

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'SMC-II' NEW DELHI**

**BEFORE SMT DIVA SINGH, JUDICIAL MEMBER**

**I.T.A .No.-4763/Del/2015  
(ASSESSMENT YEAR-2009-10)**

S.K.Jain, 348/21B, Gali No.5, Madanpuri, Gurgaon-122001. PAN-ACFPJ4010L <b>(APPELLANT)</b>	vs	ACIT, Circle-1(1), Gurgaon  <b>(RESPONDENT)</b>
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<b>Appellant by</b>	<b>None (Adj. application Rejected)</b>
<b>Respondent by</b>	<b>Ms. Anima Baranwal, Sr.DR</b>

<b>Date of Hearing</b>	<b>03.08.2016</b>
<b>Date of Pronouncement</b>	<b>02.11.2016</b>

**ORDER**

By the present appeal in 2009-10 assessment against the order dated 11.05.2015 of CIT(A)-1, Gurgaon the assessee assails the addition of Rs.20 lakhs based on surrender made during a survey. An adjournment was moved on behalf of the Ld. AR seeking time, but considering the material available on record and the submissions of the Ld. Sr DR, it was rejected,

2. The record shows that the assessee by way of filing a return on 30.03.2010 returned an income of Rs.2,55,970/-. The case was selected for scrutiny as the assessee had been subjected to a survey under section 133A(5) on 27.02.2009. In the scrutiny proceedings, the assessee was required to explain why the surrender made during the survey conducted by ADIT(Inv)-II, Gurgaon on 27.02.2009 was not honoured. On behalf of the assessee as per the reply of assessee's counsel dated 07.12.2011, the surrender had been retracted as it was allegedly made at the time when the assessee was not mentally fit. The assessee was

required to furnish proof of retraction as it was found that as per ADIT (Inv.)-II, Gurgaon there was no retraction with the said authority. The assessee furnished a copy of Retraction dated 02.03.2009 with letter dated 14.12.2011. However, the original retraction letter could not be furnished by the assessee. As a result thereof, the addition of the said amount was made by the Assessing officer.

3. In appeal before the First Appellate Authority, the copy of the original letter was admitted as fresh evidence. In support of mental incapacity the assessee as per page 11 of the impugned order filed some medical reports, consultation papers etc. in regard to a head injury suffered in 2005 for which treatment continued till 2008 as evidence of continuing Neurological problems. It was also submitted as per reproduction of the submissions at page 5 of the impugned order that *"No one knows that when the assessee is in proper senses and when he is not in proper/full senses. If the Appellant/Assessee is in proper senses at any point of time, his brain can convert his senses to mental imbalance even the next moment. At times when the Appellant/Assessee is not in proper/full senses he may not recognize even his family members and asks them from where they have come or for what purpose they have come. Once during the routine survey by the Sales-tax Officer about 4-5 years ago all of a sudden the Appellant's/Assessee's brain became imbalanced, the assessee called the Officer Ramu get me a glass of water, the matter shoot up and the other family members had to beg sorry with folded hands number of times from the Sales-tax Officer explaining him the mental condition of the assessee, only then the Sales-tax was pacified."* However, not convinced with the explanation offered the CIT(A) confirmed the view taken by the AO holding that the assessee's mental state was good. Accordingly the retraction was not permitted. Aggrieved the assessee is in appeal before the ITAT.

4. The Ld. Sr.DR heavily relies upon the impugned order.

5. Having heard the submissions and perused the material available on record, I find that the matter requires reconsideration on facts. Admittedly a survey was conducted upon the assessee on 27.02.2009. The record shows that the survey was conducted in order to ascertain the expenses incurred on the marriage of assessee's son named Amit with Ruchika, daughter of Sh. Anil Jain of Ludhiana on 15.02.2009 as per para 4 of the impugned order. The assessee as per record has surrendered an amount Rs.20 lakhs during the survey and claims that within a few days he has retracted the same. The tax authorities have accepted the fact that there is retraction letter dated 02.03.2009. However retraction has not been allowed by the tax authorities as it is considered to be an afterthought. The medical evidence in support of the retraction, it is seen, has also been dismissed on the ground that it pertains to treatment having been carried on upto 2008 and the survey admittedly was concluded on 27.02.2009.

6. Considering the facts and arguments on record, I find that the claim of the assessee has been dismissed on the basis of perceptions and surmises wherein no attempt has been made to address the specific facts. The mere fact that the assessee who has pleaded mental incapacity to make the surrender was found at his place of work per se does not preclude the assessee to claim such mental incapacity to make the surrender. A person subject to medical evaluation may be able to successfully plead that for the routine day to day functioning, he could attend to his work being carried out by his staff, help or relatives however may under stress not be capable to fully comprehend evaluate and decide the questions/proposal put forth by the survey team. Without getting a medical evaluation of the evidence relied upon the claim cannot be out rightly rejected. No doubt if the evidence filed is found to be insufficient the assessee can be called forth to further supplement the evidences. To my understanding the opinion of an Expert medical person should have

been brought on record in order to fairly decide the claim as per law. The reasoning that since exact amounts are found mentioned in the surrender cannot be the basis for rejecting the claim as the said reasoning presupposes that the assessee had the mental faculties to understand what he was agreeing to. Thus, the reasoning is neither here nor there as once medical incapacity is pleaded then who suggested the exact figures itself becomes questionable.

7. Even otherwise any "normal" person faced with a survey would definitely be under stress. Infact how a person would react to a survey may vary as there is no ideal behavioral response which can be expected universally from every person who is surveyed by the tax department. A level of stress is understandable. Persons who due to their frequent interactions and litigations with the tax authorities may take the stress of a survey relatively in their stride as a routine affair as compared to a highly sensitive reclusive person who with no exposure to litigation with tax authorities etc. may be so over-whelmed with humiliation or embarrassment especially straight after a marriage of a child that his stress level and mental capacity may be adversely impacted and his consequent response may be clouded and unclear and hence may not reflect the actual position. The position for a person undergoing treatment for a head injury which presumably has impacted his cognitive faculties may become more aggravating.

8. Thus, I find that the issue requires reconsideration on facts as the tax authorities cannot outrightly dismiss the retraction without having an independent evaluation of the mental capabilities of the assessee. I further find that on reading of the orders of the tax authorities, nothing has been brought on record to show that the marriage expenses on account of the assessee's son were exorbitant and not explainable. Infact I find that there is no discussion in the order whatsoever to show what was the nature of assessee's

business. It is seen that apart from a mention that there was a survey on account of the marriage of assessee's son, there is nothing on record to show why a marriage in the family warranted a survey wherein the assessee made a surrender which was retracted promptly. The assessment order it is seen is a two paged order with no reference to relevant facts and the 15 paged impugned order though incorporates the written submissions of the assessee however rejects them without rebutting the medical evidence relied upon. It is further seen that no discussion either on what is the business of the assessee nor on his status or known sources of income has been made. No doubt, the evidence which necessitated the Revenue to carry out a survey within a few days of the marriage of the assessee's son are facts which may be beyond the scope of the present appeal however, the absence of relevant material vis-à-vis the lack of discussion on what was the business of the assessee; the extent of expenditure incurred on the marriage which was found not commensurate with assessee's standard of living are areas on which there is no discussion whatsoever. The absence of relevant discussion lays the exercise of power vested in the authorities open to the charge of being arbitrary, biased and perverse.

9. Considering the overall peculiar factual matrix of the present case, it is deemed appropriate to set aside the impugned order and restore the issue back to the AO to address the plea of mental incompetence put forward by the assessee at the time of surrender by way of a retraction. Expert Medical opinion may be called for if so deemed appropriate as merely because as per the medical evidence treatment was under way upto a specific date by itself does not prove that the person suffering from neurological disorder was thereafter totally fit and recovered. I find that apart from that the bare fact that there was a marriage there is nothing in the order to show what led the Revenue to believe that on account of a marriage of the assessee's son, a survey was required. At least a

semblance of reference in the order should be there as without any fact or evidence, it becomes questionable why a mere marriage of a son requires, the tax authorities to carry out a survey. The facts which led to this decision at least should have been brought out in the order because in such an eventuality it would be possible to gauge and consider whether the surrender was made on account of facts which were so patent and self-speaking that the assessee had no choice but to make the surrender in the absence of any relevant discussion in the orders, the action is open to the criticism being arbitrary and whimsical. Accordingly, the impugned order is set aside and the issue is restored to the file of the AO to decide the same *de-novo*.

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

**The order is pronounced in the open court on 02<sup>nd</sup> November, 2016.**

**Sd/-**

**(DIVA SINGH)  
JUDICIAL MEMBER**

*\*Amit Kumar\**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI