

IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI "D" BENCH, MUMBAI.

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER,  
AND SHRI RAVISH SOOD, JUDICIAL MEMBER,.

ITA. No. 1683/Mum/2013  
(Assessment Year:2008-09)

Shri Rahil M. Agarbattiwala  
143, Janjekar Street,  
Mumbai-400 003

PAN. ADUPA7514Q

Appellant

Vs.

Income Tax Officer – 13(2)(1),  
Aaykar Bhawan,  
Mumbai

Respondent

अपीलार्थी की ओर से /By Appellant : None  
प्रत्यर्थी की ओर से/By Respondent : Shri Purushottam Kumar.  
सुनवाई की तारीख/Date of Hearing : 05.01.2017  
घोषणा की तारीख/Date of Pronouncement : 18.01.2017

ORDER

**PER RAVISH SOOD, J.M:**

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-24, Mumbai, dated 29.11.2012, which in itself arises from the order passed by the A.O under Sec. 143 (3) of the Income Tax Act 1961 (for short 'Act'), dated 22.12.2010. The assessee assailing the order of the CIT(A) had carried the matter in appeal before us, raising the following grounds of appeal:-

*" 1. The Ld. CIT (A) erred in law and on facts in confirming an addition to the extent of Rs.6,27,117/- as against the amount offered by the assessee of Rs.1,98,221/- during the assessment proceedings without appreciating the*

*facts on records and the submission made by the assessee. Thus, the addition must be deleted.*

*2. The Ld. CIT (A) erred in law and on facts in making an addition of Rs.50,000/- as unaccounted investment by the assessee to make purchases for the sales. Thus, the addition must be deleted.*

*3. Alternatively, without prejudice to the above, even if it is considered that it is not possible to arrive at the correct profit from the transactions as entered in unaccounted bank account, it is stated that only the peak balance in the bank account should be considered for the purpose of addition. Thus, the addition must be deleted and restricted to only peak amount."*

2. The assessee is running a proprietary concern M/s Agarbattiwala Enterprises, which is engaged in the business of trading in various types of gift and cutlery items, both as a retailer and a wholesaler, and is also a partner in a firm by the name of M/s Selection Corner. The assessee filed his 'return of income' on 02.01.2009 declaring income of Rs.1,09,120/-, which was followed by a 'revised return' on 31.10.2010. The case of the assessee was taken up for scrutiny proceedings u/s 143(2) of 'Act'. That during the course of the assessment proceedings an undisclosed 'bank account' No. 013010004831 of the assessee with Dena Bank, Branch: Nagdevi, Mumbai, having cash deposits of Rs. 54,35,485/- came to the notice of the A.O. The assessee on being called upon to explain the nature and source of the aforesaid deposits, therein submitted that the 'debit' and 'credit' entries in the said 'bank account' pertained to his unaccounted wholesale business of trading in gift and cutlery items, and referring to the profit margin of 2% to 3%, which as per him would be earned from such business, therein computed the income there from at Rs. 1,98,221/-, i.e by applying an average profit margin of 3.16%, and offered the same as additional income. The A.O in the absence of any evidence being placed on record by the assessee, which could go to support his explanation that the debit/credit entries in his undisclosed 'bank account' represented the unaccounted wholesale

business transactions, and being of the view that the same were in the nature of the sales of his regular business, thus adopted the Net profit margin of 24.88% shown by the assessee in his regular business, and estimated the undisclosed business income of the assessee at Rs. 15,43,765.18.

3. The assessee assailed the assessment order before the CIT(A), who being of the view that the Net profit rate of 24.88% applied by the A.O as regards the undisclosed business transactions of the assessee, was found to be excessive, therein did not find favor with the view of the A.O. The CIT(A) thereafter summarily going by the contention of the assessee, and taking the aggregate of the withdrawals of Rs. 7,83,893/- from the aforesaid 'bank a/c' as the ground base for computing the undisclosed income of the assessee, and further reducing the same by 20% of the aggregate of such withdrawals, i.e Rs. 1,56,778/-, thus concluded that the amount of Rs. 6,27,117/- [i.e Rs. 7,83,893/- (-) Rs. 1,56,778/-] could fairly be held to be the profit generated by the assessee from his aforesaid undisclosed business transactions. The CIT(A) further made an addition of Rs. 50,000/- towards the unaccounted seed money, which as per him would fairly explain the source of the initial capital requirement of the assessee that would have been injected by the assessee at the start of his business during the year under consideration. The CIT(A) thus on the basis of his aforesaid observations substituted the addition of Rs.15,43,765 made by the A.O, by an amount of Rs.6,77,117 [i.e Rs.6,27,117/- (+) Rs. 50,000/-].

4. The assessee being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The hearing of the aforesaid appeal was fixed for 05.01.2017, however we find that despite being afforded sufficient opportunity, neither the assessee had put up an

appearance, nor any adjournment was sought on his behalf. Thus in the backdrop of the aforesaid facts, we are left with no other option but to proceed with as per Rule 24 of the Appellate Tribunal Rules, 1963, and dispose of the appeal after hearing the respondent and perusing the material available on record.

5. The Ld. Departmental Representative (for short 'D.R') submitted before us that the appeal of the assessee was devoid of any merit, and as such the same was thus liable to be dismissed.

6. We have heard the Ld. D.R and perused the records. We are of the considered view that in the backdrop of the 'Unexplained credits' that had emerged in an undisclosed 'bank account' of the assessee with Dena Bank, Branch: Nagdevi, Mumbai, a very heavy onus was cast upon the assessee to establish beyond any scope of doubt, both the 'Nature' and 'Source' of the credits appearing in the said 'bank a/c'. We find that though the A.O accepted the genesis of the source of the aforesaid 'Credits', as being in the nature of the undisclosed business transactions of the assessee, as averred by the latter during the course of the assessment proceedings, and accepted the explanation of the assessee to the said extent, but in the absence of any evidence being placed on record by the assessee, therein declined to accept the bald claim of the assessee that the same were relatable to a wholesale business. The A.O thereafter on the basis of the attending circumstances, therein concluded that the transactions in the undisclosed 'bank a/c' of the assessee could safely be related to his regular business, and thus by referring to the profit margin disclosed by the assessee in his said regular business, therein estimated the latter's income from the said unaccounted business at Rs. 15,43,765.18.

7. We find, that the CIT(A) however not finding favor with the estimation of income so carried out by the A.O, therein dislodged the same, and concluded that eighty percent of the total withdrawals made from the undisclosed 'bank a/c' of the assessee during the year under consideration, would fairly represent the income of the assessee from his aforesaid 'Undisclosed business'. The CIT(A) further making an addition of Rs. 50,000/- towards the undisclosed source of the 'seed money', which as per him would have been brought by the assessee to meet the initial capital requirement of his undisclosed business, thus estimated the undisclosed income of the assessee at Rs. 6,77,117/-.

8. We have given a thoughtful consideration to the order of the CIT(A) and are unable to persuade ourselves to subscribe to the view arrived at by him. We are of the considered view that the approach so adopted by the CIT(A) for deducing the income of the assessee, clearly militates against the provisions of Sec. 69 of the 'Act', which reads as under:-

*"Where in the financial year immediately preceding the assessment year the assessee has made investments which are 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 the investments or the explanation offered by him is not, in the opinion of the [Assessing] officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year."*

9. We though are not oblivious of the settled position of law that an A.O under certain circumstances, in the absence of records and/or a

plausible explanation forthcoming on the part of an assessee, remains at a liberty to estimate the income of the assessee to the best of his judgment, and if such an estimation, on being assailed before the CIT(A), does not find favor with him, then the latter remains vested with a discretion to substitute the same by an estimate, which as per him would fairly represent the income of the assessee. However, such process of estimation of income cannot be allowed to go wild, and not only has to be carried out in a fair and judicious manner, but rather the very process of such estimation has to stand the test of the statutory provisions contemplated under the Income tax statute, and cannot be allowed to traverse beyond the parameters defined under the 'Act'. We are of the considered view that in the backdrop of our aforesaid observations, the process of estimation adopted by the CIT(A) can safely be held to be an exercise carried out by him in clear departure from the provisions contemplated under Sec. 69 of the 'Act', as well as is found to be devoid of any logic. We are of the considered view, that as stands gathered from a plain literal interpretation of the scope and gamut of Sec. 69, as and when an 'Unexplained Investment' emerges under the circumstances contemplated in the aforesaid statutory provision, the assessee concerned is brought within the realm and sweep of the said deeming statutory provision, and can wriggle out of the rigors contemplated therein, only by putting forth a plausible explanation to the satisfaction of the A.O, both as regards the 'Nature' and 'Source' of the said unexplained investment, failing which the value of such unexplained investment, without any choice, has to be assessed as the 'deemed' income of the assessee. We are of the considered view that the CIT(A) in the present case had proceeded with in a whimsical manner, and in complete disregard of Sec. 69, which therein did cast a statutory obligation on him to deduce the income of the assessee on the basis of the undisclosed 'Investment' of the

assessee, in light of the latter's explanation as regards the 'Nature' and 'Source' of such unexplained investment. We find that the CIT(A) had proceeded with in a most arbitrary manner, and instead of deducing the undisclosed income of the assessee on the basis of the unexplained investment made by the assessee in his undisclosed 'bank a/c', as was so required on his part under Sec. 69, had rather very strangely adopted the aggregate of the withdrawals made from the said undisclosed 'bank a/c' as the ground base for determining such undisclosed income of the assessee, a method which we would not hesitate to observe, not only militates against the clear provisions of Sec. 69, but is also devoid of any logic and reasoning, and as such does not inspire any confidence at all. We are unable to persuade ourselves to subscribe to the arbitrary method of estimation resorted to by the CIT(A) for determining the undisclosed income of the assessee, which we would not hesitate to observe, is devoid of any force of law and logic, both, and as such cannot be allowed to perpetuate as such. We thus in all fairness, herein restore the matter to the file of the A.O, who in the backdrop of the fact which is not in dispute, that the 'Nature' and 'Source' of the 'Credits' in the undisclosed 'bank a/c' of the assessee pertains to the undisclosed business transactions of the assessee, shall therein deduce the income of the assessee from the said undisclosed business. The A.O while computing the undisclosed income of the assessee in light of our aforesaid observations, shall therein proceed with on the basis of the material available on record, as well as further evidence as would be brought on record by the assessee during the course of the set aside proceedings. Needless to say, the assessee shall be afforded sufficient opportunity of being heard during the course of the set aside proceedings, and shall be at a liberty to substantiate before the A.O that the transactions in the said undisclosed 'bank a/c' are relatable

to his undisclosed wholesale business, as well as place on record of the A.O documentary evidence in support of his contentions. The order of the CIT(A) is thus set aside to the file of the A.O for readjudication, in light of our aforesaid directions.

9. The appeal of the assessee is allowed for statistical purposes, in light of our aforesaid observations.

Order pronounced in the open court on 18/01/2017.

Sd/-  
**(B.R BASKARAN)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(RAVISH SOOD)**  
**JUDICIAL MEMBER**

Mumbai, Date : 18 , January, 2017

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "T" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar  
I.T.A.T, Mumbai