Prepaid Payment Instrument [PPI]" to offer Semi Closed Wallet products and services to customers. The appellant serves as a distributor for this company and service, operating through a network of retailers. Further the agreement clearly states as per clause 2.2 that the distributor to have Rs 2 lacs as cash in hand or bank at all given points of time and there is similar minimum cash stipulation to be kept by other retailers which fall within the mandate of the agreement of distributorship with IMCSL.

The assessee was assigned the responsibility of facilitating financial transactions through a mobile wallet account as a distributor of IMCSL on a commission basis as a commercial correspondent distributor agent. Cash collected was transferred to IMCSL via the assessee's bank account.

Several retailers came forward and deposited their accumulated funds to the distributor, into his bank account for onward transmission as an agent of IMCSL. The dates of these deposits indicate that the retailers couldn't deliver the funds all at once due to circumstances beyond their control at that time. Records from the respective retailers' accounts confirm the existence of accumulated cash at the close of business on November 8, 2018. The assessee distributor did not play a proactive role in this situation as the funds were received by him directly in his bank account.

The assessing officer duly accepts the commission income of the appellant; however the assessing officer has arbitrarily accepted deposits of Rs 5,90,500/- from the first 7 days as legitimate while deeming the deposits from the remaining period as illegitimate. However, this ad hoc disallowance lacks valid reasoning or logic.

It is pertinent to mention that Ad hoc disallowances in income tax assessments have been discussed in several cases and Indian judicial precedents establish that ad hoc disallowances are not permissible under the Income Tax Act.

8. The assessee has also relied upon several judicial pronouncements which have been considered. Similar issue arose in the case of **Prem Prasad Vs. Income Tax Officer, Ward-3(2), Malda, ITA No.12/KOL/2024 AY: 2017-18** wherein it has been held as under:

11. Similar issue relating to cash deposited during the demonetisation period also came up before the **ITAT SMC-'A' Bench, Bangalore in the case of Shri Aijaz Ahmed Suri Vs. The Income Tax Officer, Ward – 1, Bagalkot**, in which the following procedure has been prescribed for assessing the unexplained deposit:

6. We have carefully gone through the various standard operating procedures laid down by the central board of direct taxes issued from time to time in case of operation clean. The 1st of such instruction was issued on 21/02/2017 by instruction number 03/2017. The 2nd instruction was issued on 03/03/2017 instruction number 4/2017. The 3rd instruction was in the form of a circular dated 15/11/2017 in F.No. 225/363/2017-ITA.II and the last one dated 09/08/2019 in F.no.225/145/2019- ITA.II. These instructions give a hint regarding what kind of investigation, enquiry, evidences that the assessing officer is required to take into consideration for the purpose of assessing such cases.

7. In one of such instructions dated 09/08/2019 speaks about the comparative analysis of cash deposits, cash sales, month wise cash sales and cash deposits. It also provides that whether in such cases the books of accounts have been rejected or not where substantial evidences of wide variation be found between these statistical analyses. Therefore, it is very important to note that whether the case of the assessee falls into statistical analysis, which suggests that there is a booking of sales, which is non-existent and thereby unaccounted money of the assessee in old currency notes (SBN) have been pumped into as unaccounted money.

8. Instruction 21/02/2017 issued by the CBDT suggests some indicators towards verifying the suspicion of backdating of cash. It also suggests indicators to identify abnormal jump in cash trials on identifiable persons as compared to earlier history in the previous year. Therefore, in our opinion it is important to examine whether assessee falls into any of these categories and transfer of deposit of cash is not in line with history of transactions in the preceding assessment years.

9. The assessee is directed to establish all relevant details to substantiate its claim in line with the above applicable instructions based on the facts in present case. We are aware of the fact that not every deposit during the demonetisation period would fall under category of unaccounted cash. However, the burden is on the assessee to establish the genuineness of the deposit in order to fall outside the scope of unaccounted cash. Assessee is directed to furnish PAN and address details of the depositors from whom loan repayment has been accepted in cash. The Ld.AO shall verify all the details / evidences filed by the assessee based on the above direction and to consider the claim in accordance with law.

11.1 Further, in the case of **Jagjit Singh v. Income-tax Officer [2023] 149 taxmann.com 48 (Amritsar - Trib.)**, it has been held as under:

5. We heard the rival submission and relied on the documents available on the record. Considering the order of the revenue authorities the assessee was not able to submit the confirmation from the sundry debtor, M/s AD Traders. The confirmation is annexed with the paper book of the assessee APB page no. 3. The assessee received SBN during demonetization period on dated 10-11-2016. The

amount was deposited in the bank account. The amount was received before the appointed day i.e., dated 31-12-2016. So, the assessee shall not (be) in a violation for receiving SBN as per the Act. In Income-tax Act the source was unexplained before the revenue authorities as the evidence was not able to submit before any of the lower authorities by the assessee. Considering the factual matrix here we direct to set aside the matter before the ld.AO for necessary verification de novo. Both the revenue and the counsel of the assessee had not made any objection for remanding back the issue before the ld. AO. Needless to say, that the AO shall provide proper and adequate opportunity of being heard to the assessee in set aside proceedings. The evidence/explanation submitted by assessee in its defence shall be admitted by the AO and adjudicated on merits in accordance with law. We order accordingly. Accordingly, the appeal of the assessee is remanded back to the ld. AO as per above terms.

12. Hence, in order to be fair to both the assessee and the Ld. AO, and respectfully following the orders of the coordinate Benches (supra), the assessment order is set aside to the Ld. AO with the direction that the reply filed by the assessee on the portal and the evidence in possession of the assessee as is mentioned in the Form No. 35 filed before the Ld. CIT(A) that the balance Rs.69,22,742/- may also be cash deposit before and after the demonetization period subject to reconciliation or payment due from debtors etc. should be considered and thereafter the income/additions, if required may be made keeping in view the above judicial pronouncements and the departmental instructions and no addition may be made on this ground without proper verification. As regards observation of the AO that post 08.11.2016, the SBNs did not have any monetary value and, therefore, were unexplained money, the same is not correct as the holders of the SBNs were permitted to deposit the same in the bank/before the RBI till the specified date. Hence, even though they ceased to be legal tender, the same did not lose their intrinsic value. At the same time, the Ld. AO cannot treat the deposit both as part of turnover and also as unexplained deposit. As the income has not been properly estimated and even though the assessee is not pressing the ground of appeal relating to estimation of income on the excess turnover, we deem it proper that the entire assessment order is set aside to the Ld. AO to be made de novo and with the direction that the reply filed on the portal as well as the subsequent replies and evidence, if any, in possession of the assessee may be examined and thereafter, the income may be assessed. The assessee shall produce all required evidence before the AO as and when called for and shall not seek any unnecessary adjournment. Thereafter, the AO shall pass an order in accordance with the facts of the case. Hence, ground no. 3 of the appeal of the assessee is allowed for statistical purposes.

9. The assessee's contention prima facie appears to be supported by the evidence filed before us but the details of cash deposits need to be correlated with the business receipts during the period and require further examination before the Ld. AO in accordance with law after considering the submissions and evidence filed by the assessee before us. There does not appear to be any justification for giving credit of Rs. 5,90,500/- only

for the receipt of SBNs from the retailers during the first few days of demonetisation only and adding back the rest of the amount. Since the assessee could not make proper representation before the Ld. CIT(A), it would be fair to both the assessee as well as the revenue if the order of the Ld. CIT(A) as well as the order of the Ld. AO are set aside and the assessment is done de novo after considering the decision in the case of Prem Prasad (supra) and after providing an adequate opportunity of being heard and after considering the submissions of the assessee in this regard. The assessee shall not seek unnecessary adjournments and shall be at liberty to file all supporting documents before the Ld. AO which could not be filed earlier. For statistical purposes, Ground Nos. 1, 2 and 3 of the appeal are allowed while Ground No. 4 being general in nature, does not require any separate adjudication.

10. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 18th October, 2024.

Sd/-
(Rajpal Yadav)
Vice President

Sd/-
(Rakesh Mishra)
Accountant Member

Dated: 18th October, 2024

AK, P.S.

Copy to:

1. The Appellant:
2. The Respondent.
3. CIT(A)
4. The CIT,
5. DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata