आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
'' SMC" BENCH, AHMEDABAD

SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No. 443/AHD/2020**
निर्धारण वर्ष/Asstt. Year: 2015-2016

Shailesh Popatbhai Katrodiya, ATM Vali Sheri, Palitana Road, Gariyadhar, Dist.-Bhavnagar. **PAN: CFSPK2508C**	Vs.	I.T.O, Ward-2(3), Bhavnagar.

(Applicant)		**(Respondent)**

Assessee by	:	Shri M.K. Patel, A.R
Revenue by	:	Shri SanjayKumar, Sr. D.R

सुनवाई की तारीख**/Date of Hearing : 11/01/2023**
घोषणा की तारीख **/Date of Pronouncement: 10/04/2023**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the assessee against the order of the Learned Commissioner of Income Tax (Appeals)-6, Ahmedabad, dated 11/06/2018 arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2015-16.

2. The assessee has raised following grounds of appeal:

1. *On the facts and in the circumstances of the case as well as law on the subject, the learned commissioner of the Income Tax(Appeals) has erred in confirming the action of the assessing officer in making addition of Rs.7,81,648/- on account of unexplained closing cash balance u/s.68 of the Income Tax Act and taxed u/s.115BBE r.w.s 68 of the Income tax Act 1961.*

2. *On the facts and in the circumstances of the case as well as law on the subject, the learned Commissioner of the Income Tax (Appeals) has not offered ample opportunities to hear the case and passed ex-parte order, hence the case may please be set aside and restored back to the CIT(A) or AO.*

3. *It is therefore prayed that the above addition may please be deleted as learned members of the tribunal may deem it proper.*

4. *Appellant craves leave to add, alter or delete any ground(s) either before of in the course of the hearing of the appeal.*

3. At the outset, I note that there is a delay in filing the appeal by the assessee for 779 days. The learned AR of the assessee has explained the reasons for the delay by stating that he (the assessee) was not aware of the provisions of income tax being small agriculturist. On being advised by his brother and upon his reference of the CA, the assessee filed the appeal with the delay. Thus, as per the ld. AR the delay occurred in filing the appeal which needs to be condoned.

4. The learned DR at the time of hearing, considering the length of delay opposed on the condonation petition filed by the assessee.

5. I have heard the rival contentions of both the parties and perused the materials available on record. U/s 253 of the Act, the Tribunal may admit an appeal, or cross-objection, after the expiry of prescribed period, if it is satisfied that there was sufficient cause for not presenting it within that period. At the outset, I note that the Hon'ble Supreme Court in series of cases has observed that the expression "sufficient cause" should be interpreted to advance substantial justice. Therefore, advancement of substantial justice is the prime factor while considering the reasons for condoning the delay. The Hon'ble Supreme Court in the case of Collector, Land Acquisition v. Mst. Katiji and Ors. (167 ITR 471) laid

down certain principles for considering the condonation petition for filing the appeal which are reproduced hereunder:

> *(1) Ordinarily, a litigant does not stand to benefit by lodging an appeal late (2) Refusing to condone delay can result in a meritorious matter being thrown at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties.*
>
> *(3) 'Every day's delay must be explained' does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational, commonsense and pragmatic manner.*
>
> *(4) When substantial justice and technical consideration are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.*
>
> *(5) There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.*
>
> *(6) It must be grasped that the judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.*

5.1 From the above judgment of the Hon'ble Apex Court, I note that the substantial justice deserves to be preferred rather than deciding the matter on the basis of technical defect. I also note that there is no allegation from the Revenue that the appeal was not filed within the time deliberately. Therefore, I am inclined to prefer substantial justice rather than technicality in deciding the issue.

5.2 I further note that the case on merit appears to be in favour of the assessee. But there is a technical defect in the appeal since the appeal was not filed within the period of limitation. There was the application filed by the assessee explaining the reasons for the delay in filing the appeal before me. I note that the Hon'ble Gujarat High Court in the case of S.R. Koshti Vs. CIT reported in 276 ITR 165 has held as under:

> ***18.*** *The position is, therefore, that, regardless of whether the revised return was filed or not, once an assessee is in a position to show that the assessee has been over-assessed under the provisions of the Act, regardless of whether the over-assessment is as a result of assessee's own mistake or otherwise, the CIT has the power to correct such an assessment under section 264(1) of the Act. If the CIT refuses to give relief to the assessee, in such circumstances, he would be acting de hors the powers under the Act and*

the provisions of the Act and, therefore is duty-bound to give relief to an assessee, where due, in accordance with the provisions of the Act.

19. *In the present case, the respondent-CIT has nowhere stated that the petitioner is not entitled to the relief under section 10(10C) of the Act. In fact, the said position is undisputed. The Assessing Officer himself had passed an order under section 154 of the Act, granting such relief. In the circumstances, even the order under section 264 of the Act made on 29-3-2004, cannot be sustained.*

20. *A word of caution. The authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If an assessee, under a mistake, misconception or on not being properly instructed, is over-assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected. This Court, in an unreported decision in case of Vinay Chandulal Satia v. N.O. Parekh, CIT [Spl. Civil Application No. 622 of 1981 dated 20-8-1981], has laid down the approach that the authorities must adopt in such matters in the following terms:*

> *"The Supreme Court has observed in numerous decisions, including Ramlal v. Rewa Coalfields Ltd. AIR 1962 SC 361, State of West Bengal v. Administrator, Howrah Municipality AIR 1972 SC 749 and Babutmal Raichand Oswal v. Laxmibai R. Tarte AIR 1975 SC 1297, that the State authorities should not raise technical pleas if the citizens have a lawful right and the lawful right is being denied to them merely on technical grounds. The State authorities cannot adopt the attitude which private litigants might adopt."*

5.3 From the above it is revealed that the income of the assessee should not be over assessed even there is a mistake of the assessee. As such, the legitimate deduction for which the assessee is entitled should be allowed while determining the taxable income.

5.4 I also note that the Hon'ble Gujarat High Court in the case of Vareli textile industry versus CIT reported in 154 Taxman 33 wherein it was held as under:

> *It is equally well-settled that where a cause is consciously abandoned (as in the present case) the party seeking condonation has to show by cogent evidence sufficient cause in support of its claim of condonation. The onus is greater. One of the propositions of settled legal position is to ensure that a meritorious case is not thrown out on the ground of limitation. Therefore, it is necessary to examine, at least prima facie, whether the assessee has or has not a case on merits.*

5.5 In view of the above and after considering the facts in totality, I am of the view that it is a fit case where the delay in filing the appeal by the assessee deserves to be condoned. Accordingly, I condone the same and proceed to decide the issue on merit.

6. The only issue raised by the assessee is that the learned CIT(A) has erred in confirming the addition made by the AO for ₹ 7,81,648/- representing the closing cash balance as on 31 March 2015 under the provisions of section 68 of the Act.

7. The facts in brief are that the assessee in the present case is an individual and claimed to be an agriculturist. The assessee first time has filed the belated return of income for the year under consideration dated 26/11/2016 declaring an income of ₹2,66,710/- only. The income tax return was filed by the assessee under the provisions of section 44AD of the Act disclosing the closing cash balance at ₹7,81,648/- as on 31 March 2015. As per the assessee, the income tax return was filed under section 44AD by the accountant inadvertently. As such, the assessee being an agriculturist was not under the obligation to file the income tax return. The assessee to support his contention has filed form No. 7/12 and 8A to demonstrate the landholding and sales bills of the agricultural produce.

7.1 As per the assessee, the cash balance of ₹7,81,648/- was accumulated by him in order to purchase the land for the agricultural activity. The assessee being uneducated was reluctant to visit the bank frequently and therefore the cash was not deposited in the bank account.

7.2 However, the AO disagreed with the contention of the assessee by observing that the income tax return was filed belatedly in order to justify the cash deposits of ₹10,20,000/- during the demonetization period. The assessee has also not filed the cash book during the assessment proceedings. Furthermore, the assessee in the income tax return has declared the income under the provisions of section 44AD of the Act whereas during the assessment proceedings he has changed his stand by claiming himself as an agriculturist. As per form No. 7/12, the landholding of the assessee was 5 vighas only wherein the production of the

Kapas to the tune of 507 Mans is not possible. There was no detail of agricultural expense furnished by the assessee. Furthermore, the assesse is not having the irrigation facilities for agriculture production as mentioned in the form No. 7/12. Thus, in view of the above the AO treated the amount of ₹7,81,648/- shown as closing cash balance as unexplained cash credit under section 68 of the Act and accordingly made the addition to the total income of the assessee.

8. Aggrieved assessee preferred an appeal to the learned CIT(A).

9. The assessee before the learned CIT(A) submitted that he does not carry out any business activity and he is depending only upon the agriculture income for which he does not maintain any cash book and other books of accounts. The accountant has wrongly declared income under the provisions of section 44AD of the Act wherein it is mandatory to furnish the details of the cash balance. As such the income of the assessee is not subject to the provisions of section 44AD of the Act and therefore there was no necessity of maintaining any details being an agriculturist.

9.1 The assessee also submitted that he has furnished the Talati certificate to demonstrate the production of Kapas in the year under consideration which has not been considered by the AO during the assessment proceedings. As such, no iota of doubt was raised by the AO on such certificate.

10. However, the ld. CIT-A disregarded the contention of the assessee by observing as under:

> *4.3 After considering findings of the AO and submissions of the appellant, this ground is adjudicated as under.*
>
> *The AO noted that the appellant had shown Closing Cash balance of Rs.7,81,648/- as on 31.3.2315 in his return of income of A.Y. 2015-16. When asked to substantiate the same and produce Cash Book, the appellant could not do so. Accordingly, the AO added* ***Rs.7,81,648/-*** *u/s 68 r.w.s 115BE of the Act.*
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> *It is seen that for A.Y. 2015-16, the appellant filed Return of Income u/s 44AD of the Act. However, when asked by the AO to explain the Closing Cash balance and to*

produce the Cash Book, the appellant turned around and said he has no business and no business income and that he is an agriculturalist and his accountant wrongly snowed agricultural income as income from sale of goods. For the Cash Balance of Rs.7,81,648/- he submitted that he submitted he has accumulated this amount for purchase of land. During appea[1] proceedings he reiterated above submissions. The authorised representative of the appellant explained that the appellant was advised by someone to file return of income u/s 44AD o the Act so that later the appellant could explain deposit of cash of Rs.10,20,000/- , deposited during Demonetization period between 9.11.2016 to 30.12.2016. Thus it is clear that the appellant has been changing his stand and has filed different explanations at different times. It is noteworthy that the appellant has filed Return of Income first time for A.Y. 15-16, the year under consideration. Before this the appellant had never filed return of income. Thus it is clear that the appellant has failed to explain with evidence the source of Rs.7,81,648/-

In view of discussion above, I hold that the AO was justified in making addition of Rs.7,81,648/- u/s. 115BBE r.w.s 68 of the Act. Accordingly, addition of Rs.7,81,648/- is upheld. This ground of appeal is rejected.

11. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before me.

12. The learned AR before me contended that the Revenue has not brought anything on record suggesting that the cash balance was generated from the activity other than the agricultural activity. As per the ld. AR, the cash balance shown at the end of the financial year does not itself represents the income.

13. On the other hand, the learned DR before me vehemently supported the order of the authorities below.

14. I have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, I note that the assessee claimed to be an agriculturist and in support of his contention has filed the landholding certificates in form 7A/12 and Talati certificate showing the agricultural produce. But the assessee fairly admitted that the accountant has wrongly declared the income under the provisions of section 44AD of the Act wherein it was mandatory to disclose the cash balance. As per the assessee, being an agriculturist, he was not supposed to disclose any cash balance in the return filed under section 44AD of the Act. Accordingly, it was contended that the

assessee should not be punished for the mistake committed by the accountant of the assessee.

14.1 To give relief to small assessees, the Income-tax Law has incorporated a simple scheme commonly known as Presumptive Taxation Scheme. There are two schemes, viz., the scheme of section 44AD and the scheme of section 44AE. An assessee adopting these provisions is not required to maintain the regular books of account and is also exempt from getting the books of account audited. The provisions of section 44AD are applicable to such resident assessee who is an Individual, Hindu Undivided Family and Partnership Firm but not Limited Liability Partnership Firm. The presumptive taxation scheme under these provisions can be opted for by the eligible assessee who is engaged in any business (except the business of plying, hiring or leasing goods carriages referred to in section 44AE), whose turnover or gross receipts from such business do not exceed the limit of audit prescribed under section 44AB of the Act.

14.2 There is no evidence available on record to indicate that the case of the assessee is covered under the provisions of section 44AD of the Act except the income tax return i.e. the income was disclosed under the provisions of section 44AD of the Act. However, the assessee during the assessment proceedings has countered that he is not covered under the provisions of section 44AD of the Act by furnishing the landholding and Talalti certificates as discussed above. However the AO, without disposing of the objections raised by the assessee has assumed that the assessee has not furnished the necessary details in support of agricultural activity. But at the same time the AO has also not brought anything on record suggesting that the assessee is engaged in the activity which is subject to the provisions of section 44AD of the Act. As such, the assessee shifted the onus upon the revenue by submitting the details of the landholding and thereafter it was the onus upon the revenue to disprove the contention of the assessee based on the documentary evidence but it has not been done so.

14.3 Be that as it may, the question also arises whether the cash balance shown by the assessee represents the income. The cash balance shown at the end of the financial year represents the cash available with the assessee out of various transactions carried out by him in the relevant financial year. In simple words, the assessee generally receives cash against the sales and makes payments for the purchases and other expenses. Whatever is left at the end of the financial year is shown as closing cash balance. As per the assessee, the cash balance was arising to him out of the accumulated fund from the agricultural activities which has been disbelieved by the AO but without bringing any material on record that the cash was generated by the assessee from any other activity which was subject to tax. Thus in my considered view, the revenue failed to discharge the onus imposed upon it to disprove the contention of the assessee. Thus, it is transpired that whatever cash was available with the assessee was out of the agricultural activity of the earlier years carried out by him. Accordingly, I am not inclined to uphold the finding of the authorities below. Hence the ground of appeal of the assessee is hereby allowed.

15. In the result, the appeal of the assessee is allowed.

Order pronounced in the Court on 10/04/2023 at Ahmedabad.

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

(True Copy)

Ahmedabad; Dated 10/04/2023
Manish