

**IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT  
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM**

**आयकरअपीलसं./ITA Nos.136 & 137/SRT/2020**

**(निर्धारणवर्ष / Assessment Year: (2011-12))**

**(Physical Court Hearing)**

Sanjit Jitendranath Biswas, 49-76, Behind Bhagyodaya Hotel, Balda-Pardi, Vapi-396195.	<b>Vs.</b>	The ITO, Ward-3, Vapi
<b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AFRPB3882K</b>		
<b>(Assessee)/(Revenue)</b>		<b>(Respondent)/(Assessee)</b>

The ITO, Ward-3, Vapi	<b>Vs.</b>	Sanjit Jitendranath Biswas, 49-76, Behind Bhagyodaya Hotel, Balda-Pardi, Vapi-396195.
<b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AFRPB3882K</b>		
<b>(Assessee)/(Revenue)</b>		<b>(Respondent)/(Assessee)</b>

<b>Assessee by</b>	Shri Rajesh Upadhyay, AR
<b>Respondent by</b>	Shri J. K. Chandnani, Sr. DR
<b>Date of Hearing</b>	13/05/2022
<b>Date of Pronouncement</b>	20/06/2022

**आदेश/ORDER**

**PER DR. A. L. SAINI, AM:**

Captioned cross appeals filed by the Assessee and Revenue pertaining to Assessment Year (AY) 2011-12, are directed against the order passed by the Learned Commissioner of Income Tax (Appeals), Valsad [in short “the Id. CIT(A)”] dated 28.02.2020, which in turn arises out of an assessment order passed by the Assessing Officer u/s.143(3) of the Income Tax Act, 1961 [hereinafter referred to as the “Act”], dated 24.06.2014.

2. Since the issue involved in these cross appeals are common and identical therefore these appeals have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

3. Now, we shall take assessee's appeal in ITA No.136/SRT/2020 for AY.2011-12, wherein the grounds of appeal raised by the assessee are as follows:

*"1. Ld. CIT(A), Valsad has erred in law and on facts to take G.P. of Rs.12.89 percent on contract receipts of Rs.64,23,832/- and thereby directed to take income @ Rs.8,28,032/- as against A.O's addition of Rs.16,79,548 being 8% N.P. on turnover of Rs.3,08,25,664/-.*

*2. Ld. CIT(A), Valsad has erred in law and on facts to direct the assessing officer to take income @ Rs.2,35,501/- on peak basis with respect to cash deposits in SBI account by withdrawing cash from 2 bank accounts i.e. ICICI Bank and Axis Bank ignoring the fact that bank account with SBI is specifically opened for transfer of payment to the workers and thereby it is a business bank account. CIT(A), ought to have even telescopic adjustment of peak credits against his G.P/N.P addition. Alternatively, no peak to be added as there is substantial cash withdrawal from 2 bank accounts.*

*3. Ld. CIT(A), Valsad has erred in law and on facts to uphold A.O's addition u/s 68 of the Act for Rs.2,00,000/- in respect of 12 parties ignoring the fact that small borrowings are from friends and family member ought to be accepted."*

4. Now, we shall take ground Nos.1 and 2 raised by the assessee. The issue involved in ground Nos. 1 and 2 raised by the assessee is that assessing officer made addition of receipts of Rs.64,23,832/- pertaining to contract receipts not shown in the total turnover and cash deposits of Rs.84,75,415/- into SBI Bank account and the total contract receipts shown by the assessee at Rs.1,59,26,417/- making the total contract receipts at Rs.3,08,25,664/- (Rs.64,23,832 + Rs.84,75,415 + Rs.1,59,26,417) and estimation of profit @8% i.e. Rs.24,66,053/- (8% of Rs.3,08,25,664) so as to make net addition of suppressed profit of Rs.16,79,548/- (Rs.24,66,053- Rs.7,86,505 profit already declared by the assessee).

5. The relevant material facts, as culled out from the material on record, are as follows. The assessee before us is an individual and filed his return of income for the assessment year under consideration on 29.09.2011, declaring total income at Rs.7,33,530/-. Later on, the assessee's case was selected for scrutiny under CASS and accordingly a notice under section 143(2) dated 03.08.2012, was issued and served on the assessee. In the assessment order, the assessing officer noted that contract receipts as per form 26AS was indicated to be Rs.2,23,50,249/- whereas the audited books of account indicated total contract receipts of Rs.1,59,26,417/- only.

