

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F", NEW DELHI
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

	I.T.A. No. 1787/DEL/2014	
	A.Y. 2009-10	
AVINASH KUMAR SETIA B-33, SHIVALIK, MALVIYA NAGAR, NEW DELHI - 110 017 (PAN: ABBPS9057K)	VS.	DCIT, CENTRAL CIRCLE-17, NEW DELHI
(APPELLANT)		(RESPONDENT)

Assessee by : Sh. UN Marwah, FCA
Department by : Sh. Shravan Gotru, Sr. DR

Date of Hearing : 12-04-2016

Date of Order : 28-04-2016

ORDER

PER H.S. SIDHU : JM

This appeal by the Assessee is directed against the order of the Ld. Commissioner of Income Tax (Appeals)-II, New Delhi dated 14.1.2013 pertaining to assessment year 2009-10 on the following ground:-

“The ld. CIT(A) erred in fact and in law confirming the addition of Rs. 1,25,00,000/-, which is not only bad in law but also against the facts and circumstances of the case.”

2. The brief facts of the case are that the assessee filed his return of income on 4.10.2010 declaring income at Rs. 4,43,912/-. In this case, survey u/s. 133A was carried out on 20.10.2008 wherein the assessee made a voluntary

disclosure of additional income of Rs. 1,25,00,000/-, but the same was not declared by the assessee in his return. Accordingly, this case was taken up for scrutiny and AO issued notice u/s. 142(1)/143(2) alongwith questionnaire dated 25.10.2010 for fixing the case of the assessee for 1.11.2010. In response to the same, Authorised Representative of the assessee appeared from time to time and filed requisite information / documentary evidence. The AO summoned the assessee as to why this information was not declared in the return. The assessee in his statement has submitted that the return of income was filed on the basis of the books of accounts based on actual facts and figures. Assessee further stated that the part declaration was given to the Investigation Department under pressure. It was also stated by him that no incriminating documents were found during the course of survey and therefore, he retracted from his declaration at that time and also at the time of filing the return. The AO considered the reply filed by the assessee alongwith other documentary evidence and held that the assessee has not shown any valid reason for not including Rs. 1.25 crores which he has voluntarily surrendered in his return of income during the survey. The AO further held that the documents were found during survey and in response to the document, assessee has made a declaration after such a long time at the time of filing of the return the retraction made is an afterthought. As far as surrender made originally is concerned, it was not under duress or coercion particularly when the surrender was not made on the very day of survey itself. To presume pressure or coercion even after 2 months is against the common sense. It is possible that after having made surrender they had manipulated their accounts so as to negate the surrender which was voluntarily made. Finally, the AO added the amount of Rs. 1.25 crores as undisclosed income of the assessee, in addition to the income as returned by him and completed the assessment on 29.12.2011 u/s. 143(3)/147 of the I.T. Act.

3. Aggrieved with the action of the Assessing Officer, Assessee filed the Appeal before the Ld. CIT(A), who vide his impugned order dated 14.1.2013 has upheld the assessment order by dismissing the Appeal filed by the Assessee.

4. Against the Ld. CIT(A)'s order dated 14.1.2013, now the assessee is in Appeal before the Tribunal.

5. At the time of hearing, Sh. UN Marwah, FCA/Authorised Representative of the stated that the similar issue has been adjudicated and decided in favour of the assessee by the ITAT in the case of M/s IIBS Infonet (P) Ltd. vs. ACIT reported in 2016 (4) TMI 346 - ITAT, Delhi, vide order dated 8.3.2016 (in which the Judicial Member is the Author of the order) has held that the addition made by the AO on the basis of the statement recorded u/s. 133A of the I.T. Act, 1961 without bringing any corroborative material on record is not sustainable in the eyes of law. He further stated that the order dated 8.3.2016 the Bench has also held that the addition cannot be made on the basis of the statement recorded during the survey u/s. 133A of the I.T. Act in view of the various judicial decision wherein it has been held that the such statement does not have any evidentiary value especially the decision of the Hon'ble Madras High Court in the case of CIT vs. Kahder Khan Son (2008) 300 ITR 157 which has been upheld by the Hon'ble Supreme Court of India in the case CIT vs. Khader Khan Son reported in (2012) 25 taxman.com 413 (SC) and appeal filed by the Revenue was dismissed by holding that section 133A does not empower any ITO to examine any person on oath. In addition to these cases, he relied upon the following cases also:-

- Pullangode Rubber Produce Co. vs. State of Kerala (1973) 91 ITR 18 (SC)

- Ravinder Kumar vs. Deputy Commissioner of Income Tax (2008) 33 SOT 25 (Delhi High Court)
- TDI Marketing (P) Ltd. vs. ACIT (2008) 28 SOT 215 (Delhi High Court)
- Mahesh Ohri vs. ACIT (2013) 23 ITR 522 154
- CIT vs. P. Balasubramanian (2013) 33 taxmann.com 130 (Madras High Court)
- ITO vs. Surrender Kumar Jain ITA No. 3871/Del/2011
- Gajjam Chinna Yellappa vs. ITO (2015) 370 ITR 671 (T&AP) (HC)
- CIT vs. Uttam Chand Jain (2010) 320 ITR 554
- R. Arun vs. ITO, 2016 (3) TMI 321 ITAT, Chennai.

6. On the contrary, Ld. DR relied upon the orders of the authorities below and stated that the same may be upheld and the Appeal of the assessee may be dismissed accordingly.

7. We have heard both the parties and perused the records available with us, especially the orders passed by the revenue authorities alongwith the statement recorded u/s. 133A of the I.T. Act and the case law cited by the Ld. Counsel of the Assessee as well as CBDT Instruction No. 286/2/2006/IT/(Inv) dated 10.3.2003; Declaration dated 18.12.2008 made during the proceedings u/s. 133A of the I.T. Act of estimated income; Withdrawal dated 16.12.2010 of surrender / declaration made during survey operation conducted u/s. 133A of the I.T. Act, 1961 ; Affidavit filed during the assessment proceedings before the

AO. For the sake of convenience, we are reproducing the contents of Declaration; Withdrawal and the Affidavit filed by the assessee are as under:-

DECLARATION DATED 18.12.2008

“From: A vinaslt Kumar Setia

B-33, Shivalik, Malviya Nagar,

New Delhi

18th December, 2008

To,

Assistant Director of Income Tax (Investigation)

Unit - 1 (2)

NEW DELHI

REG: MR. A VINASH KUMAR SETIA, B-33, SHIV ALIK, MALVIYA

NAGAR, NEW DELHI-H0017

SUB: DECLARATION DURING PROCEEDING U/S 133-A OF THE

INCOME TAX ACT OF ESTIMATED INCOME

DATE OF SURVEY: 20TH OCTOBER, 2005/21st OCTOBER 2005

~

Respected Madam,

Kindly note that survey proceedings were carried out at my premises on 20-10-2008/21-10-2008 and certain records and documents were seized. I have been tendering the explanations/clarifications about various documents from time to time.

I hereby declare that I shall pay income tax on Estimated Income, over and above my Normal Income, of Rs. 1,25,00,000/- (Rupees One Crore Twenty Five Lacs Only) and pay income tax thereon in due course of time. This income - will be as per the impounded documents, impounded computers and/or impounded record. I his estimated Income shall be declared in my own individual case or any other associates concern or company in which I have interest.

This declaration may be treated as a declaration made in pursuance of proceedings under Section 133-A of the Income Tax Act, 1961.

This declaration is made voluntarily and to buy peace and avoid protracted litigation with the Income Tax Department with understanding that penalty U/s271(1) (c) the income Tax Act, as well as the prosecution proceedings shall not be initiated against me or any of my concern in which I have interest.

Thanking You,

Yours Faithfully,

SD/-

(AVINASH KUMAR SETIA)

WITHDRAWAL DATED 16.12.2010 OF DECLARATION DATED 18.12.2008

AVINASH KUMAR SETIA

C-142, G.F. , Sarvodaya Enclave,

NEW DELHI - 110 017.

To

ASSISSTANT COMMISSIONER OF

INCOME TAX, CENTRAL CIRCLE-17

NEW DELHI.

SIR,

RE:- IN THE MATTER OF SH A VINASH KUMAR SETIA WITHDRA WAL OF
SURRENDER DECLARATION MADE DURING SURVEY OPERATION
CONDUCTED U/S 133A OF THE INCOME TAX ACT 1961

=====

This is to inform you that during survey operation conducted u/s 133A of the Income Tax Act 1961, declaration was made vide letter dated 18/12/2008 making an surrender of Rs 1.25 crore in my Individual case as well as any other associate concern in which ihad Interest.

That the said declaration was made u/s 133(A) of the Income Tax Act ~1961. In this connection it is submitted that letter for declaration was given to Investigation Department under the pressure of Income Tax Authorities and to include additional estimated income in the return on the basis seized documents. This

letter was filed to remove the pressure of the Income Tax Authorities and it does not represent true and correct picture of the affairs. Further it is also submitted. that there was no incriminating documents seized/found during the course of suggesting the undisclosed income of Rs 1.25 crore in the hands of assessee. This fact is also proved from the seized documents and books of accounts regularly maintained by the assessee. Keeping this factual position into consideration and background, no such income is declared in the returns filed for A. Y 2009-10.

Further the assessment has to be made on the basis of actual income and not on the basis of hypothetical figure. The Income Tax return for the captioned assessment year was filed based on the regular books of accounts which are already seized by the department .accordingly facts and figures can be verified from the seized material including the books of accounts.

Further your kind attention is invited to instructions No. 286/2/2003/IT(INV) dated 10th March, 2003.issued by of India, Ministry of Finance and Company affairs, Department of Revenue, CBDT which is reproduced as under:-

"TO

ALL CHIEF COMMISSIONER OF INCOME TAX

(Cadre Control)

&

All Directors General of Income Tax.

SIR,

Subject: Confession of Additional income during search and seizure and survey operation - regarding

Subject:- Confession of Additional Income during search & seizure and Survey Operation-regarding.

Instances have come to notice of the Board where assessee have admitted that they have been forced to confess the undisclosed income during the course of the search & Seizure-and survey operations. Such confession, if not based upon credible evidence, are later retracted by the concerned assessee while filing return of income. In these circumstances, on confession during the course of search & seizure and survey operation do not serve any useful purpose. It is therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax department. Similarly, while recording the statement during the course of search & seizure and survey operation no attempt should be made to obtain confession as to the undisclosed income, Any action shall be viewed adversely.

Further in respect of pending assessment proceedings also, assessing officers should - upon the evidences/ material gathered during the course of search/ survey operations or thereafter while framing the relevant assessment orders.

Yours faithfully,

Sd/-

S.RMahapatra)

Under Secretary(Inv 11)

Further as informed earlier, that there was no incriminating documents seized/found during the course of suggesting the undisclosed income of Rs 1.25 crore and also no such incriminating documents has been pointed out by your goodself in the questionnaire issued by you to suggest that there was undisclosed income earned by the assessee during the captioned assessment year. It is submitted that as per instruction of CBDT on the captioned subject and also based on the various judgements, it is a well established precedence that in the absence of any evidence, no addition is required to be made for any adhoc declaration made by the assessee. And for this proposition of law we rely on the judgement :-

- b) Paul Mathew & Sons Vs CrT 263 ITR 101 (KER)*
- c) Sanjeev Kumar Pandhi Vs CIT 305 ITR 101(P&H)*
- d) Abhi Developers Vs ITa. 12 SOT 444 (Ahm)*

In view of the above facts as informed earlier , no incriminating documents seized/found during the course of suggesting the undisclosed income nor any such documents were confronted by the assessing officer which can result into an addition of additional income of Rs 1.25 crore.

Hence no such income was included and in view of the above facts, no Adverse inference may kindly be drawn in this regard.

Any other clarification if needed, the same shall be given at your convenience.

Sd/-

(Avinash Kumar Setia)

CONTENTS OF THE AFFIDAVIT

Before the Assessing Officer

Affidavit in the matter of assessment proceedings under Income Tax Act

Affidavit of Sh. Avinash Kumar Setia S/o Late Sh RC. Setia age 40 years R/o

C .. 142, Ground Floor, Sarvodaya Enclave, New Delhi -110 017.

I, the above named deponent, do solemnly affirm and state on oath as follows :-

1. *That I am assessed to tax in Central Circle -17, New Delhi under PAN:*

ABBPS9057K.

2. *That I was present in the premises when there was a survey operation (not a search and seizure operation) and therefore, the case is covered by section 133A and what is prohibited under section 133A(4) cannot be circumvented by resort to summons under section 131.*

3. *'The Evidentiary value of the statement recorded during a survey operation is unlike section 132(4) which treats the statements during search and seizure operation as evidence in any proceedings under the in Indian Income Tax Act. Section 133A, while authorizing recording of statement by the survey Officer, does not give the same status of "Evidence to such recorded statements". This have been pointed out in Paul Mathews & Sons VS. CIT (2003) 263 ITR 101. That it is therefore, open to the assessee to explain the statements recorded during the survey and bring out the following facts on record:*

a. *That there was no notice to me.*

B. *The statement does not indicate that whether it refers is to the limited*

companies, firms or my personal assessments.

Sd/-

Deponent

VERIFICATON

I, the above named deponent, hereby declare and verify that the contents of all the paragraphs above are true to my personal knowledge and is also based on legal advice received. And nothing material has been concealed and is false. So help me God.

