

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

Before Shri R.K. Panda, Accountant Member
and Shri Vikas Awasthy, Judicial Member

ITA No.434/PN/2013
(Assessment Year : 2009-10)

ITO, Ward-1, Panvel .. Appellant

Vs.

Shri Shivraj Mishrilal Bafna,
Shop No.17, Satyam Shopping
Centre, Sector 2E, Kalamboli,
Dist : Raigad
PAN No.ADTPB2121K .. Respondent

Co. No.01/PN/2015
(Assessment Year : 2009-10)

Shri Shivraj Mishrilal Bafna,
Shop No.17, Satyam Shopping
Centre, Sector 2E, Kalamboli,
Dist : Raigad
PAN No.ADTPB2121K .. Cross Objector

Vs.

ITO, Ward-1, Panvel .. Respondent

Appellant by : Shri Prayag Jha
Department by : Shri I.P. Nago
Date of Hearing : 01-06-2015
Date of Pronouncement : 17-06-2015

ORDER

PER R.K. PANDA, AM :

This appeal filed by the Revenue and CO filed by the assessee are directed against the order dated 31-10-2012 of the CIT(A)-I, Thane relating to Assessment Year 2009-10. For the sake of convenience, these were heard together and are being disposed of by this common order.

2. Facts of the case, in brief, are that the assessee is an individual and is engaged in the business of trading in gold ornaments. He filed his return of income on 31-07-2009 declaring total income of Rs.2,33,777/-. During the course of assessment proceedings the Assessing Officer noted that as per AIR information the assessee has made cash deposit of Rs.24,71,500/- in his savings account. On being questioned by the Assessing Officer to furnish the source of such cash deposits made the assessee grossly denied of having any such account and any such cash deposit in his bank accounts. It was stated that the bank account is not showing any such transactions. The assessee also asked the Assessing Officer to provide the date wise details of the cash deposit made in the bank so that he will be able to explain the transactions. In view of the above the Assessing Officer called for information u/s.133(6) from the bank, i.e. Sahebrao Deshmukh Cooperative Bank Ltd., Kalamboli branch, Navi Mumbai. Vide letter dated 18-11-2011 the bank replied that the assessee is maintaining the following bank accounts :

Sr.No.	Account No.	A/c. opening date	Status of account
1	CA/582	19-04-1999	Account closed on 30-09-2000
2	SB/3363	18-04-1999	Account closed on 09-02-2004
3	SB/8176	21-04-2006	Account closed on 18-12-2008
4	SB/11679	07-01-1999	Account closed on 05-04-2011

3. From the details furnished by the bank the Assessing Officer noted that in the bank accounts at Sl.No.3 and 4 above an amount of Rs.40,57,265/- has been deposited on various dates and the same has not been reflected in the balance sheet/capital account filed by the assessee for reasons best known to him. He therefore asked the assessee to explain as to why the above amount should not be added to his total income u/s.68 of the I.T. Act. He also asked the assessee to explain the source of such deposits. Since

the assessee did not reply to the above query raised by the Assessing Officer to his satisfaction the Assessing Officer made addition of Rs.40,57,265/- to the total income of the assessee u/s.68 of the I.T. Act.

4. The Assessing Officer further observed that the assessee has purchased gold from various customers on different dates at Rs.3,47,600/- in cash. On being questioned by the Assessing Officer it was stated that all those sellers are new and are not known to the assessee and due to exceptional circumstances the assessee has made cash payment to the above parties. Rejecting the explanation given by the assessee the Assessing Officer made addition of Rs.3,47,600/- u/s.40A(3) of the I.T. Act.

5. Before CIT(A) the assessee challenged both the additions. So far as the addition of Rs.40,57,265/- made by the Assessing Officer u/s.68 is concerned it was stated that besides regular business of trading in gold ornaments the assessee was having the above bank accounts which were not disclosed to the income-tax authorities wherein deposits and withdrawals were made out of the unaccounted business of share trading, labour job of making of ornaments etc. The source of deposits in the bank account are out of such sale proceeds/payments from/to of share trading, labour charges, income for making gold ornaments etc. The assessee has not kept any details of such receipts and payments vouchers for which the assessee could not produce the same before the Assessing Officer and it is not possible to give the details of such transactions in the said bank accounts. It was accordingly argued that only the income earned out of said unaccounted transaction should be taxed in his case instead of deposits/credit entries as only deposits cannot be the income of the assessee. Alternatively,

the assessee pleaded for addition of the peak credit amount to the total income of the assessee. The assessee also agreed to offer additional income of Rs.3,92,536/- on account of such peak credit.

