

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'बी', अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
“ B ” BENCH, AHMEDABAD

श्री जी.डी.अग्रवाल,उपाध्यक्ष (अहम.क्षेत्र) एवं श्री कुल भारत, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI G.D. AGARWAL, VICE PRESIDENT (AZ) And
SHRI KUL BHARAT, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.531/Ahd/2012
(निर्धारण वर्ष / Assessment Year : 2008-09)

The ITO Ward-7(1) Ahmedabad	बनाम/ Vs.	M/s.Murlidhar Ice-cream & Sweet Parlour 23, Samarpan Tower Bopal, Ahmedabad-380 058
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAMFM 7921 F		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

And

CO No.89/Ahd/2012 – A.Y. 2008-09
(in ITA No.531/Ahd/2012 – AY 2008-09)

M/s.Murlidhar Ice-cream & vs. ITO, Ward-7(1)
Sweet Parlour, Ahmedabad Ahmedabad
(Cross Objector) .. (Respondent)

Revenue by :	Shri Narendra Singh, Sr.DR
Assessee by	Shri S.N. Divatia, AR

सुनवाई की तारीख / Date of Hearing	23/07/2015
घोषणा की तारीख /Date of Pronouncement	20/08/2015

आदेश / ORDER

PER SHRI KUL BHARAT, JUDICIAL MEMBER :

This appeal and cross-objection by the Revenue and the Assessee respectively against the order of the Ld.Commissioner of Income

Tax(Appeals)-XIV, Ahmedabad [‘CIT(A)’ in short] dated 30/12/2011 pertaining to Assessment Year (AY) 2008-09. The appeal and the cross objection are taken up together and are being disposed of by this consolidated order for the sake of convenience.

2. First, we take up the appeal filed by the Revenue, i.e. ITA No.531/Ahd/2012 for AY 2008-09. The Revenue has raised the following grounds of appeal:-

1. *The Ld.Commissioner of Income tax (Appeals) is not justified in facts and in law in restricting the addition to the extent of Rs.3,30,150/- out of the total addition of Rs.24,75,200/- made by the Assessing Officer u/s 68 of the I.T.Act.*
2. *The Ld.Commissioner of Income tax (Appeals) is not justified in facts and in law in admitting additional evidences in violation of Rule-46A of the I.T Rules, and in restricting, on the basis of such additional evidences, the disallowance of interest on bank loan to Rs.65,090/ , out of total disallowance of Rs.1,95,470/- made by the Assessing Officer.*
3. *On the facts and circumstances of the case, the Ld.Commissioner of Income tax (A) ought to have upheld the order of the Assessing Officer.*
4. *It is, therefore, prayed that the order of the Ld.Commissioner of Income tax (A) may be set-aside and that of the Assessing Officer be restored.*

2.1. Briefly stated facts are that the case of the assessee was picked up for scrutiny assessment and the assessment u/s.143(3) of the Income Tax Act,1961 (hereinafter referred to as “the Act”) was framed vide order dated 09/12/2010. While framing the assessment, the AO made addition

of Rs.24,82,150/- by invoking the provisions of section 68 of the Act as unexplained credit. The AO also made disallowance of bank loan interest of Rs.1,95,470/- and the addition of Rs.5,000/- made on account of excess payment made to the related party by invoking the provisions of section 40A(3) of the Act. Against the said assessment order, the assessee preferred an appeal before the Id.CIT(A), who after considering the submissions partly allowed the appeal. While partly allowing the appeal, the Id.CIT(A) restricted the addition to the extent of Rs.3,30,150/- out of Rs.24,82,150/- made on account of deposits in the bank and restricted the disallowance to Rs.65,090/- out of disallowance of Rs.1,95,470/- in respect of the interest expenditure claimed by the assessee. Against the order of the Id.CIT(A), now the Revenue is in appeal and the Assessee is in cross-objection before us.

3. First ground of Revenue's appeal is against the deletion of addition out of Rs.24,75,2000/- and restricting the same to the extent of Rs.3,30,150/-. The Id.Sr.DR submitted that the Id.CIT(A) was not justified in deleting the addition and submitted that there is no dispute with fact that the account was not disclosed by the assessee in its regular book of accounts. It is only on the basis of the AIR information received by the AO and the accounts came to the knowledge of the Revenue Authorities.

3.1. On the contrary, ld.counsel for the assessee reiterated the submissions as were made before the ld.CIT(A) and submitted that the omission to include the bank account in question in the book of accounts was unintentional mistake on the part of the Accountant. He submitted that the AO failed to appreciate the fact that there was no reason to conceal the account, which is over-draft account because the source of credit in this account will be the transfer from bank. He further submitted that the AO failed to appreciate the cash deposits made in this account were not unexplained but re-deposits out of the previous withdrawals. He further submitted that recording the transactions in the books has nothing to do with the correlating the withdrawals with the redeposit because once the account is not recorded in the books the corresponding redeposit will automatically remain unrecorded in the books. He further submitted that the AO has made addition u/s.68 as unexplained cash credit but when the transactions have not been recorded in the books there could not be addition u/s.68 wherein it is a precondition that the credit should appear in the books of a/c maintained by the assessee.

4. We have heard the rival submissions, perused the material available on record and gone through the orders of the authorities below. The ld.CIT(A) has given a finding on fact that the cash withdrawn from the bank account was used for the purpose of redepositing in the same in

the bank account. Further, the Id.CIT(A) in para-3.3 has given a finding on fact as under:-

“3.3. Decision:

I have carefully perused the assessment order and the submissions given by the appellant. The appellant has submitted that the bank account in which the cash has been deposited was on OD facility and the cash deposits were made out of the withdrawals made earlier from the same account. The bank account was omitted to be included in the books of account and only the account with State Bank of Saurashtra was shown in the books of account.

A perusal of the bank account show that the bank account has been opened by the appellant on 25/10/2007 and the appellant has initially withdrawn cash from the account and subsequently started depositing the cash in the account again. The A.O. has not considered the fact of withdrawal of cash from the same account and has merely made the addition on the basis of entries of deposit of cash. The claim of the appellant that the cash has been deposited out of the earlier withdrawal is prima facie acceptable as A.O. has not pointed out any other fact which indicates the utilization of cash in some other manner. Therefore, the claim of the appellant regarding availability of cash out of earlier withdrawals will have to be accepted. The only utilization of the cash withdrawal by the appellant could have been for the purpose of furnishing the Ice Cream Parlour for which the OD facility was taken by the appellant. This aspect will be discussed later on. Following is the position of availability of cash withdrawn from the bank account by the appellant on various dates.

CASH ACCOUNT

<i>Date</i>	<i>Particulars</i>	<i>Ch. No.</i>	<i>Opening</i>	<i>Received</i>	<i>Payment</i>	<i>Closing</i>
18.11.2007	Cash	274576	—	200000	—	200000

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20.11.2007	Cash	274577	200000	200000	—	400000
23.11.2007	Cash	274578	400000	200000	—	600000
25.11.2007	Cash	274579	600000	200000	—	800000
27.11.2007	Cash	274580	800000	1 50000	—	950000
10.12.2007	Cash	274582	950000	200000	—	1150000
15.12.2007	Cash	—	11 50000	—	3150	11 46850
20.12.2007	Cash	274583	1146850	200000	—	1346850
22.12.2007	Cash	274584	1 346850	100000	—	1446850
05.01 .2008	Cash	274585	1446850	200000	—	1 646850
08.01.2008	Cash	274586	1 646850	125000	—	1771850
12.01.2008	Cash	274587	1771850	50000	—	1821850
15.01.2008	Cash	—	1821850	—	3800	1818050
16.01.2008	Cash	274588	1818050	200000	—	2018050
17.01.2008	Cash	274590	2018050	27000	—	2045050
19.01.2008	Cash	—	2045050	—	10200	2034850
12.02.2008	Cash	—	2034850	—	500000	1534850
19.02.2008	Cash	—	1534850	—	30000	1504850
25.02.2008	Cash	—	1504850	—	200000	1304850
25.02.2008	Cash	—	1304850	—	50000	1254850

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28.02.2008	Cash	—	1254850	—	40000	1214850
01.03.2008	Cash	274592	1214850	100000	—	1314850
07.03.2008	Cash	—	1314850	—	200000	1114850
07.03.2008	Cash	—	1114850	—	100000	1014850
11.03.2008	Cash	—	1014850	—	1000000	14850
15.03.2008	Cash	—	14850	—	200000	-185150
18.03.2008	Cash	—	-185150	—	145000	-330150
20.03.2008	Cash	274593	-330150	200000	—	-130150
28.03.2008	Cash	274594	130150	200000	—	69850
28.03.2008	Cash	274595	69850	200000	-	269850
	Total			2752000	2482150	

It is seen from the above chart that the appellant has withdrawn Rs.27,52,000/- from the bank account on various dates and has deposited Rs.24,82,150/-. It is however noted that on 15/03/2008, the appellant deposited more than what it had withdrawn and there was a negative cash on that day. The appellant again deposited Rs.1,45,000/- on 18/03/2008 which further increased the negative balance of cash. Therefore, the total cash deposited in the bank account in excess of what was withdrawn by the appellant comes to Rs.3,30,150/- for which the appellant has no source to explain. The appellant in the appellate proceedings has taken contradictory plea for deposit of this cash. In earlier submission, it has been mentioned by appellant that cash of Rs.3,50,000/- was deposited by one of the partner Shri Ashok Patel from his personal source. Subsequently he stated that appellant has taken loan from four different parties in the following manner.

- (i) Patel Prahladbhai Madhavdas (Rs.2,00,000)
- (ii) Patel Jayantibhai Tribhovandas (Rs.25,000)
- (iii) Patel Vikrambhai Dhulabhai (Rs.75,000) and
- (iv) Patel Navinbhai Somnathbhai (Rs.50,000).

The appellant has also submitted the confirmation of these four parties regarding the deposit. The claim of the appellant is not acceptable as these evidences were not submitted before the A. O. and neither these were filed in the earlier stages of hearing. The evidences are not contemporary in nature as there is no evidence of loan from bank. The appellant has tried to create an evidence by showing cash loan from different persons which cannot be accepted at this stage as this is an afterthought and creation of false evidence. It is also worthnoting that this claim is against the earlier claim of receiving cash from one of the partners. In view of these facts, the claim of the appellant regarding deposit of cash of Rs.3,30,150/- is not accepted and is considered as unexplained cash deposited in bank account.

The appellant was also asked to explain the source of expenditure in furnishing the Ice Cream Parlour: It has been submitted by him that he has shown furniture of Rs.1,59,830/- in the books of accounts. The amount of furniture shown by the appellant is inadequate as it is not possible to furnish any shop with this small amount. It would therefore be reasonable to estimate that a further expenditure of Rs.2,50,000/- must have been made by him in furnishing the shop. The appellant has submitted that the excess amount of cash withdrawn was used by him for this purpose. The claim of the appellant is examined and it is seen that the appellant has withdrawn an amount of Rs.27,52,000/- and has deposited cash of Rs.24,82,150/- which shows that excess cash of Rs.2,69,850/- was available with the appellant. This cash is accordingly treated as source of investment in furnishing the shop. The appellant will not get any credit of Rs. 2,50,000/-for future use.

*In view of the above discussions, the addition to the extent of Rs.3,30,150/- out of the addition made by the A. O. is confirmed and the rest is deleted. The ground of appeal is, therefore, **partly allowed.**”*

4.1. The finding of the Id.CIT(A) that there were transactions of cash deposit and withdrawal. This fact is not controverted by the Revenue by placing any contrary material on record. We are of the considered view where there are deposit and withdrawal entries into the bank account, it would be presumed that the amount withdrawn was available with the

assessee for depositing the same. Therefore, it cannot be concluded that the entire deposits were from unexplained source. We do not see any reason to interfere with the finding of the Id.CIT(A), the same is hereby upheld. Thus, this ground of Revenue's appeal is rejected.

5. Ground No.2 is against restricting the disallowance of interest expenditure to the extent of Rs.65,090/- out of total disallowance of Rs.1,95,470/-. It is also submitted that the additional evidences were admitted in violation of Rules 46A of the IT Rules, 1962. The Id.Sr.DR supported the order of the AO and submitted that the Id.CIT(A) was not justified in deleting the addition.

