

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'J' : MUMBAI

BEFORE SHRI D.K. AGARWAL, (JM) AND SHRI B. RAMAKOTAIAH ,(AM)

ITA No.1475/Mum/2009
Assessment Year : 2005-06

Jagdish N. Thakkar
A-19A, Blue Bells
Devidayal Road, Mulund(W)
Mumbai-400 080.
P.A. No. **(AABPT 4165 C)**

.....(*Appellant*)

Vs.

Income tax officer-23(2)(3)
Pratyakshakar Bhavan
Bandra Kurla Complex
Mumbai-400 051.

.....(*Respondent*)

Appellant by : Shri Hari S. Raheja
Respondent by : Shri L.K. Agrawal

ORDER

Per D.K. AGARWAL (JM).

This appeal preferred by the assessee is directed against the order dated 26.12.2008 passed by the Id. CIT(A) for the Assessment Year 2005-06.

2. Briefly stated facts of the case are that the assessee, an individual, derives income from salary, share in partnership firm and commission income. The return was filed declaring total income of Rs.97,120/-. During the course of assessment it was observed by the Assessing Officer that under CASS based on AIR information, the

assessee has deposited cash in his saving bank account to the tune of Rs.27,55,000/-. Accordingly the assessee was asked to furnish the source of cash deposits in the bank account with supporting evidences in respect of claim made in this regard. In response the assessee's representative submitted daily cash summary indicating the dates of deposits in bank and withdrawals from the bank. In respect of frequent cash deposits and withdrawals, the assessee vide written submission dated 11.12.2007 submitted as under (extracted from para-2 of assessment order) : -

“This has reference to your query as to why there are several cash deposits and withdrawals to and from the bank. In this regard I wish to clarify that I have been planning to buy an agricultural property at my native place in Gujarat. Of and on I have been getting the proposals for sale of property. The sellers of these properties being residents of rural area do not accept money by cheque in general. Hence with a view to be in a position to pay them immediately if I got a good choice of agricultural property I used to hold money in cash. During the interregnum I used to apply for public issue of shares/investment in shares and whenever a good issue/share was recommended to me I used to deposit the cash in account so as to apply for the issue and whenever the refund is there and good proposal of agriculture land I used to withdraw in line with my desire to buy agricultural property.

Without prejudice to above I may also point out that there is no fiscal, economic or banking law which prohibits holding money in cash and depositing and withdrawing the same from the bank.”

However, the Assessing Officer while observing that as per daily cash flow statement filed by the assessee the opening cash in hand is not

verifiable in the absence of any balance sheet and the assessee has failed to file capital accounts for the earlier years despite opportunity was provided to the assessee vide notice u/s.142(1) dated 30.4.2007 and there is no connection or nexus of the withdrawals and the deposits, treated the entire cash deposits of Rs.27,55,000/- in the assessee's bank account as unexplained cash deposits in the hands of the assessee and added to the income of the assessee and accordingly completed the assessment at an income of Rs.28,52,120/- vide order dated 31.12.2007 passed u/s.143(3) of the Income tax Act, 1961(the Act).

3. On appeal, before the Id. CIT(A) the assessee contended that [extracted from para-4 of the order of the Id. CIT(A)] as under :

"The appellant in appeal stated that he had filed a daily cash summary for the period 01.04.2004 to 31.03.2005 which reflects each of the cash deposits made in the bank account. The cash deposits were out of opening cash in hand and withdrawals made during the year, salary earnings, commission income and withdrawals from partnership firm. It was argued that there had never been a situation of cash having been deposited in excess of the cash in hand and therefore, the issue of unexplained cash deposit does not arise. As regards the observation of the Assessing Officer that the appellant had submitted a 'peak' working of cash deposits, it was stated that he never filed such a statement and that he had never conceded to the working of 'peak. The appellant further argued that there was no question of application of 'peak' theory because all cash deposits had been properly explained as arising out of existing balances. As regards the observation of the Assessing Officer about non filing of capital account, it was pointed out that the Assessing Officer at no point of

time required him to file such a statement. The same was the position with reference to the observation of non filing of balance sheet and evidence for appellant having cash balance at the end of the year. More importantly, the appellant stated that the Assessing Officer did not bring on record any evidence to disregard the fact that the appellant had sufficient cash balance in hand as on the day of cash deposits. The Assessing Officer has not alleged that cash withdrawals have been utilized for any other purpose not has she brought any material on record to show that appellant did not have cash in hand on the days when deposits were made. In view of all these, the appellant contended the addition be deleted."

4. The Id. CIT(A) after considering the assessee's submission and other material available on record including the assessee's bank account observed and held as under :

".....The appellant also failed to explain the source of opening balance inspite of specifically requesting for it by letter dated 25.11.2008. In view of all these, none of the explanation offered by the appellant is acceptable. Therefore, the only option left is to treat the withdrawals and deposits as unexplained. There is a case, as the Assessing Officer has done, to treat all the deposits as unexplained and assess it as unexplained income. But to be fair and just, it is better to treat the 'peak' of the deposits and withdrawals as the unexplained income. This is because there is a possibility that at least some of the withdrawals were re-deposited in the same account. Therefore, the 'peak' of the withdrawals and deposits is taken in this exercise. The opening balance is also considered as the appellant failed to explain the source despite this office specifically requiring him to do so by letter dated 25th Nov. 2008. The appellant had filed a statement of cash flow with the Assessing Officer. Accordingly to this, the peak of the cash balance is Rs.15,12,225/- as on 24.4.2004. This is taken as the unexplained cash deposit in the place of Rs.27,55,000/- assessed by the Assessing Officer. The Assessing Officer is directed to adopt the figure of Rs.15,12,225/- in the place of Rs.27,55,000/- adopted in the assessment order."

5. Being aggrieved by the order of the Id. CIT(A) the assessee is in appeal before us challenging in all the grounds the sustenance of addition of unexplained bank deposits Rs.15,12,225/-.

6. At the time of hearing the Id. Counsel for the assessee while reiterating the same submissions as submitted before the Assessing Officer and the Id. CIT(A) further submits that as per cash summary appearing at page 4-5 of the assessee's paper book 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. With regard to the opening cash balance Rs.6,85,325/- appearing in the said cash summary, the Id. Counsel for the assessee submits that it is out of bank withdrawals of the earlier year. He further submits that bank withdrawals were made for purchase of property in Gujarat, however, the deal could not be finalised therefore, the cash withdrawals from the banks were deposited in the bank account and in support the reliance was also placed on the confirmation letter from Shri Viral Thakkar appearing at page-12 of assessee's paper book. He therefore, submits that the addition made by the Assessing Officer and sustained by the Id. CIT(A) be deleted.

7. On the other hand the Id. DR supports the order of the Assessing Officer and the Id. CIT(A).

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

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	8.4.04	2,25,000	
15.4.04	1,00,000	28.4.04	1,00,000	
24.4.04	5,00,000	22.5.04	30,000	
26.6.04	1,25,000	28.5.04	1,70,000	
		1.6.04	30,000	
		9.6.04	2,70,000	
		10.6.04	30,000	
		16.6.04	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
6.9.04	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.

10. In the result, assessee's appeal is partly allowed.

Order pronounced in the open court on 31.5.2010.

Sd/-
(B. RAMAKOTIAH)
ACCOUNTANT MEMBER

Sd/-
(D.K. AGARWAL)
JUDICIAL MEMBER

Mumbai, Dated: 31.5.2010.
Jv.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT(A) Concerned, Mumbai
The DR " " Bench

True Copy

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.

	Details	Date	Initials	Designation
1	Draft dictated on	18.5.10		Sr.PS/PS
2	Draft Placed before author	19.5.10		Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on	31.5.10		Sr.PS/PS
7.	File sent to the Bench Clerk	31.5.10		Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			