6. Based on the arguments advanced by the assessee the Ld.CIT(A) accepted the theory of peak credit and directed the Assessing Officer to make addition of Rs.3,92,536/- and interest earned on this account at Rs.47,104/-. The relevant observation of the CIT(A) on this issue reads as under :

“4.1. I have gone through the assessment order passed by the A.O., written submissions filed by the appellant and also had detailed discussion on the issue with the A.R. of the appellant during the appellate proceedings.

4.2. The contention of the AR of the appellant is that in respect of the deposits in the bank accounts of the appellant, the entire credits in the unaccounted bank account of the appellant cannot be treated as income. In such situation only the peak credit theory should be applied and accordingly the peak amount worked out amounting to Rs. 3,92,536/- and interest earned on this amounting to Rs.47,104/- should be taken as the income for the period under consideration.

4.3. The above arguments of the AR have been considered and I intend to agree with these arguments. Where there are several credits and debits in the same bank account/ accounts, whether several credits in the accounting year, only the peak balance in the account can be taken as the income of the appellant for that period. The theory of the peak credit is most logical and applied on such deposits so as to ascertain the maximum amount which the appellant had in his bank accounts in question at any particular date, which can be treated as unexplained. The entire credits in the accounts cannot be the income of the appellant. This peak credit theory is generally accepted by the courts as it is logical and followed while attempting to make an addition for unexplained credits.

4.4. In the case of ITO Vs Maheshkumar Jayantilal Vora, (2004) 3 SOT 96 (Rajkot), ITAT Rajkot while deciding a similar issue has held as under :-

" We have duly considered the rival contentions and the material on record. The only dispute for our resolution is whether peak credit method applied in the facts of the case is rightly applied or not. It is well established that no income can be taxed twice. It is also not in dispute that these deposits include refunds of the subscriptions made from the deposits. Thus, by aggregating all deposits, they tend to get taxed twice which is against the principles of taxation the decisions cited by the Id. Counsel lend support to the case of the assessee and hence we decline to interfere with the decision of the CIT(A)."

4.5. It can be observed from the trend of these cash / cheque deposits in the bank accounts in question of the appellant that the cheques and cash amounts are being regularly deposited in the bank account of the appellant on the day to day basis and also there are also debits on the day to day basis. Therefore, the peak credit theory would be most logical and relevant in the instant case.

4.6. As far as the cash deposits in the bank account no. 8176 in question are concerned, it can be observed that there are total cash deposits amounting to Rs.20,76,551/-, there is peak credit of Rs. 3,92,536/- on 15/07/2008. This peak credit amount can be taken as the unexplained cash credit in the above bank account of the appellant for the period under consideration. In addition to the above, the appellant has also earned interest on these deposits, which @ 12% comes to Rs.47,104/-. Therefore, the total addition to the income of the appellant would be Rs.4,39,640/- on account of deposits in the bank account no. SB/8176 of the appellant for the year under consideration.

4.7. Similarly, in the other bank account no. 11679, there is peak credit of Rs.2,03,436/- on 26/03/2009 and this peak credit amount can be taken as the unexplained cash credit from this bank. In addition to the above peak credit, interest earned on such peak credit for the year comes to Rs.24,500/- which will also be added back to the income of the appellant for the year under consideration. The total addition therefore on account of peak credit in the bank account no. SB/11679 would come to Rs.2,27,936/- for the year under consideration. The total addition on the basis of the peak credit theory, which can be added back to the income of the appellant, comes to Rs.6,67,576/- (4,39,640 + 2,27,936). Therefore, the AO is directed to add back an amount of Rs. 6,67,576/- to the income of the appellant on account of unexplained deposits in the above mentioned bank accounts of the appellant for the period under consideration.

4.8. In view of the facts and circumstances explained above, in my opinion, the addition made by the AO for an amount of Rs. 40,57,265/- on account of the deposits in the bank accounts cannot be justified and therefore deleted. The AO is directed to delete the above addition and assess the income of the appellant as stated above on the peak credit basis at an amount of Rs.6,67,576/- and the addition made to this extent is confirmed.”

7. So far as the addition u/s.40A(3) is concerned it was submitted that the purchase of gold from customers is a regular practice being followed by the jewellers and most of the persons who come to sell the gold are indeed from very far flung areas. They always insist for cash payment for selling of the gold. If the Assessing Officer had any doubt regarding these purchases he should have made independent enquiries from the parties concerned. The assessee further argued that the payments in cash

above Rs.20,000/- were due to business expediency and covered by the provisions of section 40A(3) read with the Rule 6DD. The assessee further argued that all the bills and vouchers were produced before the Assessing Officer during the course of assessment proceedings.

8. Based on the arguments advanced by the assessee the Ld.CIT(A) deleted the addition. While doing so, he observed that it has been held in various decisions that if the genuineness of the payment is not in doubt and the same is recorded in the books of account the assessee's explanation regarding payment in cash can be accepted. The mandate of the proviso is to exempt the payment in violation of provisions of section 40A(3) in such cases and under such circumstances as may be prescribed. He observed that in the case of the assessee he is a trader and manufacturer of gold jewellery and it is general practice in the business to purchase the jewellery from the customers. When the needy customers come from far flung places it is but natural that the assessee has to make the payment in cash. Further, such cash payments for the purchases have been made only to 12 persons ranging from Rs.20,000/- to Rs.45,0000/- starting from 14-04-2008 till 19-03-2009 spreading over almost the entire year, properly billed and vouched. Further, the assessee has purchased gold from unknown customers. Therefore, it is more obvious that assessee has to make payment in cash. Further, if any doubt was there in the mind of the Assessing Officer he could have called the parties and should have carried out independent investigation to prove his point as all the details of the parties were available. Referring to the decision of the Mumbai bench of the Tribunal in the case of

ACIT Vs. Mangalchand Premchand and Company reported in 1 SOT 269 he directed the Assessing Officer to delete the addition.

9. Aggrieved with such order of the CIT(A) the Revenue has filed this appeal with the following grounds :

“1. On the facts and in the circumstances of the case, the CIT(A)-I, Thane was not justified in deleting the addition made u/s.68 on account of the deposits in the bank accounts, overlooking the fact that the assessee failed to explain the source of deposits.

2. On the facts and in the circumstances of the case, the CIT(A)-I erred in accepting the peak credit theory, overlooking the fact that there is nothing on record to show that withdrawals made were not utilised and were available for re-depositing in the same bank account.

3. On the facts and in the circumstances of the case, the CIT(A)-I erred in admitting fresh evidence without giving opportunity to the AO.

4. The appellant prays the order of the CIT(A)-I Thane, may be vacated and that of the Assessing Officer be restored.

5. The appellant craves leave to add, amend or alter any ground/grounds, which may be necessary.”

9.1 The assessee has also filed cross objections basically supporting the order of CIT(A).

10. The Ld. Departmental Representative heavily relied on the order of the Assessing Officer. So far as addition u/s.68 is concerned he submitted that it is an admitted fact that the assessee had huge deposits in the bank account during the impugned assessment year. As against deposit of more than Rs. 40 lakhs in cash in the bank account, the profit and loss account of the assessee shows a turnover of hardly about Rs.10 lakhs. Under these circumstances when the Assessing Officer has pinpointed the cash deposits made by the assessee in the bank account the Ld.CIT(A) should not have deleted the addition by applying the theory of peak deposit. He submitted that there is no

evidence whatsoever to support the claim made by the assessee that the deposits in the bank account are out of cash withdrawn on various dates and sale of shares. The Ld.CIT(A) without properly appreciating the facts of the case has simply went by the submissions made before him. Neither he has independently proved the submissions made by the assessee nor he directed the Assessing Officer to verify the details which were not before the Assessing Officer. He submitted that there is no doubt regarding the power of the CIT(A) which are coterminous with that of the Assessing Officer but such powers depend upon the facts of each case. So far as deletion of disallowance u/s.40A(3) is concerned he submitted that without assigning any proper reason the Ld.CIT(A) deleted the disallowance made by the Assessing Officer u/s.40A(3) of the I.T. Act. He accordingly submitted that the order of the CIT(A) be reversed and that of the Assessing Officer be restored.

11. The Ld. Counsel for the assessee while supporting the order of the CIT(A) submitted that the theory of peak addition has been accepted by various Benches of the Tribunal as well as High Courts. For the above proposition, he referred to the decision of Rajkot Bench of the Tribunal in the case of ITO Vs. Maheshkumar Jayantilal Vora reported in 3 SOT 96. Referring to the decision of the Mumbai bench of the Tribunal in the case of M.A. Shahul Hmeed Vs. ITO reported in 40 CCH 193 (Mumbai) (Tribunal) he submitted that the Tribunal in the said decision has held that when there are cash deposits made in bank account and also cash withdrawals made from the same account, addition on account of unexplained cash deposits made in said account has to be done on the basis of peak credit. For the above proposition he relied on the

decision of the Hon'ble High Court of Calcutta in the case of Sanjay Kumar Jain Vs. CIT reported in 118 Taxman 821.

11.1 So far as the ground raised by the Revenue over the acceptance of additional evidences are concerned the Ld. Counsel for the assessee referring to the decision of the Hon'ble Bombay High Court in the case of Smt. Prabhadevi S. Shah Vs. CIT reported in 100 Taxmann 404 (Bom.) submitted that the Hon'ble High Court in the said decision has held that the restrictions placed on the assessee to produce evidence did not affect the powers of the AAC under subsection 4 of section 250. It has been held there in that the powers of the AAC are much wider than the powers of an ordinary court of appeal. The scope of his powers is coterminus with that of the Assessing Officer. He can do what the ITO can do. He can also direct the ITO to do what he failed to do. The power conferred on the AAC under said sub section 4 of section 250 being quasi judicial power, it is incumbent on him to exercise the same if the facts and circumstances justify. If he failed to exercise his discretion judicially and arbitrarily refuses to make enquiry in a case where the facts and circumstances so demand, his action would be open for correction by a higher authority. It has been accordingly held that the restrictions placed on the assessee to produce evidence do not affect the powers of the AAC under sub section 4 of section 250. He accordingly submitted that no addition should have been made u/s.68 on account of the deposits in the bank account. Further, by admitting additional evidence, the CIT(A) has not violated any of the provisions. Therefore, the ground raised by the Revenue on this issue should be dismissed.

11.2 The Ld. Counsel for the assessee further submitted that bank statements are not books of accounts and therefore entries made in such bank deposits cannot be the basis for addition u/s.68 of the I.T. Act. For the above proposition, the Ld. Counsel for the assessee referred to the following decisions :

1. Smt. Shanta Devi Vs. CIT reported in 37 taxmann 104 (Punj. & Har.)
2. Anand Ram Taitani Vs. CIT reported in 223 ITR 544 (Gau.)
3. ITO Vs. Kamal Kumar Mishra reported in 33 taxmann.com 610 (Lucknow Tribunal)
4. Sind Medical Stores Vs. CIT reported in 117 DTR 78 (Raj.)
5. CIT Vs. Bhaichand N. Gandhi reported in 11 Taxmann 59 (Bom.)

11.3 So far as the deletion of disallowance u/s.40A(3) he reiterated the same arguments as made before the Assessing Officer and the CIT(A) and submitted that the CIT(A) is fully justified in deleting the disallowance.

12. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. The assessee in the instant case is engaged in the business of trading in gold ornaments. It is an admitted fact that the assessee in its profit and loss account has disclosed turnover of Rs.11,14,504/- whereas the deposits in the two undisclosed bank accounts are Rs.40,57,465/-. Although initially the assessee denied to have made any such cash deposits, however, before the CIT(A) he made a plea that the deposits in the said accounts relate to his unaccounted business of share trading and labour job of making of

gold ornaments. This plea was taken before the CIT(A) for the first time. We find neither the CIT(A) called for a remand report from the Assessing Officer nor asked the assessee to produce evidences to prove that he was in fact engaged in the business of share trading. It may be pertinent to note here that cash was deposited in the said bank accounts whereas most of the withdrawals are by inward clearing and only few instances of cash withdrawal. The theory of peak credit as argued by the assessee before CIT(A) will be applicable only when there are deposits in cash and withdrawals in cash. In the instant case when the deposits are made in cash and most of the withdrawals are by way of clearing and not cash withdrawn, therefore, the theory of peak credit is not fully applicable to the facts of this case. The Ld.CIT(A) has not gone through the bank statements which were produced before him. Although there are certain cash withdrawals, however, the number of inward clearing entries are almost equal to the number of cash withdrawals. Therefore, it has first to be ascertained as to what are the nature of entries. Further, there is one transfer of Rs.1 lakh on 21-04-2008 from S.B. A/c.No.11817, it is not known about the nature of this entry. In our opinion, the matter requires thorough scrutiny before coming to a final conclusion as to the nature of entries, total amount of cash withdrawn and inward clearing of cheques etc. The Ld.CIT(A) without applying his mind and without verifying the nature of transactions has simply carried away by the arguments made before him which in our opinion is not at all justified. So far as the argument of the Ld. Counsel for the assessee that addition u/s.68 cannot be made on the basis of entries in the bank pass book, we find the assessee initially denied to have made any such cash deposit in any bank account before the Assessing Officer. Now the assessee has pleaded before the

CIT(A) for addition of peak credit. Before coming to the legality of the aspect, the facts in our opinion needs to be enquired into.

12.1 Similarly, so far as the addition u/s.40A(3) is concerned, here also, we find the Ld.CIT(A) while deleting the addition made u/s.40A(3) observed as under :

“6.2. Majority of the Courts have taken a view that if the genuineness of the payment is not in doubt and the same is recorded in the books of accounts, the assessee's explanation regarding payment in cash can be accepted. The mandate of the proviso is to exempt the payment in violation of provisions of section 40A(3) in such cases and under such circumstances as may be prescribed. The last sentence of the proviso, i.e., having regard to the nature and extent of banking facilities available, considerations of business expediency and other relevant factors, is the guideline for the authority making such disallowances, which mean the AO has to apply his mind before taking decision regarding the disallowances to be made u/s. 40A(3).”

12.2 However, from the order of the CIT(A) we do not find as to whether the persons to whom payments have been made for purchase of gold ornaments are having bank accounts or not and whether the places where they are residing is covered by the banking facilities or not. Without ascertaining this vital aspect the CIT(A) has jumped to conclusion that it was for business expediency that the assessee has purchased the gold ornaments in cash from different persons. He also accepted the contention of the assessee that if the Assessing Officer had any doubt regarding the cash payments he should have called the parties and should have carried out independent investigation. Although the Assessing Officer has failed in his duty, the Ld.CIT(A) whose powers are coterminus with that of the Assessing Officer should have atleast remanded the matter to the file of the Assessing Officer with a direction to investigate and enquiry regarding the cash payments which he has failed to do so. In view of the above we are unable to accept the observations of Ld.CIT(A). Considering the totality of

the facts and circumstances of the case and in the interest of justice, we deem it proper to restore the issue to the file of the Assessing Officer with a direction to adjudicate both the issues afresh in the light of our above observations.

13. In the result, the appeal of the Revenue as well as the CO filed by the assessee are allowed for statistical purposes.

Pronounced in the open court on 17-06-2015.

Sd/-

(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

satisfy

Pune Dated: 17th June, 2015

Copy of the order forwarded to :

1. Assessee
2. Department
3. CIT(A)-I, Thane
4. CIT-I, Thane
5. The D.R, "B" Pune Bench
6. Guard File

By order

// True Copy //

Senior Private Secretary
ITAT, Pune Benches, Pune