

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“SMC - C” BENCH : BANGALORE**

**BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT**

ITA Nos.216 to 221/Bang/2022
Assessment Year : 2012-13 to 2017-18

Mr. Gregory Francis D’Silva, 13-12-130/24 and 25, 1 <sup>st</sup> Floor, Inland Ornate Navabharath Circle, Kodialbail, Mangaluru – 575 003. <b>PAN : AFTPD 9610 D</b>	Vs.	DCIT, Central Circle – 1, Albuquerque House, Opp. Forum Mall, Pandeshwar, Mangaluru – 575 001.
ASSEESSEE		RESPONDENT

Assessee by	:	Smt. Sheetal, Advocate
Revenue by	:	Shri. Ganesh R. Gale, Standing Counsel for Department.

Date of hearing	:	24.11.2022
Date of Pronouncement	:	28.11.2022

**ORDER**

These are group of appeals by the assessee against 6 different orders all dated 28.01.2022 of CIT(A) – 2, Panaji, relating to Assessment Years 2012-13 to 2017-18.

2. The common issue that needs adjudication in this group of appeals is as to whether the Revenue authorities were justified in adding cash deposited by the assessee in the bank account in each of the Assessment Years 2012-13 to 2017-18 has to taxed under section 69A of the Income Tax Act, 1961 (hereinafter called ‘the Act’), as assessee’s unexplained money OR only 8% of the cash deposits has to be brought to tax under

section 44Ad of the Act as treating the same as assessee's turnover in the business of construction contracts.

3. The assessee is an individual and is a partner in partnership firm M/s. Ace Developers, which is engaged in construction and sale of apartments. There was a search and seizure operation conducted under section 132 of the Act in the case of Nidhi Ace Infrastructure on 24.06.2016. As part of the said search operation, the residence of Mr. Gregory D'Silva at Mangalore was also searched. Books of Accounts and documents were seized in the course of search at the assessee's premises, which have been described by the AO in the order of Assessment as follows:

*“Seized documents contained in A/GD/1 comprising of 58 pages as per inventory in Annexure A/GD/1 to Panchanama dated 25.06.2016. A/GD/01 contains details of various transactions between Gregory D'Silva, Premi D'Silva and Melwyn Claudy Mascarenhas.”*

4. The assessee was not subjected to a Search u/s.132 of the Act and hence proceedings u/s.153A of the Act was not initiated against the assessee. Since the search was in the case of Nidhi Ace Infrastructure and the documents found in the course of such a search had bearing on determining the total income of the assessee, proceeding under section 153C of the Act were initiated against the assessee and notice under section 153C dated 09.08.2018 was issued to the assessee for the Assessment Years 2012-13 to 2017-18. In the course of assessment proceedings under section 153C of the Act, it transpired that the assessee had deposited cash in his bank account in the various Assessment Years as per the following details:

Assessment year	Description:	Additions made
2012-2013	cash deposited in banks	6,39,000
2013-2014	cash deposited in banks	6,74,800

2014-2015	cash deposited in banks	30,032
2015-2016	cash deposited in banks	90,000
2016-2017	cash deposited in banks cash credits	9,35,381 2,50,900
2017-2018	cash deposited in banks	3,01,400

5. The assessee explained before the AO that the cash deposits for the various Assessment Years set out above were made out of contract receipts which were not included in the return of income. Since the cash represents income from the business of civil contracts, it is only the presumptive tax rate of 8% specified under section 44AD of the Act on the above cash deposits that can be brought to tax. The plea of the assessee was rejected by the AO for the reason that the assessee failed to establish with supporting evidence that the cash deposits were receipts from civil contract works undertaken by the assessee. The AO therefore brought to tax the cash deposits as unexplained money under section 69A of the Act and brought the same to tax under the head “Income from Other Sources”.

6. On appeal by the assessee, the CIT(A) confirmed the order of the AO. The CIT(A) held that section 44AD is a special provision and it carves out an exception in respect of certain businesses where the turnover is not more than Rs.2 crores and is an indication that this provision is meant for small businesses. To avail the benefit of such provision, the assessee has to necessarily satisfy the Assessing Officer that they come within the frame work of section 44AD. The CIT(A) held that the assessee failed to prove that cash deposits are arising from an eligible business and therefore he is entitled to claim the benefit of presumptive rate of tax.

The CIT(A) referred to several judicial pronouncements in support of his conclusion as above. These decisions are not directly on the point and in my view have been rendered in the context that if the assessee does not offer satisfactory explanation about the source of the cash deposited in the bank account, then the same may be added to the total income of the assessee. In the present case however, the question is that if the unexplained cash deposits/cash credit is generated from business then should the entire cash deposit be subjected to tax or only the profit element of unrecorded turnover should be brought to tax. Off-course the onus is on the Assessee to show that the cash deposits arose from undisclosed turnover in contract business. The cases cited by the CIT(A) in this regard are:

- (i) **Shoreline Hotel (P.) Ltd. v. Commissioner of Income-tax; Central-[2018] 98 [taxmann.com](#) 234 (Bombay)**, wherein the Hon'ble HIGH COURT OF BOMBAY held that entire non genuine transactions needed to be brought to tax and that the action of the AO limiting addition under section 69C on basis of GP ratio (15%) was unjustified. In this case the transaction itself was non-genuine transaction.
- (ii) *In the case of **CIT v. Maduri Rajaiahgari Kistaia 120 ITR 294 (AP)**, it was held that unless unexplained credits are referable to business, they cannot be considered as part of business income for the purpose of estimation of profits of business.*
- (iii) ***CIT v. Devi Prasad Vishwanath Prasad [1969] 72 ITR 194** where there is an unexplained credit, it is open to the AO to hold that it is income of the assessee, and no further burden lies on the AO to show that the income is from any particular source. It is for the assessee to prove that, even if the sundry creditors represent income, it is income from a source which has already been taxed.*
- (iv) ***NavinShantilal Mehta v. Income-tax Officer, Ward-32 (2) (4), [Mumbai 2018] 90 [taxmann.com](#) 16 (Mumbai - Trib.)**,*

- the ITAT MUMBAI BENCH, held that where assessee had made unexplained cash deposits in his bank account and the same was added to the income of assessee, then the law is well settled that onus of proving source of a sum found to be received/transacted by assessee is on him and where it is not satisfactorily explained, it is open to revenue to hold that it is income of assessee and therefore the additions were justified.*
- (v) **SomabhaiAmbaalal Prajapati v. Assistant Commissioner of Income-tax, Central Circle-2(2), Ahmedabad [2017] 88 [taxmann.com](http://taxmann.com) 369 (Ahmedabad - Trib.)/[2016] 50 ITR(T) 74 (Ahmedabad - Trib.) [2017] 88 [taxmann.com](http://taxmann.com) 369 (Ahmedabad - Trib.), THE ITAT AHMEDABAD BENCH 'SMC' held that the burden to prove that cash entries was on the assessee and since the requisite burden had not been discharged by the assessee, therefore the amount needed to be brought to tax.**
- (vi) **Kahan Udyog v Commissioner of Income-tax, [2013] 219 Taxman 23 (Delhi) (MAG), Hon'ble High Court of Delhi held that where Incriminating documents relating to unrecorded expenditure were found and seized by revenue and transactions were not recorded in books of account then addition made by Assessing Officer was justified.**

The law in sum and substance is that if the Assessee has to show that the cash deposits were referable to unrecorded contract business receipts.

7. Aggrieved by the order of the CIT(A), the assessee has preferred the present appeals before the Tribunal. Learned Counsel for the assessee reiterated submissions as were made before the Revenue authorities. Learned Counsel for the assessee placed reliance on the decision of the Madhya Pradesh High Court in the case of CIT Vs. Balchand Ajith Kumar 263 ITR 610 (MP). In the aforesaid decision, the question was whether the entire unaccounted sale has to be added as undisclosed income or only the net profit rate has to be treated as undisclosed income. The Hon'ble MP held as follows:

1. *On appreciating the rival submissions raised at the Bar, we have carefully perused the order passed by the Commissioner of Income-tax (Appeals) and also that of the Tribunal. It is not disputed that the undisclosed income was Rs. 2,57,000. The sole question that arises for consideration is whether the entire income has to be treated as profit or there should be adoption of a method of net profit income. In the case of CIT v. President Industries [2002] 258 ITR 654, the High Court of Gujarat in a similar matter came to hold as under (page 655) :*

*"Having perused the assessment order made by the Assessing Officer, the order made by the Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal, we are satisfied that the Tribunal was justified in rejecting the application under Section 256(1). It cannot be a matter of an argument that the amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales. The sales only represented the price received by the seller of the goods for the acquisition of which it has already incurred the cost. It is the realisation of excess over the cost incurred that only forms part of the profit included in the consideration of sales. Therefore, unless there is a finding to the effect that investment by way of incurring the cost in acquiring the goods which have been sold has been made by the assessee and that has also not been disclosed. In the absence of such finding of fact the question whether the entire sum of undisclosed sale proceeds can be treated as income of the relevant assessment year answers by itself in the negative. The record goes to show that there is no finding nor any material has been referred about the suppression of investment in acquiring the goods which have been found subject of undisclosed sales."*

4. *We are in respectful agreement with the aforesaid opinion inasmuch as the total sale cannot be regarded as the profit of the assessee. The net profit rate has to be adopted and once a net profit rate is adopted, it cannot be said that there is perversity of approach. Whether the rate is low or high, it would depend upon the facts of each case. In the present case net profit rate of five per cent. has been*

*applied. We do not think it appropriate that the same requires to be enhanced. We are also inclined to think that it is high. In any case, it cannot be said that there has been perversity of approach.”*

8. Learned DR relied on the order of the CIT(A) and the decision cited by the CIT(A), in support of his conclusions that the assessee's plea has to be rejected.

9. I have considered the rival submissions. The question whether undisclosed income is from business or any other source is a question of fact which has to be decided taking into account facts and circumstances of the case and overall evidence available. I am of the view that the explanation offered by the assessee that such deposits are from his contract business as a plausible explanation in absence of anything contrary on record in terms of any other source of income. Admittedly, the assessee also undertakes civil construction contracts. The partnership firm in which the assessee is a partner is also in the business of construction. The details of the contract work with Ursuline Sister of Mary Immaculate Educational Society were furnished by the assessee. The burden u/s.69A of the Act is only to give a satisfactory explanation. The facts and circumstances of a given case would be sufficient to draw an inference that receipts can be attributed to only business and no other source. The decision of the Hon'ble Madhya Pradesh High Court in the case of Balchand Ajitkumar (supra) also supports the plea of the assessee. I therefore accept the plea of the assessee that 8% of the cash deposits/cash credit, be treated as income of assessee from business of civil construction and the said sum be taxed in lieu of taxing the entire cash deposits in the bank account/cash credit. I therefore partly allow all these appeals.

10. In the result, all these appeals are partly allowed.

*Pronounced in the open court on the date mentioned on the caption page.*

Sd/-  
**(N.V. VASUDEVAN)**  
**Vice President**

Bangalore,  
Dated: 28.11.2022.  
/NS/\*

Copy to:

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|---------------|---------------|
| 1. Assesseees | 2. Respondent |
| 3. CIT        | 4. CIT(A)     |
| 5. DR         | 6. Guard file |

By order

Assistant Registrar,  
ITAT, Bangalore.