

**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE**

**BEFORE SHRI R. K. PANDA, VICE PRESIDENT
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

**ITA No.332/PUN/2024
Assessment Year : 2017-18**

ITO, Ward-6(3), Pune	Vs.	M B Ashtekar 828, Budhwar Peth, Sonya Maruti Mandir, Laxmi Road, Pune – 411002
		PAN: AAYFM4465F
(Appellant)		(Respondent)

Assessee by : Shri Kishor B Phadke,
Shri Manish Somani and
Miss Nikita Bhutada
Department by : Shri Ramnath Murkunde
Date of hearing : 22-10-2024
Date of pronouncement : 25-11-2024

ORDER

PER R. K. PANDA, VP :

This appeal filed by the Revenue is directed against the order dated 31.12.2023 of the Ld. CIT(A) / NFAC, Delhi relating to assessment year 2017-18.

2. Facts of the case, in brief, are that the assessee is a partnership firm engaged in jewellery business and filed its return of income on 07.11.2017 declaring total income of Rs.3,10,430/-. The case of the assessee was selected for scrutiny under CASS on account of 'abnormal increase in cash deposits during demonetization period as compared to pre-demonetization period'. Accordingly, statutory notices u/s 143(2) and 142(1) of the Income Tax Act, 1961 (hereinafter referred to as 'the

Act') along with questionnaire were issued and served on the assessee, in response to which the AR of the assessee appeared before the Assessing Officer and filed the details from time to time.

3. During the course of assessment proceedings on being questioned by the Assessing Officer, the assessee submitted that all the stock of the firm amounting to Rs.5,85,19,116/- was sold to M/s. M.B. Ashtekar Jewellers Pvt. Ltd., there are no cash sales, cash deposits, withdrawals of the firm and all the transactions appearing in the erstwhile bank account of the partnership firm are duly reflected in the audited books of the company M.B. Ashtekar Jewellers Pvt. Ltd. He, therefore, asked the assessee to furnish the financial statements and all the other details proving that the business has been transferred to a company. Since there was no compliance, the Assessing Officer issued a show cause notice asking the assessee to explain as to why the cash deposited of Rs.16,00,000/- into IDBI Bank account No.045910200011398 and Rs.1,81,57,000/- in account No.0459651100000329 should not be treated as unexplained credit u/s 68 of the Act. The assessee in response to the same submitted that during the year that bank account was operated by the company as its bank account and at the time of renewal of cash credit account i.e. March 2017, a new cash credit account was sanctioned by IDBI Bank in the name of company. However, the Assessing Officer was not satisfied with the arguments advanced by the assessee. He noted that the PAN of the firm is used well after the claim made by the assessee that all the assets & liabilities were taken over by the company. Since the assessee failed

to prove the nexus that the sources for the cash deposit originated from the company and that the firm has not been dissolved and no separate agreement was made for transfer of business of firm to the company, he rejected the claim of the assessee and held that the cash deposit of Rs.1,97,57,000/- belongs to the assessee's firm. He accordingly, made addition of the same to the total income of the assessee u/s 68 of the Act.

4. In appeal, the Ld. CIT(A) / NFAC deleted the addition by observing as under:

“7.5 I have carefully considered the rival contentions. Perusal of the submissions filed and the extensive documents furnished by the appellant, do indicate that the entire business of the appellant firm, including the concerned bank accounts, has been taken over by the company w.e.f. 01.04.2016. The notes to account to the audited financial statements of the company for the AY 2017-18 do mention about the takeover of business of the partnership firm. Further, even though the concerned bank a/cs bearing No.045965110000329 and 0459102000011398 continued to remain in the name of the firm in the records of the bank, the same are found duly reflected in the books of account of the acquiring company as the closing balances as on 31.03.2017 in the concerned accounts of IDBI 398-Rs.39,082/- and IDBI-329 Rs.1,51,942/- reflected in the Balance Sheet of the company under the schedule 'Cash & Cash Equivalent' match with the closing balance of both the bank accounts as per the respective bank statements. The perusal of the concerned bank ledger of IDBI Bank OD A/c No.329 in the books of the company also reflects the opening balance as NIL and transfer of credit balance of Rs. 1,09,47,772 from MB Ashtekar firm on 01.04.2016

7.6 Further, it is also noted that in response to verification conducted by the department in respect of cash deposits post demonetization under 'Operation Clean Money' across India, the company did own up the cash deposits in question and claimed the same to be from its cash sales. The company has also received summons u/s 131(1A) and vide its response dated 05.04.2021 filed before the DDIT, Inv-2(3), Pune (reproduced below), both the above mentioned IDBI bank accounts have been mentioned as the company's bank accounts for business purpose. Further the company has also stated that both the above accounts are in the name of the firm MB Ashtekar but belong to the company.

April 5, 2021

To,
The Asst./Deputy Director of Income Tax,
Inv.2(3),
Pune.

Subject: Summon u/s 131(1A) of Income Tax Act

Ref: Your notice no. ITBA/INV/S/131/2020-21/1031126728(1) / M
B Ashtekar Jewellers Private Limited / PAN : AAJCM6137A

Sir/Madam,

In continuation of earlier reply to the above mentioned notice, I am submitting herewith the following information asked for:

1. **Details of Cash deposition & withdrawals:**

Following are the details of Bank accounts where cash deposition & cash withdrawal are reflected:

Sr. No.	Name of the bank	Bank Account No	Total Deposits in cash (in Rs.)		Total withdrawal in cash (in Rs.)	
			2015-16	2016-17	2015-16	2016-17
1	Pavana Sahakari Bank	14110200000049	2,85,01,600	4,98,72,580	6,10,000	-
2	IDBI Bank	0459102000012421	2,09,69,450	1,02,10,800	-	-
3	Kotak Mahindra Bank		47,00,000	3,44,54,600	-	-
4	IDBI Bank	00480	2,06,42,500	-	18,55,000	-
5	IDBI Bank O/D	0459653800000019	-	3,00,000	-	-
6	IDBI Bank *	0459102000011398	-	20,41,000	-	-
7	IDBI Bank O/D *	0459651100000329	-	2,72,80,000	-	-

* Bank account in the name of firm M.B. Ashtekar

The appellant has submitted copy of multiple replies filed by the company in response to the summons issued u/s 131(1) to it by the DDIT(Inv) 2(3), Pune, reiterating the same facts, with recent responses being filed on 11.09.2023 & 27.10.2023 Perusal of all these reply letters filed by the company does establish that the transactions in the two bank accounts in question are accounted for in the books of accounts of the company due to take over of the business of the appellant firm by the company w.e.f. FY 2016-17.

7.7 Further, the appellant has duly explained the reasons behind continuation of the bank accounts in the name of the appellant firm for quite some time even after the transfer of business, as mentioned at para 7.3 above Perusal of the statement of bank a/c no 329 does reflect that the entire overdraft balance of Rs 1,08,48,058 in the said account on 27.03.2017 was repaid at one go by payment from the a/c of

the company of Rs.1,10,00,000 on 27.03.2017 as per the condition laid out in the IDBI new OD limit sanction in the name of the company as per the Sanction letter dated 21.03.2017 already discussed at para 7.3 above.

7.8 In view of the above discussed facts & circumstances, the contention of the appellant that the concerned bank accounts in question were taken over by the company w.ef. 01.04.2016 and were owned & operated by the company during the year is found to be acceptable. The company has also owned up the concerned bank accounts as well as the cash deposits therein. In view of the above discussed extensive evidence, the AO was not justified in assessing the cash deposits in question in the hands of the appellant firm as unexplained credits u/s 68 esp. when the same were not recorded in the books of the appellant firm. Though the appellant has stated that the concerned cash deposits are out of the sale proceeds of the company and have duly been accounted for in the company's regular books of accounts and considered while filing its ITR, however, still if the AO was not satisfied with the genuineness of the source of the cash deposits, he could have reopened the assessment in the hands of the company M.B. Ashtekar Jewellers Pvt. Ltd.

7.9 It is noted that though the assessment in the hands of the appellant firm has been made on protective basis, yet the impugned assessment order is totally silent about whether or when the substantive assessment has been done in the hands of the company or not. Protective assessment is a precautionary assessment. Where an income has arisen, but AO is not sure who will pay tax on that income, he resorts to precautionary or protective assessment. The object of a protective assessment is that in case substantive addition is made in the hands of other person and in case that assessment fails, Department must get the tax from the person in whose hands the protective assessment is made Thus, a protective assessment becomes operational only when the corresponding substantive assessment fails. Therefore, existence of a substantive assessment is a pre-condition for making a protective assessment. Therefore, vide letter dated 01.12.2023 issued during the course of appeal proceedings, the jurisdictional Assessing Officer (JAO) ITO ward 6(3), Pune was asked to inform in whose hands the corresponding substantive assessment has been done and the present status thereof The A.O. was also to inform whether any proceedings under the IT Act were taken up in the hands of the company for the AY 2017-18 and the present status thereof. However, no reply has been received from the A.O. till date.

7.10 In view of the above discussed facts, it is hereby held that the cash deposits in question belong to the company M.B. Ashtekar Jewellers Pvt Ltd and not to the appellant partnership firm. Accordingly, the protective addition of Rs.1,97,57,500/- made in the hands of the appellant u/s 68 is hereby deleted. However, the A.O. is free to initiate proceedings u/s 148 read with section 150(1) of the Act in the hands of the company MB Ashtekar Private Limited, if deemed fit, to assess the cash deposit in question in its hands following the due procedure as per law in this regard in case the substantive assessment has not yet been done in the hands of the company. In case the jurisdiction over the case of the company does not lie with the A.O., the information may be passed on to the concerned

jurisdictional Assessing Officer for necessary action. Hence, Ground of appeal no 1, 2 and 3 are hereby allowed.

8. Ground of appeal no. 4 - This ground challenges the initiation of penalty proceedings u/s 270A for under reporting of income even though the assessment was made on protective assessment. In this regard, as the addition made by the AO u/s 68 has already been deleted in the preceding para, the penalty proceedings initiated u/s 270A are rendered infructuous. Without prejudice to the above, as the concerned addition in question has been made by the AO as unexplained cash credits u/s 68, the correct applicable penalty proceedings would have been u/s 271AAC and not 270A. However, since the addition so made has already been deleted, the ground of appeal no.4, is hereby treated as allowed for statistical purposes.

9. Ground of appeal no 5: Through this ground the appellant urged for addition/alteration of any ground during the hearing. No such option has been exercised by the appellant during the appeal proceedings. Therefore, this ground needs no adjudication.

10. In the result, the appeal is allowed.

5. Aggrieved with such order of the Ld. CIT(A) / NFAC, the Revenue is in appeal before the Tribunal by raising the following grounds:

- 1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.1,97,57,000/- made by the AO on account of unexplained cash deposit on protective basis in the case of the assessee, without appreciating the fact that the impugned cash deposits was made under the PAN of the assessee and as the assessee had failed to prove the nature and source of cash such cash deposit.*
- 2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.1,97,57,000/- made by the AO on account of unexplained cash deposit on protective basis ignoring the fact that there was no evidence brought on record to show that the said cash deposit was either disclosed in the hand of M/s. M. B. Ashtekar Jewellers Pvt. Ltd., to whom the assessee claimed to have sold all assets & liabilities or the said addition was made on substantive basis in the case of the said assessee.*
- 3. The appellant craves leave to add, amend, or alter any ground(s) of appeal at the time of hearing before the Hon'ble Tribunal.*

6. The Ld. DR strongly challenged the order of the Ld. CIT(A) / NFAC in deleting the addition. He submitted that when the cash deposits in question were made under the PAN of the assessee's firm and the assessee failed to prove the nature and source of such cash deposits, the Ld. CIT(A) / NFAC was not justified in deleting the same. Further, no written agreement or document was produced before the Assessing Officer or the Ld. CIT(A) / NFAC to substantiate that the business of the assessee firm including all its assets and liabilities have been taken over by the M.B. Ashtekar Jewellers Pvt. Ltd. He submitted that the powers of the CIT(A) are coterminous with that of the powers of the Assessing Officer. Therefore, merely because the Assessing Officer has used the word 'protective', the Ld. CIT(A) / NFAC instead of converting the same to "substantive" should not have deleted the addition. He accordingly submitted that the order of the Ld. CIT(A) / NFAC be reversed and that of the Assessing Officer be restored.

7. The Ld. Counsel for the assessee on the other hand submitted that the entire cash deposits of Rs.1,97,57,000/- were accounted for in the books of M/s. M.B. Ashtekar Jewellers Pvt. Ltd. Referring to page 2125 of the paper book, the Ld. Counsel for the assessee drew the attention of the Bench to clause 12 of the Notes to accounts which reads as under:

"12. Mergers & acquisitions

The Company has acquired the existing business of partnership firm named 'M B Ashtekar' with effect from 01 April 2016 along with its business assets, liabilities, bank accounts, etc. The aforesaid firm has also been into the same business as that of the company."

8. Referring to page 2129 of the paper book, the Ld. Counsel for the assessee drew the attention of the Bench to the reply given to the Assessing Officer on the issue of taking over of the business of the assessee firm by M/s. M.B. Asthekar Jewellers Pvt. Ltd. which reads as under:

“December 19, 2019

*To
The Income Tax Officer,
Ward 6(4)
Pune*

Subject: Confirmation of Cash Deposition

*Ref: Income Tax Assessment of M/s M B Ashtekar/A.Y. 2017-18/PAN:
AAYFM4465F*

Madam,

We hereby confirm the following facts in respect of the company and which are relevant for ongoing Income Tax Assessment of M/s M. B. Ashtekar:

- 1. We have taken over business assets, liabilities, cash and bank accounts including overdraft (cash credit) account, stock, debtors, creditors, furniture, fixtures, machinery, etc. of our group firm M/s M. B. Ashtekar with effect from 01-04-2016.*
- 2. All the assets and liabilities taken over are duly reflected in the audited books of accounts of the company for Financial Year 2016-2017.*
- 3. The retail business of the firm with effect from 01-04-2016 was carried out in the name of the company and all the sales effected from Laxmi Road shop has been included in sales revenue of the company.*
- 4. Cash collections from retail sales, collection from customers, revenue from operations, etc. are duly reflected in the audited books of accounts of the company.*
- 5. The erstwhile bank accounts of the firm are also duly reflected in the books of accounts of the company with effect from 01-04-2016 and cash depositions in those accounts are also duly reflected in the books of accounts of the company.*

5. *In fact, we had suo moto made specific disclosure of cash depositions in SFT disclosures in relation to the following accounts of the firm which are reflecting in the books of accounts of the company:*

IDBI Bank Account No. 0459651100000329 - Rs.1,81,57,000/-

IDBI Bank Account No. 0459102000011398 - Rs.16,00,000/-

During the course of assessment of the firm, we have already shared the audited financials, month wise cash collections, depositions, etc. in relation to the business of the company. The depositions in the above referred accounts are from the normal business transactions of the company and are duly disclosed in its returns.

If you need any further information in this regard, we would be glad to furnish you the same.

Thanking you,

For M B Ashtekar Jewellers Pvt. Ltd.

*Sd/-
Director”*

9. Referring to page 23 of the event chart, he submitted that the bank accounts of the firm wherein the cash was deposited, have been shown in the Balance Sheet of M/s. M.B. Asthekar Jewellers Pvt. Ltd. He submitted that the income tax department has reopened the case of M/s. M.B. Asthekar Jewellers Pvt. Ltd. by issuing a notice under section 148 of the Act. He submitted that when the cash deposits in the bank accounts of the firm are already disclosed in the bank account of M/s. M.B. Asthekar Jewellers Pvt. Ltd. and were duly explained and proved before the Assessing Officer, addition of the same again in the hands of the firm will amount to double addition which is not correct. He accordingly, submitted that since the order of the Ld. CIT(A) / NFAC is exhaustive and a detailed one

giving justifiable reasons for deleting the addition, the same should be upheld and the grounds raised by the Revenue should be dismissed.

10. We have heard the rival arguments made by both the sides, perused the orders of the Assessing Officer and Ld. CIT(A) / NFAC and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us by both sides. We find the Assessing Officer in the instant case made addition of Rs.1,97,57,000/- to the total income of the assessee on the ground that the assessee has not satisfactorily explained the nature and source of such cash deposits in the bank accounts of the firm. The submission of the assessee that such cash deposits were shown by the company namely M/s. M.B. Asthekar Jewellers Pvt. Ltd. out of the sale proceeds, was rejected by the Assessing Officer on the ground that the PAN number of the assessee firm was used for deposit of the cash into the bank account of the assessee and the assessee failed to explain the nature and source of such cash deposits. We find the Ld. CIT(A) / NFAC deleted the addition, the reasons of which have already been reproduced in the preceding paragraphs. It is the submission of the Ld. DR that when the impugned cash deposits were made under the PAN of the assessee firm and the assessee failed to prove the nature and source of such cash deposits and did not produce any documentary evidence that the assets and liabilities of the assessee firm were taken over by M/s. M.B. Asthekar Jewellers Pvt. Ltd. by following due process of law, the Ld. CIT(A) / NFAC should not have deleted the addition merely because the Assessing Officer has used the word 'protective' in the assessment order.

11. We find in the instant case, it is an admitted fact that the assessee has not followed the due process of law for taking over of all the assets and liabilities of the assessee firm by M/s. M.B. Asthekar Jewellers Pvt. Ltd. No written agreement or resolution of the company were ever produced. At the same time, it is also an admitted fact that the bank accounts of the assessee firm are reflected in the Balance Sheet of M/s. M.B. Asthekar Jewellers Pvt. Ltd. However, the order of the Ld. CIT(A) / NFAC is silent on the issue as to whether such cash deposits in the bank accounts are out of the sale proceeds of the stock that has been transferred from the assessee firm to M/s. M.B. Asthekar Jewellers Pvt. Ltd. He has not addressed the issue as to when all the assets and liabilities of the firm were taken over by M/s. M.B. Asthekar Jewellers Pvt. Ltd. w.e.f. 01.04.2016, how the firm has declared an income of Rs.3,10,430/- in the return of income filed. He has not given any finding as to whether sufficient cash balance was available in the books of the company in whose balance sheet the bank accounts are reflected. He could have done this by calling for a remand report from the Assessing Officer. He has not given any such finding and has simply accepted the submissions of the assessee made before him and also went by the word 'protective' used by the Assessing Officer. Under these circumstances, we are of the considered opinion that the matter requires a revisit to the file of the Ld. CIT(A) / NFAC with a direction to give a specific finding that the cash deposits so made in the bank account were out of the sale proceeds and that sufficient cash was available in the books of the company. The Ld. CIT(A) / NFAC shall decide the issue as per fact and law after giving due opportunity of being heard to the assessee. We hold and direct

accordingly. The grounds raised by the Revenue are accordingly allowed for statistical purposes.

12. In the result, the appeal filed by the Revenue is allowed for statistical purposes.

Order pronounced in the open Court on 25th November, 2024.

Sd/-

(ASTHA CHANDRA)
JUDICIAL MEMBER

पुणे Pune; दिनांक Dated : 25th November, 2024

GCVSR

Sd/-

(R. K. PANDA)
VICE PRESIDENT

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent
3. The concerned Pr.CIT, Pune
4. DR, ITAT, 'A' Bench, Pune
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे
/ ITAT, Pune

S.No.	Details	Date	Initials	Designation
1	Draft dictated on	12.11.2024		Sr. PS/PS
2	Draft placed before author	13.11.2024		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS			Sr. PS/PS
6	Kept for pronouncement on			Sr. PS/PS
7	Date of uploading of Order			Sr. PS/PS
8	File sent to Bench Clerk			Sr. PS/PS
9	Date on which the file goes to the Head Clerk			
10	Date on which file goes to the A.R.			
11	Date of Dispatch of order			