

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "D" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 836/MUM/2016  
Assessment Year: 2006-07**

M/s. Babulal G. Jain  
Room No. 201Priyadarshini Bldg.  
Kamathipura Lane No. 13, S.P. Rd.  
Nagapada  
Mumbai - 400 008

Vs. ITO 17(3)(1)  
Mumbai

**PAN No. AAIPJ8776M**

**(Appellant)**

**(Respondent)**

Assessee by: Shri S.L. Jain, AR  
Revenue by: Shri J. Sravanan, DR

Date of Hearing : 02/02/2017  
Date of pronouncement: 19/04/2017

**ORDER**

**PER N.K. PRADHAN, AM**

This is an appeal filed by the assessee. The relevant assessment year is 2006-07. The appeal is directed against the order of the Commissioner (Appeals) - 32, Mumbai and arises out of the order u/s 143(3) of the Income Tax Act, 1961 (the 'Act').

2. The grounds of appeal filed by the assessee read as under:

- i. The Learned Commissioner of Income Tax (Appeals) - 32 has erred in law in confirming the addition made by the Assessing Officer of Rs. 30,00,000/- as a undisclosed income of the assessee which most unjustified and arbitrary.

- ii. The Learned Commissioner of Income Tax (Appeals) – 32 has erred in law in applying Section 44AF which is not applicable to the case of the assessee.
- iii. The order of the Commissioner of Income Tax (Appeals) – 32 is bad in law and unjustified.

3. Briefly stated, the assessee filed his return of income for the A.Y. 2006-07 on 25.06.2006 showing total income of Rs.76,850/-. The Assessing Officer (AO) had received information from the Directorate of Enforcement vide letter dated 06.04.2010 that on 13.10.2005 at Valiyapattanam Railway station an amount of Rs. 30 lacs was robbed from one Shri M.T. Umer during his journey from Mumbai to Calicut and the said amount was stated to be entrusted to him by the assessee. During the course of assessment proceedings, the AO asked the assessee to submit the source of Rs. 30 lacs. In response to it, the assessee submitted the details of 40 Visa aspirants from whom the alleged cash was received by the assessee. Then the AO issued notice u/s 133(6) to the 40 Visa aspirants and the position is narrated in the assessment order which is produced as under:-

SL NO	NAME	REMARKS
1	THERAVIL GIRISH	REPLIED THAT HE HAS NO DEALINGS WITH ASSESSEE
2	REJIS BABU VADAKKETHODI	REPLIED THAT HE HAS NO DEALINGS WITH ASSESSEE
3	DEVIDASAN VELU KOLOTHUMTODI	REPLY AWAITED
4	MORDU KOLKAT	REPLY AWAITED DELIVERED ON 05.11.13
5	SARAFUDDEEN DAPPIL MOHIMMED	REPLY AWAITED
6	BHILASH CHIRAKKAL BALAKRISHNAN	RETURNED UNDELIVERED
7	RAJAN THENESSERY	REPLY AWAITED
8	SHAJIMON THATTADI PARAMBIL	REPLY AWAITED
9	MUHAMMED ASHRAF ARIMBRA	REPLY AWAITED
10	PALLATHODI MOHAMMED IQBAL	RETURNED UNDELIVERED

1	MUJEEB CHEKU HASSAN	REPLIED THAT HE HAS NO DEALINGS WITH ASSESSEE
12	MUHAMMED KUTTY ADATTHHODI	REPLY AWAITED
13	ABBAS THACHAMKUNNAN	REPLY AWAITED
14	MANOJ KRISHNAN ALLAKKATT	REPLIED THAT HE HAS NO DEALINGS WITH ASSESSEE
15	ABOBAKKAR SIDHIQU ALAKKAL	REPLIED THAT HE HAS NO DEALINGS WITH ASSESSEE
16	MUHAMED MUSHAFA AKKA PARAMBIL	RETURNED UNDELIVERED
17	ABDUL JALEEL MANIKKANTHODI	REPLY AWAITED
18	UBAIDULLA VALIYATHODI	REPLIED THAT HE HAS NO DEALINGS WITH ASSESSEE
19	MUNEER KUNNATH	REPLY AWAITED
20	MOHD ABDULJALAL VALIYATHODI	REPLY AWAITED
21	MUTHANGAPPAR AMBIL SASIDARAN	NOTICE UNDELIVERED
22	ORATHODY MUHAMMED SAJEER	REPLY AWAITED
23	RIYAS BABU KODUVAND	REPLY AWAITED
24	HANEEFA RAWTHAR SAAHULHAMEED	REPLY AWAITED
25	PULIYAKKATTIL SIDHEEQUE	REPLY AWAITED DELIVERED ON 18.11.13
26	MELEVEETIL SAMEERALI	REPLIED THAT HE HAS NO DEALINGS WITH ASSESSEE
27	SIHABUDDEN VILAKKATHODI	REPLY AWAITED
28	MAHESH POTHUVAKKUTH	REPLY AWAITED
29	MADATHODI UMAR	REPLIED THAT HE HAS NO DEALINGS WITH ASSESSEE
30	MUNDAKKAL CHANGARU	REPLIED VIDE LETTER DATED 27.11.2013 THAT HE HAS PAID Rs. 75,000/- IN CASH FOR AIR TICKET & VISA TO BABULAL JAIN
31	KUTTERI ABDUL NASIF	REPLY AWAITED DELIVERED ON 19.11.13
32	THONDIYIL JAYAFAR SADK	REPLIED VIDE LETTER DTD 21.11.13 THAT HE HAD PAID Rs. 75,000/- TO MR. HAMSA BY CASH AND WAS NOT AWARE TO WHOM THE AMOUNT WAS ENTRUSTED FOR PURCHASING AIR TICKET
33	ANVER MEKKADANKUZHI	REPLY AWAITED
34	SHOWKATH ALI THOTTAKKARA	REPLY AWAITED
35	THETTAYIL JOSEPH	NOTICE UNDELIVERED
36	PONNAK AMPAT VINODAN	REPLY AWAITED
37	MUHAMMED JALEEL	REPLY AWAITED DELIVERED ON 17.11.13
38	KARIVILK AKKAPRATH	REPLY AWAITED
39	KUNNATH DILEEP	REPLIED THAT HE HAS NO DEALINGS WITH ASSESSEE
40	AYOOB AMBALAAPARAMBAN	RETURNED UNDELIVERED

The AO, on examination of the above observed that only one person at Sr. No. 30 that is Mr. Mundakkal Changaru vide letter dated 27.11.2013 confirmed the payment of Rs.75,000/- to the assessee. Mr. Thondiyil Jayafar Sadk vide letter dated 21.11.2013 has replied that he has paid Rs.75,000/- to one person, named Mr. Hamsa by cash and he was not aware to whom the amount was entrusted for purchasing air ticket. In response to a query raised by the AO, the assessee filed a reply dated 14.02.2014 which is at Page 4 of the assessment order. The AO was not convinced with the same as the assessee failed to discharge the burden of proving the genuineness of transaction with the parties. Therefore, he made an addition of Rs.29,25,000/- to the income shown by the assessee.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) observed that (i) 8 out of the 40 persons denied having any relation with the appellant, while in 7 cases, the notices could not be delivered. In rest of the cases, there was no response except for one person who confirmed that he had paid Rs.75,000/- to the appellant for carrying on work for obtaining Visa and Air ticket, (ii) the assessee has filed return of income u/s 44AF who is applicable to assessee engaged in retail trade of any goods or merchandise, (iii) admittedly, the assessee has made a claim to the cash claimed to have been stolen from the possession of one M.T. Umer, vide Cr MC No. 609 of 2011. Therein the assessee has claimed ownership of cash. In that petition, the assessee has requested the Court to quash the criminal proceedings against the accused in the theft case. The Hon'ble High Court refused to accept the petition and dismissed the same.

The Ld. CIT(A) noted that during the appellate proceedings before him, nothing more in the matter was produced or argued. As regards the alternate plea of the assessee that the cash having been lost in theft, has to be allowed as deduction, the Ld. CIT(A) found that the case laws cited by the assessee apply to cases where cash having been lost in theft, has to be allowed as deduction. All the case laws cited by the assessee apply to cases where either cash itself is the stock in trade or cash transactions form integral part of the business of the assessee. The assessee is in the retail trade of goods and merchandise. Therefore, the Ld. CIT(A) confirmed the addition of Rs.29,25,000/- made by the AO.

5. Before us, The Ld. Counsel for the assessee filed a copy of the documents filed by the assessee on 16.06.2015 before the Ld. CIT(A).

6. *Per contra*, the Ld. DR relied on the order passed by the Ld. CIT(A).

7. We have heard the rival submission and perused the relevant material on record. The Hon'ble Supreme Court in *State of Kerala vs. K.T. Shaduli Grocery Dealer* AIR 1977 SC 1627, recognised the importance of oral evidence by holding that the opportunity to prove the correctness or completeness of the return necessarily carry with it the right to examine witnesses and that includes equally the right to cross-examine witnesses.

In *ITO vs. M. Pirai Choodi* [2012] 20 taxmann.com 733 (SC), the Hon'ble Supreme Court held:-

“In this case, the High Court has set aside the order of assessment on the ground that no opportunity to cross-examine was granted, as sought by the assessee. We are of the view that the High Court should not have set aside the entire assessment order. At the highest, the

High Court should have directed the Assessing Officer to grant an opportunity to the assessee to cross-examine the concerned witness.”

7.1 In view of the above, the order of the Ld. CIT(A) is set aside and the AO is directed to pass an assessment order afresh as per the provisions of the Act, after giving opportunity of being heard to the assessee to cross-examine a reasonable number of the concerned parties. The assessee is directed to file before the AO the relevant details.

8. In the result, the appeal is allowed for statistical purposes.

**Order pronounced in the open court on 19.04.2017**

Sd/-

(SAKTIJIT DEY)  
JUDICIAL MEMBER

Mumbai;

Dated: 19.04.2017

*Biswajit, Sr. P.S.*

Sd/-

(N.K. PRADHAN)  
ACCOUNTANT MEMBER

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**