SD/-

*Deponent**

7.1 We find considerable cogency in the Ld. AR of the assessee that the Tribunal vide order dated 8.3.2016 has dealt the similar issue and decided the same in favour of the assessee in the case of M/s IIBS Infonet (P) Ltd. vs. ACIT reported in 2016 (4) TMI 346 – ITAT, Delhi, (in which the Judicial Member is the Author of the order). For the sake of convenience, we are reproducing the relevant para no. 8 & 9 of the order dated 8.3.2016 (Supra) as under:-

“8. We have heard both the parties and perused the records, especially the orders of the revenue authorities, statement recorded u/s. 133A of the Act and the case laws cited by the Ld. Counsel of the assessee, as aforesaid as well as the CBDT’s Circular dated

10.3.2003. We find that in the present case an addition of Rs. 70 lacs was made by the AO on the basis of statement of Mr. Ajay Singhal at the time of survey recorded u/s. 133A of the I.T. Act. We find considerable cogency in the Ld. Counsel of the assessee's submissions that addition cannot be made on the basis of the statement recorded during the survey under section 133A of the Act, in view of the various judicial decisions wherein, it has been held that such statement does not have any evidentiary value, especially the decision of the Hon'ble Madras High Court in the case CIT vs. S. Khakder Khan son reported in {2008} 300 ITR 157 (Madras) wherein, it has been held that "Addition on the basis of statement recorded during survey under section 133A-Sect. 133A does not empower any IT Authority to examine any person on oath, hence, any such statement has no evidentiary value and any admission made during such statement cannot, by itself, be made the basis for addition" and the decision of the Hon'ble High Court of Jharkhand delivered in the case of CIT, Ranchi vs. Ravindra Kumar Jain reported in (2009) 33 SOT 251 (Delhi) wherein, it has been held that "addition made by the lower authorities merely on the basis of statement recorded during survey and thereafter, without bringing

any corroborative material on record is devoid any merits.” We also find force in the assessee’s counsel contention that in view of the CBDT’s Letter issued vide F.No. 286/2/2003-IT (Inv.) dated 10th March, 2003 the addition made by the AO and confirmed by the Ld. CIT(A) is not sustainable in the eyes of law. For the sake of clarity we are reproducing the contents of the CBDT’s letter dated 10.3.2003 as under:-

“F.No. 286/2/2003-IT (Inv)

*Government of India,
Ministry of Finance & Company Affairs,
Department of Revenue
Central Board of Direct Taxes,
Room No. 254, North Block,
New Delhi, the 10th march, 2003*

To

*All Chief Commissioners of Income tax (Cadre Contra)
&
All Directors General of Income Tax Inv.*

Sir,

Sub:- Confession of additional Income during the course of search & seizure and survey operation - regarding

Instances have come to the notice of the Board where assesseees have claimed that they have been forced to

confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assessee while filing returns of income. In these circumstances, on confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on' collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Departments. Similarly, while recording statement during the course of search it seizures and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.

Further, in respect of pending assessment proceedings also, assessing officers should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders

Yours faithfully,

Sd/-

(S. R. Mahapatra]

Under Secretary (Inv. II)

9. In the background of the aforesaid discussions and respectfully following the precedents of the Hon'ble High Courts, as aforesaid and in view of the CBDT's Letter dated 10.3.2003, as aforesaid, we are of the considered opinion that the addition made on the basis of the statement in the present case recorded u/s. 133A is not sustainable in the eyes of law, hence, we delete the addition of Rs. 70 lacs made by the AO and confirmed by the Ld. CIT(A) and allow the Appeal of the Assessee accordingly.

7.2 We also find that the decision of the Hon'ble Madras High Court in the case of CIT vs. Khader Khan Sons (2008) 300 ITR 157 has been confirmed by the Hon'ble Supreme Court and the Appeal of the Department has been dismissed reported in (2012) 25 taxmann.com 413 (SC).

8. In the background of the aforesaid discussions and respectfully following the precedents of the Hon'ble Supreme court, High Courts, ITAT, Delhi Bench decision dated 8.3.2016, as aforesaid and in view of the CBDT's Letter dated 10.3.2003, we are of the considered opinion that the addition made on the basis of the statement in the present case recorded u/s. 133A is not sustainable in the eyes of law, hence, we delete the addition of Rs. 1.25 crores made by the AO and confirmed by the Ld. CIT(A) and allow the Appeal of the Assessee accordingly.

9. In the result, the Appeal filed by the Assessee stands allowed.

Order pronounced in the Open Court on 28/04/2016.

Sd/-

[PRASHANT MAHARISHI]
ACCOUNTANT MEMBER

Sd/-

[H.S. SIDHU]
JUDICIAL MEMBER

Date 28/04/2016

"SRBHATNAGAR"

Copy forwarded to: -

1. Appellant -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY

By Order,

Assistant Registrar,
ITAT, Delhi Benches