

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ “आई” मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL “I” BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JM AND SHRI RAJESH KUMAR, AM

आयकर अपील सं./I.T.A. No.5928/Mum/2010

(निर्धारण वर्ष / Assessment Years : 2006-07)

Jignesh Girish Bengari 17 Usha Kiran,4 th floor, Plot Npo.136, Geradia Nagar, Ghatkopar (E), Mumbai-400077	बनाम/ Vs.	Income Tax Officer 22(1)(2), 33, tower No.6, Vashi Railway Station Complex, Vashi, Navi Mumbai-400703
स्थायी लेखा सं./ PAN : AAFPB1952C		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से/ Appellant by :	Shri V H Jariwala
प्रत्यर्थी की ओर से/ Respondent by :	Shri Alok Singh

सुनवाई की तारीख / **Date of Hearing** : **27.4.2016**

घोषणा की तारीख / **Date of Pronouncement** : **27.5.2016**

आदेश / ORDER

PER RAJESH KUMAR, AM :

This is an appeal filed by the assessee against the order dated 20.5.2010 passed by the Id.CIT(A)-33, Mumbai and it relates to the assessment year 2006-07.

2. The present appeal before us was recalled vide order dated 22.3.2016 passed in MA No.135/Mum/2015 by the Co-ordinate Bench of the Tribunal as the appeal was dismissed ex-parte vide order dated 3.10.2011. Now, this appeal is being disposed off after hearing both the parties.

2.1. The only issue involved and challenged in the grounds of appeals relates to confirmation of additions of Rs. 9,27,000/- by CIT(A) as made by the AO for the cash deposited into the bank account during the year.

3. The facts in brief are that the assessee was engaged in the business trading in readymade garments and filed his return of income on 17.10.2008 declaring an income of Rs. 99,791/- under presumptive tax scheme under the provisions of section 44AF of the Act. The case of the assessee was selected for scrutiny under CASS on the basis of AIR information that assessee has made deposits of more than Rs. 10.00 lacs in his account. The AO afforded several opportunities to the assessee but neither assessee nor his authorized representative attended the case and ultimately the assessment was framed ex-parte u/s 144 of the Act by assessing income of the assessee at Rs.10,26,761/- by adding Rs.9,27,000/- to the income of the assessee for unexplained cash deposited into the bank.

4. The assessee filed an appeal before the CIT(A) challenging the additions made by the AO. The Id CIT(A) after considering the submissions of the assessee during the course of appeal proceedings dismissed the appeal of the assessee by observing and holding as under:-

"3. I have carefully examined the ground of appeal and statement of facts filed. The Assessing Officer in his order dated 15.12.2008 has stated as under:

"As stated above, the case was selected for scrutiny to verify the cash deposits in the bank. Since the assessee failed to attend in response to the notices issued, a summons u/s 131 of the I. T Act, 1961 was issued to the Branch Manager, Standard Chartered Bank, Ghatkopar (E) Mumbai calling for the bank statement of the assessee for the period 1.4.05 to 31306 On going through the statement received from the bank it is seen that there are cash

deposits amounting to Rs. 9,27,000 the details of which are as under:

"Since the assessee failed to attend this office inspite of affording reasonable opportunities the source of cash deposits in the bank could not be verified and also no details whatsoever has been filed along with return of income. Hence I have 10 other alternative but to treat the above cash deposits /credits as assessee's undisclosed income".

3.1 During the course of appellate proceedings the appellant has reiterated facts mentioned in the statement of facts. The appellant has also submitted a copy of bank summary, profit & loss account, capital account and balance sheet as on 31.3.2006 along with a copy of the book to state his case that the cash deposits in the bank reflect his cash sales and that the business of the appellant which was trading in readymade garments was carried out only through the banking channels. The appellant also stated that while considering the deposits, the withdrawals should have also been considered and the AO should have considered the peak figure only from addition, if any. From the material available before me, I find that this is a case wherein no regular books of accounts have been maintained for the source of income declared. The accounts of the appellant are informal and incomplete to the extent no details purchases are available and there is no stock register. The P&L account sheet along with capital account is made with reference to entries in the bank account pass book. The appellant has also not been able to confirm that all sales effected have been considered for computation of income as no sale bills are available. The cash deposits have not been correlated with sales declared. In view of the above, I find that the Assessing Officer's action in making the addition of the cash deposits in the bank account cannot be faulted with. The deposited being unexplained money in the bank account would need to be considered as the undisclosed income of the appellant independent of the trading account declared in the P&L account. In view of the above, I am not inclined to interfere with the order of the Assessing Officer in this case. The addition made is confirmed and the grounds of appeal dismissed."

5. The Id AR of the assessee submitted before us that the assessee is a small trader in readymade garments and filed his return of income u/s

44AF of the Act. The assessee deposited into his bank account the amount realized out of cash sales and also made withdrawals frequently. While referring to the bank statement of the assessee with Standard Chartered Bank, Ghatkopar, Mumbai for the whole year filed at page no 1 to 8 of the paper book, the Id counsel submitted that the deposit and withdrawals were frequent and the maximum balance accumulated in the bank during the entire year on a particular date was Rs.1,77,482/- on 7.7.2005 which was a proof in itself that deposit and withdrawals were for business purposes and vehemently submitted that the additions made by the AO was without any cogent basis. He further submitted that the assessee filed his return of income under the provisions of section 44AF of the Act which envisages a special scheme for retailer providing for filing of return of income @8% of the turnover in which the requirement of maintenance of books of accounts has been done away with. Under the said scheme the assessee filed the return of income availing the special scheme which should have been accepted by the AO. The Id counsel for the assessee argued that the income returned by the assessee should have been accepted or at the most the assessment on the peak balance theory should have been made. He finally prayed that order of CIT(A) is wrong and without any substance and therefore be set aside by directing the AO to accept the returned income or alternatively the additions be confirmed to an amount calculated by taking Rs. 1,77,482/- which is the maximum

bank balance on 7.7.2005 minus gross total income of Rs. 1,35,551/-. In support of his arguments the Id counsel referred to a number of decisions namely (i) ITO Vs Ekta Vasawani ITA No 420/Jodh/2013 AY 2009-10 dated 21.02.2014, (ii) Mediga Ashok kumar V ITO ITA No:1674/Hyd/2013 AY 2005-06 dated 29.12.2014 (iii) Jagdish N Thakkar V ITO ITA No:1475/Mum/2009 AY 2005-06 dated 31.05.2010 and (iv) ITO V Dev Kumar Jana ITA No263/Kol/2012 AY 2008-09 dated 18.06.2013. Per contra, Id DR heavily relied on the orders of authorities below.

6. We have considered the rival submissions and relevant materials on records including the orders of authorities below. We find that undisputedly assessee is a small trader who filed the return of income @ 8% of the turnover under the provisions of section 44AF of the Act. Before the AO the assessee did not attend the hearings which culminated into ex-parte assessment which was also confirmed by the First Appellate Authority (FAA). The provisions of section 44AF absolves the assessee from maintaining the books of accounts and provides for presumptive scheme in case the assessee returns income @ 8% of turnover. The only basis of addition is the deposit of cash into bank of the assessee on various dates during the year. The total deposits and withdrawals during the year were Rs. 12,13,972/- and Rs. 12,05,974/- respectively which the assessee claims to be made from the sales and the withdrawals were also for the purpose of business. Obviously the submissions of the Id counsel

appears to be reasonable and plausible. We find merit in the arguments that at the most the additions on basis of peak balance in bank which Rs.1,77,482 on 7.7.2005 should be made. Besides, the case of the assessee also finds strong support from the decisions relied and referred by the Id counsel of the a assessee. In case of ITO Vs Ekta Vasawani (supra) the tribunal has as under:-

"2.5 We have heard the rival submissions and have carefully perused the entire material on record. Both the parties have reiterated their earlier stand. It is a clear cut case of declaration of income under the Provisions of [Section 44AF](#) of the Act. The A.O. has accepted the return filed in respect of assessee's business u/s 44AF of the Act. From the explanation as indicated above, we are convinced that the assessee has been able to prove the gifts received from various natural relatives being grandfather, grandmother and husband. All these gifts stand proved by the evidence filed on record and only because those were not produced before the A.O. , their gifts cannot be treated as ingenuine . With the help of cash flow statement, the assessee has explained the receipt from business in cash which have been properly explained. It is true that the assessee has declared the income u/s 44AF of the Act on estimation basis as provided by the Act itself, which is a special provision for computation of income under the head 'profits and gains of business /professions in the case of retailer business and in such cases the Provisions of [Section 44AA](#) and [44AB](#) do not apply. This provision is aimed at encouragement of retailers to pay taxes without adhering to the nitty-gritty's of the technicalities with regard to maintenance of books of account as per the Act. In such cases, the profit declared by the assessee on declared sales cannot be doubted. In our considered opinion, the assessee has given enough proof of these gifts received from various near and dear relatives who, in the normal course of life intend to make such gifts in order to keep good family relations and also to help their near and dear ones. The insistence on production of such relatives like grandparents is against the social norms and against the basics of our society. Otherwise also it may not be practicable to demand production of old relatives being very aged persons. It is also not socially warranted to make such exercise where even the donors are so closely related, otherwise either they would not make such gifts or the assessee would like to hide the fact of receipt of gifts from

the Department. Since the assessee has produced enough evidence to prove the genuinity of the gifts, we accept them as genuine in the light of these evidence. Only because the donors were not produced before the A.O., he cannot treat them as ingenuine unless the A.O. brings some tangible evidence on record to doubt the claim of the assessee. In this case, no such situation has arisen. Therefore, we accept these gifts as genuine. Regarding cash deposits out of sale proceeds is concerned, these also cannot be questioned when the assessee has claimed that certain amount was deposited in cash from the receipts of her business and particularly when the Return of Income has been filed u/s 44AF of the Act and the same has been accepted by the A.O. Therefore, in the totality of the facts and circumstances of the case, we do not find any infirmity in the findings of the Id CIT(A) who has deleted the addition of Rs. 16,08,200/- made on account of unexplained cash deposits in the bank account. As a result of our above findings, the only ground raised in this appeal has to fail. 3.0 In the result, the appeal of the Revenue is dismissed."

In the case of Mediga Ashok kumar V ITO(Supra), the Tribunal has observed and held as under :

"4. After considering the rival contentions and perusing the paper book placed on record, we are of the opinion that there is no need to make any addition in assessee's case. As seen from the submissions on the record, assessee is running a retail cloth business in the name and style of A-Star Silks at Suryapet and the total turnover was at Rs.20,06,000. The bank account maintained by assessee is for the purpose of business but in the joint name of assessee and assessee's wife. It was the explanation of assessee that the cash deposits made are business receipts and there are regular withdrawals for the purpose of business during the year. Therefore, separate addition of the deposits cannot be made. 5. As can be seen from the order of Assessing Officer, A.O. has issued only one notice under section 143(2) and 142(1) posting the case on 24.12.2007. A.O. records the following in the order : "In response to notice issued under section 143(2) and 143(1), assessee's Authorised Representative Mr. S. Ramakrishna, Income Tax Practitioner appeared on 24.12.2007 and thereafter, seeking number of adjournments repeatedly without disclosing the requisite information called for vide notice under section 142(1). As seen from the date of order, the order was completed on 24.12.2007 itself. We

are unable to understand how the income tax practitioner who appeared on 24.12.2007 could seek repeated adjournments when the assessment order itself was completed on the same day. Therefore, the observation of the Ld. CIT(A) that A.O. gave number of opportunities to assessee cannot be accepted. 6. Be that as it may, assessee has not maintained books of accounts. Therefore, assessee's explanation that deposits in the bank account are out of proceeds of business cannot be brushed aside. Since the deposits in the bank account are less than the turnover shown by assessee, a presumption can be drawn accepting assessee's explanation that the deposits are nothing but business receipts. Since the provisions of section 44AF are invoked in the case, we are of the opinion that separate addition of deposits as unexplained credits cannot be approved. In view of this, assessee's grounds are allowed. A.O. is directed to accept the income returned as such. Ground of the assessee is allowed."

In the case of Jagdish N Thakkar V ITO (supra), the Tribunal has observed and held as under :

"8. We have carefully considered the submissions of the rival parties and perused the material available on record. We find that there is no dispute that the assessee does not maintain books of accounts. It is also not in dispute that the assessee has not filed any income and expenditure account, capital account and statement of affairs (balance sheet). The Assessing Officer under CASS based on AIR information found that the assessee has deposited Rs.27,55,000/- in cash in his savings bank account with The Bharat Co-operative Bank (Mumbai). On being asked it was explained by the assessee that the deposits in the said bank account are out of opening cash in hand Rs.6,85,325/- and current year's bank withdrawals. It was also submitted by the assessee that there had never been a situation of cash having deposited in excess of the cash in hand, therefore, the issue of unexplained cash deposit does not arise. However, the Assessing Officer in the absence of any evidence of opening cash in hand Rs.6,85,325/- and capital account and also in the absence of any nexus of the withdrawals with the deposit, treated the cash deposit of Rs.27,55,000/- in the bank account as unexplained cash deposit. On appeal, the Id. CIT(A) while observing that the appellant failed to explain the source of opening balance despite his office specifically A.Y:05-06 requiring him to do so by letter dated 25.11.2008 worked out peak of the cash balance Rs.15,12,225/-

from the statement of cash flow filed by the assessee and accordingly directed the Assessing Officer to adopt the figure of Rs.15,12,225/- in place of Rs.27,55,000/-.

9. We further find that even at this stage, the Id. Counsel for the assessee while submitting that the opening cash balance of Rs.6,85,325/- is out of previous withdrawals from the bank accounts has failed to file any supporting evidence. Under these circumstances and in the absence of any material placed on record by the Id. Counsel for the assessee to prove the opening cash balance of Rs.6,85,325/- and the nexus of withdrawals and deposits in the bank account, we after rejecting the working of peak of cash balance adopted by the Id. CIT(A), worked out unexplained cash deposits with the bank as under:-

Date	Dr. Amount(Rs.)	Date	Cr. Amount(Rs.)	Excess Amount deposited/unexplained cash deposit
10.4.04	4,55,000	8.04.04	2,25,000	
15.04.04	1,00,000	28.04.04	1,00,000	
24.04.04	5,00,000	22.5.04	30,000	
26.4.04	1,25,000	28.05.04	1,70,000	
		1.6.04	30,000	
		9.6.04	2,70,000	
		10.6.04	30,000	
		10.6.04	2,00,000	
		17.6.04	25,000	
		30.6.04	25,000	
		2.7.04	1,25,000	
		6.7.04	65,000	
		7.7.04	1,00,000	
		9.7.04	1,00,000	
		12.7.04	1,00,000	
Total	11,80,000		15,95,000	4,15,000
6.4.04	20,000	6.10.04	2,00,000	
4.10.04	50,000			
Total	70,000		2,00,000	1,30,000
		14.10.04	60,000	60,000
Total				6,05,000
Less old cash available with the assessee by estimate, in the absence of any evidence				25,000
Total unexplained cash deposit				5,80,000

Accordingly the excess amount deposited in the bank Rs.5,80,000/- is treated as unexplained amount. The Assessing Officer is directed to adopt the figure of Rs.5,80,00/- in place of Rs.15.12,225/- adopted and sustained by the Id. CIT(A). The grounds taken by the assessee are, therefore, partly allowed."

In the case of ITO V Dev Kumar Jana (supra) the Tribunal has observed and held as under :

"5. We have considered the rival submissions, perused the orders of the lower authorities and materials available on record. The undisputed facts of the case are that during the course of assessment proceedings the AO found that the assessee has deposited Rs.29,26,000/- in Standard Chartered Bank, Howrah Branch during the year under consideration which was an undisclosed bank account of the assessee. The AO therefore made addition of the entire deposits of Rs.29,26,000/- to the income of the assessee u/s 69 of the Act. On appeal the Id. CIT(A) following the orders of the ITO. Ward-51(4),Kol vs Deb Kumar Jana A.Yr.2008-09 Kolkata Bench of the Tribunal held that the entire deposits in the bank account cannot be treated as unexplained investment of the assessee. He held that the only peak balance can be treated as unexplained investment of the assessee. Accordingly he directed the AO to restrict the addition to the peak balance of Rs.4,81,228/- and deleted the balance amount of addition of Rs.24,44,772/-. The Id.DR before us has relied on the order of the AO. He could not point out any specific error in the order of the Id. CIT(A). He also could not bring any material to show that the peak balance determined by the Id. CIT(A) of Rs.4,81,228/- was not correct. In absence of any such material being brought on record we find no good and justifiable reason to interfere with the order of the Id. CIT(A) which is confirmed and the grounds of appeal of the revenue are dismissed."

7. The case of the assessee is squarely covered by the decisions of the coordinate benches as referred to above and we ,therefore , respectfully following the ratio laid down in these decisions set aside the order of CIT(A) and sustain the addition to the extent of Rs.1,77,482 by deleting the addition of Rs.749518/- based upon the peak theory.

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

Order pronounced in the open court on 27th May, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 27th May, 2016 को की गई।

Sd
(SAKTIJIT DEY)
JUDICIAL MEMBER

sd
(RAJESH KUMAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 27th /5/2016

व.नि.स./ SRL , Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

True copy

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**