5.1. On the contrary, Id.counsel for the assessee submitted that during the year under appeal, assessee-firm had claimed interest expenditure of Rs.1,95,470/- which was paid for the purpose of business. The Id.counsel for the assessee submitted that the interest expenditure was paid towards the interest paid to HDFC secured loan. The loan was taken for the business purposes. Further, Id.counsel for the assessee reiterated the submissions as were made before the Id.CIT(A).

6. We have heard the rival submissions, perused the material available on record and gone through the orders of the authorities below. We find that the Id.CIT(A) has given finding on fact in para 4.3 of his order.

“4.3 Decision:

I have carefully perused the assessment order and the submissions given by the appellant. The A. O. has made the disallowance as the appellant did not give any evidence for the utilisation of the loan for the business purpose. During the course of appellate proceedings, the appellant has filed copy of the ledger account of the loan which shows that certain withdrawals were made by the partners in cash and certain withdrawals were made for the business purpose. It has been pointed out by him that a withdrawal of Rs.5,00,000/- was made on 31/07/2006 by cash which was utilised for making the purchases. Similarly, an amount of Rs.1,03,000/- was also withdrawn in cash and utilised for purchases. Similarly, there were other withdrawals of small amount which were also used by the appellant for the purpose of business. The claim of the appellant has been looked into. It is noted from the details made available that not all the funds which were taken out of the loan account of the bank were utilised for the purpose of business. The appellant has given an amount of Rs.7,01,200/- to its partners for which there is no purpose of business. The other amount has been utilised for business. The appellant has also in the written submission accepted the above fact. Accordingly, the disallowance of interest should be proportionately reduced taking into account the amount not utilised for business. After considering the same, the disallowance is restricted to Rs.65,090/- (Rs.1,95,470 x 7,01,200/21,05,768). The ground of appeal is accordingly partly allowed.”

6.1. The above finding of the Id.CIT(A) is not controverted by the Revenue by placing any contrary material on record. The contention of the Revenue is that the Id.CIT(A) has violated the Rule 46A of the IT Rules. There is no specific submission as what were the evidences

which were considered by the Id.CIT(A) without giving opportunity to the AO and/or the evidences which were not available before the AO. Therefore, this contention of the Revenue is also devoid of any merit. Thus, we do not see any reason to interfere with the order of the Id.CIT(A), same is hereby upheld and Revenue's ground No.2 is rejected.

7. Ground Nos. 3 & 4 are general in nature which require no independent adjudication. As a result, Revenue's appeal for AY 2008-09 is dismissed.

8. Now, we take up the assessee's Cross Objection No.89/Ahd/2012 – AY 2008-09 (arising out of ITA No.531/Ahd/2012 – for AY 2008-09 Revenue's appeal).

8.1. The only effective ground is against confirming the addition to the extent of Rs.3,30,150/- made u/s.68 of the Act. The Id.counsel for the assessee reiterated the submissions as were made before the Id.CIT(A).

8.2. On the contrary, Id.Sr.DR supported the orders of the authorities below.

9. We have heard the rival submissions, perused the material available on record and gone through the orders of the authorities below.

We find that the Id.CIT(A) has given finding on fact in para-3.3 of his order, which is already reproduced in the Revenue's appeal-supra at para No.4 of this order.

9.1. The above finding of the Id.CIT(A) is not controverted by the assessee, therefore, we do not see any reason to interfere with the order of the Id.CIT(A), same is hereby upheld. Thus, ground raised by the assessee is rejected and the cross-objection of the assessee is dismissed.

10. In the result, the appeal of the Revenue and the cross objection filed by the Assessee both are dismissed.

Order pronounced in the Court on Thursday, the 20th day of August, 2015 at Ahmedabad.

Sd/-
(जी.डी.अग्रवाल)
उपाध्यक्ष(अहम. क्षेत्र)
(G.D. AGARWAL)
VICE PRESIDENT (AZ)

Sd/-
(कुल भारत)
न्यायिक सदस्य
(KUL BHARAT)
JUDICIAL MEMBER

Ahmedabad; Dated 20/ 08 /2015
टी.सी.नायर, व.नि.स./T.C. NAIR, Sr. PS

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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-XIV, Ahmedabad
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
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सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad

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