Thus, prima facie, it was observed by the assessing officer that there was suppression of contract receipt to the tune of Rs.64,23,832/-. It was also noted by the assessing officer that assessee had deposited cash of Rs.92,20,415/- in the saving bank account held with SBI Pardi Branch. In response to query by the assessing officer during assessment proceedings, the assessee had stated that he cash deposited cash of Rs.92,20,415/- in the saving bank account held with SBI Pardi Branch. In response to query by the assessing officer during assessment proceedings, the assessee had stated that cash deposits were from contract receipts and transfer from one bank to another bank. This contention was not accepted by the assessing officer on the ground that the SBI bank account was nowhere reflected in the print- out of cash book filed by the assessee. The assessing officer also noted that the assessee has shown in the cash books, cash receipts from the parties for whom job work was carried out. However, these parties did not confirm about any payment of cash to the assessee. The instances noted by the assessing officer from the cash book was Rs.1,40,000/- on 16.04.2010 from Shri D.R. Patel and Rs.1,80,000/- on 22.04.2010 noted in the cash book but these parties denied any cash payment to the assessee. Similarly, cash payment in the name of M/s. S.A. Builders amounting to Rs.1,50,000/- was reflected in the cash payment made to the assessee. Based on these findings, the assessing officer concluded that the assessee's claim of cash deposit in the SBI account out of other bank withdrawal and contract receipts were not acceptable and therefore assessing officer rejected the same. The assessing officer also observed that transaction in the SBI bank statement indicated withdrawals by ATM mostly at Jalpaiguri. The assessing officer also noted that cheque was issued to Shankar Biswas and Naushad from these accounts. All these facts led the assessing officer to conclude that the deposits in the SBI account was unaccounted contract receipts of the assessee. Thus, the receipts of Rs.64,23,832/- and Rs.84,75,415/- were added to the total contract receipts shown in the return of income at Rs.1,59,26,417/-. On the adjusted total contract receipts of Rs.3,08,25,664/- (Rs.15,92,6417 + Rs.64,23,832 + Rs.3,08,25,664), the profit @8% i.e. Rs.24,66,053/- was calculated and after reducing the profits shown at Rs.7,86,505/- in the return of income by assessee, the net addition of Rs.16,79,548/-

was made by assessing officer, by considering all the above facts and taking a lenient view. The total receipts of the assessee was worked out by assessing officer at Rs.3,08,25,664/- as under:

<i>Receipts shown in the return</i>	<i>Rs.1,59,26,417/-</i>
<i>Add: (1) Receipts not recorded as above</i>	<i>Rs. 64,23,832/-</i>
<i>As admitted by the assessee</i>	
<i>(2)Receipts recorded in the bank account with</i>	
<i>SBI, Pardi which is not disclosed in the return</i>	<i><u>Rs.84,75,415/-</u></i>
<b><i>Total turnover</i></b>	<b><i><u>Rs.3,08,25,664/-</u></i></b>
<i>Profit at the rate of 8% thereof</i>	<i>Rs.24,66,053/-</i>
<i>Less: Profit shown by the assessee</i>	<i><u>Rs.7,86,505/-</u></i>
<i>Addition on account of suppressed receipts</i>	<i>Rs.16,79,548/-</i>

6. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A) who has computed the estimated addition based on gross profit ratio 12.89% (as compared to estimated net profit ratio at the rate of 8% computed by the assessing officer), on contract receipts of Rs.64,23,832/-, which comes to Rs.8,28,032/-. As regards cash deposit in SBI bank account at Rs.84,75,415/-, the Id CIT(A) made addition based on peak credit at Rs.2,35,501/-. Whereas, Id CIT(A) did not comment on the other contract receipts shown by the assessee in books of accounts to the tune of Rs.1,59,26,417/-, on which assessee has shown profit at Rs.7,86,505/- at the net profit rate of 4.93%.

7. Aggrieved, by the addition sustained by Id CIT(A), the assessee is in further appeal before us.

8. Shri Rajesh Upadhyay, Learned Counsel for the assessee, pleads that assessing officer has not rejected books of accounts of the assessee and assessment was framed under section 143(3) of the Act, therefore, net profit declared by the assessee at the rate of 4.94% should be used to make estimated addition. Without prejudice, Id Counsel submitted that past three years average of net profits of the assessee may be used for making estimated addition, which comes at 4.79%.

9. On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

10. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the Id. CIT(A) and other material brought on record. We note that Assessing Officer as well as Id. CIT(A) failed to consider the past history of net profit ratio shown by the assessee, which is very much relevant to make estimated addition. It is well settled that in estimation there is always a certain degree of guesswork. No doubt the authorities concerned should try to make an honest and fair estimate of the income and should not act totally arbitrarily. Department must act judiciously, while making estimated addition and must be guided by judicial consideration and by rule of justice, equity and good conscience. And also that there must be honest and fair estimate of the proper figure of assessment, for which consideration of local knowledge and repute, besides the previous returns an assessment of the assessee concerned, and all other matters must be taken into account for fair and proper estimate which of course, would fall in the category of guesswork, but a honest guesswork.

11. Based on the factual position narrated above, we are of the view that estimation made by assessing officer is not based on sound reasoning in comparison with the past results shown by the assessee. We note that in AY.2009-10, the assessee's audit results shows net profit at the rate of 5.12% and for A.Y.2010-11, net profit ratio is 4.32% and for AY.2011-12 the net profit ratio is 4.99%. Therefore, if we consider the average of these three years, the average net profit comes at 4.79%. Thus, based on past three years average net profit, the addition, on turnover ought to have been made by the assessing officer at the rate of 4.79%.

12. Besides, the contract receipts of Rs.64,23,832/-, is part of turnover of the assessee, however, Id CIT(A) applied gross profit ratio on these receipts which is not acceptable. The cash deposit in SBI bank account at Rs.84,75,415/- is also part

of assessee's turnover. Therefore, total turnover of the assessee comes at Rs. Rs.3,08,25,664/-( Rs.64,23,832 + Rs.84,75,415 + Rs.1,59,26,417) on which estimation should be made at the rate of average net profit @ 4.79%. Taking into account all these facts, we are not inclined to accept the contention of the Assessing Officer in any manner to make estimated addition @ 8%, hence, the assessee's income should be estimated @ 5% of turnover of Rs. 3,08,25,664/-, which comes to Rs.15,41,283/-. As the assessee has declared net profit on turnover at Rs. 7,86,505/- therefore, we direct the assessing officer to make addition of Rs.7,54,778/- ( Rs.15,41,283- Rs. 7,86,505). Thus, ground Nos. 1 and 2 are partly allowed.

13. Coming to ground No.3 raised by the assessee, we note that assessing officer made addition of Rs.2,00,000/- in respect of 12 parties from whom the assessee borrowed small amount for business purposes. Amount borrowed from each party is between Rs.13000 to Rs. 19000/-, which is received by the assessee from friend circle to meet immediate business requirements. The Id Counsel submits that assessee paid these amounts in subsequent years, therefore the addition may be deleted. However, Id DR relied on the findings of the assessing officer. We note that assessing officer failed to bring any evidence on record to show that said amount borrowed from friends and relatives are bogus and for non-business purposes. The assessee is a small businessman and in needy hours, he borrowed money from his friends and relatives, and in subsequent years he has paid to them. We note that there are no findings of the assessing officer that it is assessee's money which came back to the assessee in the form of cash credit. Hence, a small amount borrowed by assessee to meet the urgent business requirements should not be added in the hands of the assessee, therefore, based on this factual position the addition of Rs.2,00,000/- is hereby deleted.

14.In the result, ground No.3 raised by the assessee is allowed.

15. Now, we shall take Revenue's appeal in ITA No. 137/SRT/2020 for assessment year 2010-11. Grounds of appeal raised by the Revenue are as follows:

*“1. On the facts and circumstances of the case and in Law, the Ld. CIT(A) has erred in quashing the reopening of assessment initiated u/s 147 of the Income -Tax Act,1961 by ignoring and not properly appreciating the facts of the case.*

*2. It, therefore, prayed that the order of the Ld. CIT(A) be restored.*

*3. The assessee craves to add, modify or alter any grounds during the course of appeal proceedings.”*

16. In this appeal the Revenue's main grievance is that learned CIT(A) has erred in quashing the reopening of assessment initiated u/s 147 of the Income -Tax Act,1961 by ignoring and not properly appreciating the facts of the case. The facts have already been stated by us in para no. 5 of this order, therefore, we do not repeat the assessee's facts again for the sake of brevity. The Ld Counsel for the assessee has contended that the reopening of assessment was arbitrary and based on mere change of opinion as the issues of reopening were duly covered in the original assessment order u/s 143(3) of the Act. The ld Counsel has explained that from para-12 of the original assessment order u/s 143(3) dated 24.01.2014, it is clear that receipts of Rs.64,23,832/- and Rs.84,75,415/- were duly considered while calculating total turnover and estimating profit @ 8% for addition of suppressed income at Rs.16,79,548/-. From the copy of reason recorded dated 10.07.2015, the ld Counsel has stated that assessment was reopened on the basis of the same receipts of Rs.64,23,832/- and Rs.84,75,415/-. Thus, ld Counsel demonstrated that both the figures of Rs.6423,832/- and Rs.84,75,415/- were taken in the total turnover in original scrutiny assessment and reopening of assessment again on the basis of same issues amounted to change of opinion not permissible under the provisions of Act. The Counsel has referred to decision of Hon'ble Supreme Court in the case of CIT vs. Kelvinator India Ltd. 320 ITR 521 wherein the Hon'ble court held that reopening of assessments on the same set of facts and evidences available in the original proceedings are not valid in law.

17. On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

18. We have heard both the parties. We have gone through the original assessment order u/s 143(3) dated 24.01.2014 and reasons recorded by the assessing officer dated 10.07.2015. We note that receipts of Rs.64,23,832/- and Rs.84,75,415/- were duly covered in the total turnover computed in the said original assessment order dated 24.01.2014 to compute suppressed income. We observed that in the reasons for reopening, it was stated that rather than profit @ 8%, the whole receipts of Rs.64,32,832/- and Rs.84,75,415/- were to be added under section 68 of the Act. Therefore, it is abundantly clear that in the original assessment order, the assessing officer had discussed and adjudicated these two receipts. The assessing officer adjudicated the issue stating that all these contract receipts should be included in the total turnover of the assessee and then after he computed the estimated income at the rate of 8% of the total turnover. This way, the assessing officer had already considered these two receipts in the original assessment proceedings. Hence, there is no new tangible material to reopen the assessment. Therefore, the current facts of reopening of assessment clearly amounted to change of opinion applying the decision of Hon'ble Supreme court in the case of Kelvinator India Ltd (supra), therefore, the reopening is not sustainable. We note that in the case of CIT vs. Kelvinator of India Ltd. 256 ITR 1, the Full Bench of the Delhi High Court was considering a case of reopening u/s 147 within 4 years from the end of the assessment year. The Court held that when a regular order of assessment is passed in terms of section 143 (3) of the Act, a presumption can be raised that such an order has been passed on application of mind. It was held that if it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving premium to an authority exercising quasi-judicial function to take benefit of its own wrong. It was held that section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceedings upon a mere change of opinion. On appeal by the department to the Supreme Court,(reported in 320 ITR 561(SC)) it was held that though the power to reopen under the amended section 147 is much wider, one needs to give a schematic interpretation to the words "reason to believe" failing



which section 147 would give arbitrary powers to the AO to re-open assessments on the basis of “mere change of opinion”, which cannot be per se reason to re-open. One must also keep in mind the conceptual difference between power to review and power to re-assess. The AO has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of “change of opinion” is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of “change of opinion” as an in-built test to check abuse of power by the AO. Hence, after 1.4.1989, the AO has power to re-open, provided there is “tangible material” to come to the conclusion that there is escapement of income from assessment. Considering, these facts and circumstances, we note that the re-assessment u/s 144 r.w.s. 147 dated 21.03.2016 was rightly quashed by the Id CIT(A). That being so, we decline to interfere with the order of Id. CIT(A) in deleting the aforesaid additions. His order on this addition is, therefore, upheld and the grounds of appeal of the Revenue are dismissed.

19. In the result, appeal filed by the Revenue is dismissed.

Registry is directed to place one copy of this order in all appeals folder / case file(s).

Order is pronounced in the open court on 20/06/2022 by placing the result on the Notice Board as per Rule 34(5) of the Income Tax (Appellate Tribunal) Rule 1963.

**Sd/-**  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

Surat

दिनांक/ Date: 20/06/2022

*SAMANTA*

**Copy of the Order forwarded to**

1. The Assessee
2. The Respondent
3. The CIT(A)

**Sd/-**  
**(Dr. A.L. SAINI)**  
**ACCOUNTANT MEMBER**

4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

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Assistant Registrar/Sr. PS/PS  
ITAT, Surat