

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E' : NEW DELHI

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT AND
SMT. BEENA A. PILLAI, JUDICIAL MEMBER

ITA No.2116/Del/2012
Assessment Year : 2006-07

M/s National Industrial
Corporation Limited,
801-803, Ashok Bhawan,
93, Nehru Place,
New Delhi – 110 019.
PAN : AAACN0628E.
(Appellant)

Vs. Deputy Commissioner of
Income Tax,
Central Circle-19,
New Delhi.

(Respondent)

Appellant by : Shri G.N. Gupta, AR.
Respondent by : Ms. Jyoti Kumari, CIT-DR.

Date of hearing : 17.03.2016
Date of pronouncement : 30.03.2016

ORDER

PER G.D. AGRAWAL, VP :-

This appeal by the assessee for the assessment year 2006-07 is directed against the order of learned CIT(A)-XXXIII, New Delhi dated 29th March, 2012.

2. The assessee has raised following grounds of appeal :-

"1. That on the facts and in the circumstances of the case, the learned CIT(A)-XXXIII, New Delhi (hereinafter called CIT(A) for short erred in rejecting the contention of the appellant that Deputy Commissioner of Income Tax, Central Circle-19, New Delhi (hereinafter called AO for short had no jurisdiction to pass the impugned assessment order as per the provision of Section 127(3) read with Section 124(4) of the Income Tax Act, 1961 (hereinafter

called the act for short) and that the impugned assessment order is abinitio, null and void and deserve to be quashed.

2. That on the facts and in the circumstances of the case, the learned CIT(A) erred in rejecting the plea of the appellant that the impugned assessment order is bad in law and had been framed by the AO on the basis of surmises and conjectures and that too without affording the appellant proper opportunity to be heard.

3.1 That on the facts and in the circumstances of the case, the learned CIT(A) erred in confirming the addition of Rs.3,38,72,500/- made by the AO as unexplained payment alleged to have been made by the appellant company from undisclosed sources and out of the books of account through UPDA to un-named officials and politicians for patronage and favors.

3.2 That on the facts and in the circumstances of the case and without prejudice to the generality to the ground of appeal no. 3.1 above the learned CIT(A) erred in upholding the action of AO that it was not incumbent on AO to give an opportunity to the appellant company to cross examine Shri R.K. Miglani whose statement was relied upon by the department for the purpose of making a frivolous addition of Rs.3,38,72,500/-."

3. At the time of hearing before us, it is stated by the learned counsel that the only dispute in this appeal is with regard to the addition of ₹3,38,72,500/- made by the Assessing Officer on the basis of statement of Shri R.K. Miglani. That the Assessing Officer has never allowed any opportunity to the assessee to cross-examine Shri Miglani. He stated that on the basis of statement of Shri Miglani, the addition was made in the case of M/s Sir Shadi Lal Enterprises, in whose case, the ITAT set aside the orders of the authorities below and restored the matter to the file of the Assessing Officer vide order dated 18th December, 2015 in ITA No.4993/Del/2011. He submitted that the facts being identical, the issue under consideration should also be set aside to the file of the Assessing Officer with the identical direction.

4. Learned DR, on the other hand, relied upon the orders of authorities below.

5. We have carefully considered the submissions of both the sides and have perused material placed before us. We find that the identical issue has been considered by the ITAT in the case of M/s Sir Shadi Lal Enterprises Ltd., wherein the ITAT set aside the matter to the file of the Assessing Officer with the direction to allow opportunity to the assessee to cross-examine Shri Miglani. The relevant finding of the ITAT reads as under:-

“19. We find that the statement given by Mr. Miglani in 14.02.2006 has been retracted by Mr. Miglani on 03.03.2008 (i.e. after more than 2 years) by filing an affidavit. It has to be seen under what circumstances he has resiled from the earlier statement and reasons for doing so after 2 years and it has to be examined whether the retraction after such a long time inspires confidence and, whether any weightage need to be given to it has to be examined by the AO. However, the AO should keep in mind that before making an addition by the department against the assessee, if Mr. Miglani’s statement has been relied on by the AO, then Mr. Miglani should have been allowed to be cross examined by the assessee. We find that the assessee had requested for cross-examining Mr. Miglani which has not been done in this matter. The AO simply has sent some summons and has asked the assessee to produce Mr. Miglani. We take note that in the absence of Mr. Miglani not coming before him, the AO put the responsibility on the assessee to produce him and when the assessee failed to produce Miglani before the AO, then he went ahead with the impugned addition which cannot be countenanced. In case, if Mr. Miglani is not keeping well then the AO should consider to issue a commission u/s 131(d) of the Act to collect evidence and allowing the assessee also to cross examine him. The evidences could have been collected not only from Mr. Miglani, it could have been collected by investigating

further from 23 distilleries which could have thrown light of the modus operandi of these distillers as has been said by Mr. Miglani during search. We find a thorough investigation is needed in this case.

20. From a perusal of page 4 of the AO's order, we note that assessee's Pilkhani and Shamli Distilleries, according to AO, incurred unexplained expenditure of Rs.214 lakhs. Since the assessee is one of the member of the Society registered as UPDA, which was involved in illegal activities as stated by the AO, then nothing prevented the AO to have pierced the veil and examine/investigate the said illegal activities in detail to bring out the unexplained expenditure incurred by the assessee and undisclosed income in the hands of UPDA. It is well settled that the AO is not tied down by the strict application of Evidence Act, and he can use the information from his enquiry from third persons also, however, it has to be kept in mind that, if the AO is going to make any addition/disallowance based on third party information, then he is bound to give a copy of the information to the assessee and give an opportunity to the assessee to rebut the same and allow the assessee to test the third party statement by allowing the assessee to cross-examine the third party. In case, if the third party cannot be traced or dies, application of section 32 of the Indian Evidence Act need to be examined, however, the AO should make all endeavour to trace the third party and should not put the burden on the assessee to produce the third party information on which he intends to make adverse finding or addition or disallowance on the assessee.

22. From Mr. Miglani statement and other evidences, it has to be established that assessee was a member of UPDA, then Mr. Miglani's statement that money used to be collected by core distillery in the case of assessee, it is said to be Lord Distillery and a lead distillery, M/s. S.S.L., whether any evidence is collected to corroborate this fact.

23. Therefore, we are inclined to set aside the order of the lower authorities and remand this issue i.e. Grounds No.1 to 2.4 back to the file of the AO to de novo decide on these issues impugning addition of Rs.2,14,39,000/- after giving opportunity to the assessee to cross examine Mr. Miglani and to collect evidences in the light of the above direction of ours. We would like to make it clear that any

observation of ours made above shall not influence in any manner the outcome of the adjudication The issues have to be dealt with on its own merits and nothing should be read to adversely affect the assessee. We order accordingly.”

6. Admittedly, the facts in the appeal under consideration are identical. Therefore, respectfully following the above decision of ITAT, we also set aside the orders of authorities below on this point and direct the Assessing Officer to readjudicate the issue in the light of the order of the ITAT in the above appeal.

7. In the result, the appeal of the assessee is deemed to be allowed for statistical purposes.

Decision pronounced in the open Court on 30.03.2016.

Sd/-
(BEENA A. PILLAI)
JUDICIAL MEMBER

Sd/-
(G.D. AGRAWAL)
VICE PRESIDENT

VK.

Copy forwarded to: -

1. Appellant : **M/s National Industrial Corporation Limited,
801-803, Ashok Bhawan,
93, Nehru Place, New Delhi – 110 019.**
2. Respondent : **Deputy Commissioner of Income Tax,
Central Circle-19, New Delhi.**
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar