THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "SMC" BENCH

Before: Shri Ramit Kochar, Accountant Member

ITA No. 1096/Ahd/2023
Assessment Year 2011-12

Pareshkumar Punamchand Shah, C/o. MS Chhajed & Co,CA, "Kamal Shanti" Nr. Sardar Patel Statue, Ahmedabad-380014. Gujarat **PAN:AZFPS0232A** (Appellant)	v.	The Income-tax Officer, Ward-2(2)(4), Aayakar Bhawan, Vejalpur, Anandnagar-Prahaladpur Road, Ahmedabad-380015, Gujarat (Respondent)

Assessee by: CA Preyashi Tated
Revenue by: Shri Hrishikesh Hemant Patki, Sr. D.R

Date of hearing : 08.07.2024 & 25-07-2024
Date of pronouncement : 16-08-2024

आदेश/ORDER

This appeal in ITA No.1096/Ahd/2023 for assessment year 2011-12 is filed by the assessee with Income Tax Appellate Tribunal, Ahmedabad Bench, Ahmedabad , which

has arisen from the appellate order dated 15-09-2023 passed by ld. CIT(A), NFAC, Delhi u/s.250 of the Income-tax Act,1961 in DIN & Order No. ITBA/NFAC/S/250/2023-24/ 1056157783(1), which in turn has arisen from the Assessment Order dated dated 14-12-2018 passed by learned Assessing Office u/s.144 r.w.s 147 of the 1961 Act.

2. At the outset , it is noticed that there is a delay in filing this appeal by the assessee belatedly by 38 days beyond the time prescribed u/s 253(3) of the 1961 Act. The assessee has filed an affidavit dated 03/06/2024 averring that the assessee was not aware of the ex-parte appellate order passed by ld. CIT(A) on the ITBA Portal. However, while checking the ITBA portal, the assessee found that the order has been passed by the Ld.CIT(A) , and thereafter he immediately filed an appeal before the Tribunal , and in this process delay of 38 days occurred in filing this appeal before ITAT beyond the time stipulated u/s 253(3) of the Income-tax Act,1961.It is averred that this is a bonafide reason for filing this appeal belatedly with ITAT , and prayers are made to condone the aforesaid delay. On the other hand, the Ld. Sr. DR for the Revenue has fairly submitted that the department has no serious objection if the aforesaid delay of 38 days in filing this appeal belatedly by the assessee is condoned. In my considered view , the assessee ought to have been vigilant once it had filed an

appeal before ld. CIT(A), and at the same time , I have also observed that ld. CIT(A) appellate order was stated to be posted on ITBA portal, but the assessee has claimed that it did not open the ITBA portal and hence the assessee was not aware of the appellate order passed by ld. CIT(A) . Thus, the assessee is contended that it is only after opening the ITBA portal , the assessee got the knowledge of appellate order passed by ld. CIT(A) , and by implication, the assessee is contending that the said order was not served by ld. CIT(A) by any other means such as email , post etc.. The reasons for the delay as averred by the assessee in the Affidavit dated 03.06.2024 filed by the assessee(placed on record in file) is in the realm of possibility and a plausible reason for delay , more especially that this is a period of switch over phase wherein the Revenue is moving towards effective utilisation of latest and advanced technologies while handling tax matters and processes at various levels and stages including filing and processing of returns of income, filing and processing of various applications under various provisions of the statute, faceless assessments , faceless adjudication of appeals, appellate proceedings , and in this switchover phase, there is every possibility that there could be initial hiccups , difficulties, glitches and adaptability to newer technology , which could arise both for the Revenue as well for the assessee, and some time may be required for the things to

stabilise and for its adaptability. Thus, keeping in view of reasonable and one of plausible and possible cause cited by the assessee duly supported by affidavit dated 03.06.2024 (placed on record in file), I condone the delay of 38 days in filing this appeal belatedly by the assessee beyond the time prescribed u/s 253(3). When technicalities are pitted against the substantial justice, the Courts will lean towards advancement of substantial justice rather than technicalities, unless the malafide on the part of the assessee is at writ large. Under the facts and circumstances, I do not find any malafide on the part of the assessee in filing this appeal belatedly with ITAT by 38 days , and in the interest of justice, I condone the delay and proceed to adjudicate the appeal on merits in accordance with law. Reference is drawn to the decision of Hon'ble Supreme Court in the case of ***Collector of Land Acquisition, Anantnag v. Mst. Katiji (1987 AIR 1353(SC))***.

3. The grounds of appeal raised by the assessee in memo of appeal filed with ITAT, reads as under:-

> *"...1. The order passed by the Ld. CIT(A) is against law, equity & justice.*
>
> *2. The re-opening of assessment is void, illegal and without jurisdiction.*
>
> *3. The Ld.CIT(A) has erred in law and facts in upholding reopening of assessment merely on the basis of deposits in bank account.*

4. The Ld.CIT(A) has erred in law and facts in upholding addition of Rs.24,83,000/- of cash deposited in bank account as unexplained cash credit u/s.68.

5. Appellant craves right to add amend and alter or modify all or any grounds of appeal before final appeal."

4.The brief facts of the case are that as per information gathered by the Income-tax Department, the assessee had deposited cash in his Bank Account held with Vijaya Bank, at Manekchawk Branch and also deposited cash in Indusind Bank , during the financial year 2010-11. It was also observed by the AO, that assessee has also entered into share transactions and earned income from commodities through Multi Commodity Exchange. The assessee has not filed the return of income for the impugned assessment year. Therefore, the source of cash deposits made by the assessee in his bank and share transactions as well transactions made in commodities during the financial year 2010-11 required to be verified. The AO invoked the provision of section 147 of the Act, and assessment was reopened and notice u/s.148 of the Act dated 20.03.2018 was issued by the AO to the assessee, after recording of the reasons for re-opening . The assessee did not file return of income in pursuance to the notice u/s.148 issued by the AO to the assessee. The AO , thereafter , issued statutory notices u/s 142(1) to the assessee during the reassessment proceedings, but there was no compliance by

the assessee. The Show-cause notice, dated 05.12.2018 was issued by the AO to the assessee , as under:

> *"2. In this Subject it is to be stated that after taking the approval of the Hon'ble Pr. CIT-Ahmedabad-2, Ahmedabad Notice u/s 148 of the I.T. Act dated 20.03.2018 was issued and served upon you. Due to change of incumbent in the office notice u/s 142(1) r.w.s. 129 of the L.T. Act dated 25/07/2018 issued and served upon you. You have neither replied nor submitted any details in response to this notice. This office has issued notice u/s 133 for calling information to MCX, BSE, Indusind Bank and Vijaya Bank on 29/08/2018. This office has received the information. In this regard this office has issued notice U/s 142(1) of the I.T. Act and served upon You. You have neither replied nor submitted any details in this regard. As per the information received, you have cash of Rs. 19,63,000/- in Vijaya Bank Manekchowk Branch, Ahmedabad in Account No.730501011000653 and Rs.5,20,000/- in Indusind Bank, Main Branch, Ahmedabad in account No. 0009-M68197-001. On verification of data received from MCX it is seen that you have made total loss of Rs.62,71,285/-.*
>
> *3. It is therefore, I have no other alternative but to finalize the assessment u/s. 144 r.w.s. 147 of the I.T. Act on the basis of the information available on record as you have not furnished any explanation/justification/confirmation/proofs etc. You have made total loss of Rs. 62,71285/- which you might have been made payment to the broker and you have not disclosed the source of payment to the broker. Therefore show cause is given to you that why the amount as discussed above should not treated as your income for Rs. 87,54,285/- from undisclosed sources and added to your total income as unexplained above for the year under consideration and also why the penalty U/s 271(1)(b) for non compliance of notices, u/s. 271(1)(c) for concealment of income should not be initiated and levied in your case.*
>
> *4. You are therefore requested to furnish your explanation/ clarification along with the evidences in this regard as well as point wise reply of notices u/s. 142(1) on or before 13/12/2018 positively, failing which it will be presumed that you have no explanation to offer and accordingly your assessment will be finalized u/s. 144 r.w.s. of the I.T. Act, 1961 on the basis of materials available on the record of this office."*

4.2 The assessee did not furnish any explanation in response to the aforesaid Show-cause notice as well to notices issued by the AO u/s 148 and 142(1) to the assessee, and the AO proceeded to frame ex-parte assessment u/s 144 of the 1961 Act, by making additions to the tune of Rs.29,93,000/- to the income of the assessee towards undisclosed cash deposits.

4. Aggrieved, the assessee filed first appeal before the Ld.CIT(A), who adjudicated the appeal of the assessee , by holding as under:

> *"4.4* ***Decision***
> *4.4.1 It is an admitted fact that during the relevant previous year the appellant has made total cash deposit of Rs. 19,63,000/- in Vijaya Bank, ManekChowk Branch, Ahmedabad, account no. 730501011000653 and Rs.5,20,000/- in Indusind Bank, Main Branch, Ahmedabad, account no.0009-M68197-001. Therefore the onus of proving the source of cash with support of authentic documentary evidences lies on the appellant. Even for the sake of arguments it is presumed though not accepted that there was sufficient cause for failure on the part of the appellant to comply with the hearing notices issued by the A.O. the appellant did not avail the opportunity of being heard offered during the course of appellate proceedings by issue of notice u/s. 250 of the I. T. Act. It clearly indicate that there was no sufficient cause for failure on the part of the appellant for non-compliance either during the course of assessment proceedings or even at the appellate stage. It is noted from the assessment order as also from this office records that the appellant failed to discharge the onus cast upon him of proving the source of cash deposits. In the absence of explanation proving the source of said cash deposits, I concur with the view of the A.O. that this amount of Rs.24,83,000/- is required to be brought to tax as undisclosed income of the appellant. In support reliance is placed on the following ruling of the Hon'ble Supreme Court and High Courts.*

4.4.2 CIT Salem Vs K Chinnathamban reported in [2007] 162 TAXMAN 459 (SC) The Supreme Court in this case of held that "the onus of proving the source of deposit primarily rests on the person in whose name the deposit appears in various banks.

4.4.3 Considering the above judgment by the Apex Court it is crystal clear that the onus to explain the cash deposits is on the appellant in whose account the money was deposited. In this case the AO could not get satisfactory explanation of the source of the cash deposits from the appellant. Even during the appellate proceedings the appellant has failed to file any explanation or provide documentary evidences for the cash deposits. The action of the A.O. in making addition of Rs.24,83,000/- is therefore found to be justified and hence the same is upheld. In the assessment order the A.O. has made addition of Rs.29,93,000/- However the total cash deposit in the said two bank accounts is of Rs.24,83,000/- Therefore the differential amount of Rs.5,10,000/- is directed to be deleted. This ground of appeal raised by the appellant is partly allowed.

5.1 The second ground of appeal raised by the appellant read as under:

> *" The Ld. AO has grievously erred in law and or on facts in not allowing sufficient opportunity before making ex-parte assessment us. 144. The Ld. AO has failed to appreciate that there was sufficient cause for failure to comply with the alleged notices of hearing issued by AO. Thus, the ex-parte assessment was made in gross violation of the Principles of natural justice.."*

5.2 ***Decision***

5.2.1 In view of the detailed discussion made in the above ground of appeal this ground of appeal is dismissed.

6.1 The third ground of appeal raised by the appellant read as under:

> *" The Ld. AO has grievously erred in law and or on facts in holding the cash deposits aggregating to Rs. 29,93,000/- in bank accounts as unexplained and thereby making addition of Rs. 29,93,000/-.."*

6.2 ***Decision***

6.2.1. In view of the detailed discussion made in the above ground of appeal this ground of appeal is dismissed.

7.1 The fourth ground of appeal raised by the appellant reads as under:

> *" That in the facts and circumstances of the case as well in law , the Ld. AO has grievously erred in holding the cash deposits aggregating to Rs.29,93,000/- in bank accounts as unexplained and thereby making addition of Rs.29,93,000/-."*

7.2 ***Decision***
7.2.1. In view of the detailed discussion made in the above ground of appeal this ground of appeal is dismissed.

8.1. The fifth ground of appeal raised by the appellant read as under:

> *" The notice issued us. 148 on 20.03.2018 and the proceedings u/s. 147 were illegal and unlawful because the conditions precedent was not satisfied . The AO has also failed to provide copy of reasons recorded . It is therefore prayed that the addition of Rs. 29,93,000/- made by the AO should be deleted."*

8.2 ***Decision***
8.2.1 In view of the detailed discussion made in the above ground of appeal this ground of appeal is dismissed.

9. In the result, the appeal filed by the appellant is **dismissed.**"

6. Aggrieved , the assessee filed second appeal before the Tribunal and , inter-alia, raised legal ground challenging the re-opening of the concluded assessment as well grounds challenging the additions made on merits. It is submitted by the ld. Counsel for the assessee that the reason recorded for reopening of the concluded assessment u/s 147 were not provided to the assessee , and an ex-parte order was passed by the AO. It is submitted that now reasons recorded for reopening of the concluded assessment were obtained under

RTI Act. It was submitted by the ld. Counsel for the assessee that no return of income was filed by the assessee u/s 139 as well no return of income was filed in pursuant to notice u/s 148. Our attention was drawn to the written synopsis filed by the assessee. It was submitted by ld. Counsel for the assessee that the reopening was done for verification of cash deposits which is not permissible. The Reliance is placed on judgment of Hon'ble Gujarat High Court in the case of PCIT v. Manzil Dineshkumar Shah reported in [2018] 95 taxmann.com 46 (Gujarat) . The ld. Counsel for the assessee relied upon the decision of ITAT, Ahmedabad Bench in ITA no. 2380/Ahd/2016 in the case of Rameshbhai N.Patel v. ITO.It was submitted that the entire cash deposits in the bank account cannot be held to be income of the assessee. Without prejudice, the ld. Counsel for the assessee submitted as additional evidence filed for the first time before ITAT , working of peak cash credit , and it was submitted, without prejudice, that only peak cash credit can be added which amount to Rs. 11,74,730/-,as there were both cash deposits as well cash withdrawals from the bank account during the year under consideration .

6.2 The Ld.Sr. DR on the other hand submitted that the assessee has not filed return of income u/s.139 as well in pursuance to notice issued by the AO u/s 148 of the Act. It

was submitted that the assessee did not appeared before the AO as well before ld. CIT(A). The Ld. Sr. DR relied on the decision of the ITAT, Delhi Benches, in ITA No. 1265 and 1266/Del/2019, dated 04.03.2021 in the case of Shri Parveen Garg v. The ITO, New Delhi, and also decision of ITAT, Chandigarh Benches in ITA No. 921/CHD/2019, dated 26.04.2022 in the case of Shri Balwinder Singh v. The ITO, Jargaon, and further relied on the appellate order of the Ld.CIT(A).

7.I have considered the contention of both the parties and perused the materials available on record. I have observed that the assessee has not filed its return of income originally u/s.139 of the Act . There was cash deposits made by the assessee to the tune of Rs.24,73,000/- in Vijaya Bank, Maneckchowk Branch, Ahmedabad and Rs.5,20,000 in Indusind Bank,Main Branch, Ahmedabad. Therefore, as per the AO source of the cash deposit of Rs. 29,93,000/- during financial year 2010-11 remained unexplained and sources of cash deposit in above bank accounts required to be verified. Further, the AO observed that the assessee has also made share transactions of Rs. 4,29,216/- and as well entered transactions of Rs. 3,02,75,77,050/- in commodities through Multi Commodity Exchange. The assessee did not filed any return of income originally u/s 139 for the impugned

assessment year. Therefore, the profit and gain from above transactions and sources of payments made by the assessee for the purchase of shares and commodities needs to be verified. Therefore, the AO has reasons to believe that the income chargeable to tax has escaped assessment . The reasons were recorded by the AO on 21.02.2018 after taking approval of ld. PCIT. The AO reopened the assessment u/s 147 by issuance of notice u/s 148 dated 20.03.2018. The assessee was asked to file return of income in pursuance to aforesaid notice u/s 148. The assessee did not file return of income in pursuance to notice issued by the AO u/s 148. The AO issued notices u/s 142(1) and SCN to the assessee during the course of reassessment proceedings. The assessee did not participated in re-assessment proceedings, which led to the additions being made by the AO to the income of the assessee to the tune of Rs. 29,93,000/- in the hands of the assessee towards undisclosed cash deposits, vide reassessment order dated 14.12.2018 u/s 144 read with section 147 of the 1961 Act. The loss of Rs. 62,71,285/- incurred by the assessee in commodities transactions through MCX was ignored. The assessee filed first appeal before the Ld.CIT(A), who partly allowed the appeal of the assessee by confirming the order of the AO to the tune of Rs.24,83,000/- being unexplained cash deposits in bank account, while ld. CIT(A) gave relief to the assessee to the tune of Rs. 5,10,000/- . It is pertinent to

mention that the assessee did not comply with the notices issued by ld. CIT(A). Further, even as of date , no return of income for the impugned assessment year is filed by the assessee.The assessee has now filed second appeal before ITAT. Before the tribunal, no cogent reasons were submitted by the assessee for its non compliances before the AO as well ld. CIT(A). There were cash deposits in the bank account of the assessee to the tune of Rs. 24,83,000/- , and the onus was on the assessee to explain the sources of cash deposits. The assessee did not file any return of income originally u/s 139 and also did not file any return of income in pursuance to notice u/s 148. There were also share transactions to the tune of Rs. 4,29,916/- undertaken by the assessee as well commodities transactions to the tune of Rs. 302,75,77,050/- entered into by the assessee through MCX. The assessee did not file return of income u/s 139 , while it was incumbent on the part of the assessee to have filed return of income as is required u/s 139, keeping in view the factum of transactions carried on by the assessee. The AO has rightly invoked provisions of Section 147/148 of the 1961 Act, as the AO rightly has reasons to believe that income has escaped assessment keeping in view cash deposits in the bank accounts as well transactions entered into by the assessee in shares/commodities. The assessee did not file any return of income in pursuance to notice issued u/s 148. The assessee

did not participated in the assessment proceedings as well appellate proceedings conducted by ld. CIT(A). In my considered view, the AO has rightly invoked provisions of Section 147 as AO rightly has reasons to believe that income of the assessee has escaped assessment. At the stage of reopening of assessment, conclusive proof of income escaping assessment is not required rather a prima-facie formation of a belief of the AO is required based on tangible material having live link/nexus with the formation of belief that the income of the assessee has escaped assessment. The said reasons to believe that income have escaped assessment should have a live link or nexus with the information/material before the AO which led to the formation of belief that income has escaped assessment . In the instant case, the assessee did not file return of income u/s 139. Secondly,The assessee had deposited cash of Rs. 29,93,000/- (sic. Rs. 24,83,000/-) in his bank accounts with Vijaya Bank and Indusind Bank. Thirdly, the assessee has entered into share transactions of Rs. 4,29,216/- and transactions in commodities through MCX to the tune of Rs. 3,02,75,77,050/- . Despite entering into massive financial transactions, the assessee had not filed any return of income was filed u/s 139, and in my considered view keeping in view factual matrix as is emerging from the records, the AO was having sufficient and tangible incriminating information that the income of the assessee has

escaped assessment and in my considered view, the AO has rightly invoked provisions of Section 147/148 of the 1961 Act. Existence of reasons to belief by way of tangible material and its live link/nexus with formation of belief by the AO that income of the assessee has escaped assessment is relevant, and not the sufficiency of material because at the stage of reopening prima-facie belief of the AO based on material on record that income has escaped assessment.Reference is drawn to judgment and order of Hon'ble Supreme Court in the case of *ACIT v. Rajesh Jhaveri Stock Brokers Private Limited , (2007) 291 ITR 500(SC).* Thus, I uphold reopening of the assessment by the AO by invoking provisions of Section 147. The cash stood deposited in the bank accounts of the assessee. The assessee did not denied that the bank account did not belong to the assessee nor any denial is there that cash was not deposited by the assessee. The onus is on the assessee to explain the source of cash deposit in the bank account. The assessee also did not filed return of income in pursuance to notice u/s 148.The assessee never asked for reasons recorded by the AO u/s 147 for reopening of the assessment. The assessee did not participated in reassessment proceedings before the AO, nor appellate proceedings before the ld. CIT(A). The assessee has now obtained reasons recorded u/s 147 by the AO for reopening of the assessment, through RTI application. The assessee has not

brought on record any evidences for explaining sources of cash deposits in the bank accounts held by it with Vijaya Bank and Indusind Bank. So far as merits of the additions are concerned, the ld. Counsel for the assessee has now taken a plea before ITAT for the first time, which plea is taken without prejudice, that only peak credit can be added with respect to cash deposits and entire cash deposits cannot be added, and in context thereof the assessee has filed additional evidences before the Tribunal by way of working of peak cash credits to the tune of Rs. 1174,730/- as well bank statements of both the bank accounts viz. Vijaya Bank and Indusind Bank for the relevant period are filed , and contentions are made that the entire cash deposits in the bank cannot be added and it is the peak amount which could be added, as there were cash deposits as well cash withdrawals from the Bank. The additional evidences filed requires verification by authorities below. The mandate of the 1961 Act is to bring to tax correct income in the hands of the correct assessee for the correct assessment year, keeping in view provisions of the 1961 Act. Thus, Revenue has right to collect correct taxes.Under the facts and circumstances, I admit the additional evidence filed by the assessee by way of working of peak credit , although filed without prejudice, which requires verification by authorities below. Whatever may be the reasons , it is a fact on record, that both the assessment as well appellate proceedings

were adjudicated ex-parte in the absence of the assessee. Thus, in the interest of justice, I restore the matter back to the file of ld. CIT(A) to re-adjudicate the issue of additions made by the AO on merits in accordance with law, after giving proper opportunity of being heard to the assessee as well AO. The assessee is directed to comply with the notices issued by ld. CIT(A), otherwise the ld. CIT(A) shall be free to pass the appellate orders ex-parte. I clarify that I have not commented on the merits of the issue in this appeal. The appeal of the assessee is partly allowed for statistical purposes. I order accordingly.

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

Order pronounced on 16th August, 2024 at Ahmedabad in accordance with Rule 34(4) of the Income-Tax(Appellate Tribunal) Rules, 1963.

Sd/-

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Ahmedabad : Dated:16/08/2024

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद