

**IN THE INCOME TAX APPELLATE TRIBUNAL
AGRA BENCH, AGRA
BEFORE SHRI A.D. JAIN, JUDICIAL MEMBER AND
DR. MITHA LAL MEENA, ACCOUNTANT MEMBER**

ITA No. 357 /AGR/2015
Assessment Year: 2011-12

Suresh Chand Agarwal, 20-Kaveri Kunj, Kamla Nagar, Agra PAN: ABHPA 9742 K	Vs.	ACIT, Circle-4(1), Agra
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APPELLANT		RESPONDENT
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Assessee by:	Shri Pankaj Gargh, Avocate
Revenue by:	ShriInderjeet Singh, CIT DR

Date of hearing:	10/01/2018
Date of Pronouncement:	07/02/2018

ORDER

PER, DR. MITHA LAL MEENA, AM:

The appeal, by Revenue is directed against the order of the Commissioner of Income Tax, (Appeals)-II Agra, [herein after referred to as "the CIT(A)"], dated 19.03.2015 in respect of AY 2011-12 on the following grounds:

- "1. Because the Ld. CIT(A) has wrongly, illegally and arbitrarily confirmed the addition of Rs. 40 Lac made by the Assessing Officer only on the basis of statement of the assessee recorded during the course of survey in the absence of any adverse material to substantiate the addition.*
- 2. Because the Ld. C1T(A) has erred both in law and on facts in rejecting the appellant's submission and in ignoring the fact that there is no material whatsoever in the possession of the Assessing Officer to prove the addition of Rs. 40 Lac which is over and above*

the amount which has been surrendered by the assessee in his return of income.

- 3. Because in the revised return filed the assessee surrendered Rs. 1,10,00,000/- and breakup of the same on the basis of seized material was filed before Ld. CIT(A) and also before the Assessing Officer. Ld. CIT(A) has wrongly mentioned in the appellate order that the assessee failed to establish that the admission made in the statement at the time of survey was wrong by not giving a detailed computation of income from impounded document stated to be only of Rs. 1,10,00,000/-.*
 - 4. Because under the facts and circumstances of the case the addition of Rs. 40 Lac being wrong, arbitrary and bad in law deserves to be deleted.”*
2. The assessee has raised a common issue, being replicated into the four grounds of appeal, thereby objecting the action of the Ld. CIT(A)'s confirming the addition of Rs. 40 Lac, on the basis of statement of the assessee recorded during the course of survey, in the absence of adverse material to substantiate the addition.
3. The assessee is a colonizer and also works on contract. During the course of survey proceeding, various incriminating documents were found and impounded from the business premises of the assessee. On being confronted with these documents, the assessee admitted that it had not shown its complete income in the books of account. Considering this fact and on the basis of various incriminating documents found during survey, the assessee offered to pay tax on additional income of Rs.1,50,00,000/- for AY 2011-12 in the statement recorded during survey. However, later on the AO

noticed from the return of income that the assessee has shown additional income of Rs.1,10,00,000/- only. Therefore, the AO vide his letter dated 13.01.2014 required the assessee to show cause as to why the difference of income of Rs.40,00,000/- (Rs.1,50,00,000 - Rs.1,10,00,000) may not be treated as his additional income of the assessment year 2011-12 and added to the total income of the assessee. In the reply filed by the assessee he submitted before the Assessing Officer that he is a heart patient and had undergone heart surgery in the month of December 2013 and due to the surgery and to purchase peace in the life, he is surrendering additional income of Rs.40,00,000/- subject to the condition that the department will initiate any penalty proceedings against him. Accordingly, the Assessing Officer made addition of Rs.40,00,000/- to the returned income of the assessee.

4. The Id. CIT(A) observed that :

“.....the Id. AR has taken repeated adjournments but no calculation of undisclosed income of Rs.1,10,00,000/- declared in the return on the basis of examination of impounded document, has been filed and finally, a plea has been taken in hearing held on 18.03.2015 that similar conditional surrendered income was considered and addition made thereof was deleted by Hon'ble ITAT, Agra in case of the present assessee for AY 2009-10 and hence, for AY 2011-12 (the assessment year under consideration) also, such addition made on the basis of conditional surrendered income should be deleted. This plea of the Id. AR cannot be accepted because as I have already

discussed above that the Hon'ble ITAT, Agra has deleted the amount of Rs.14 lac in AY 2009-10 stating to be conditional surrendered income because in that assessment year, detailed calculation of income of Rs.36 lac out of total surrendered income of Rs.50 lac was filed and such calculation was also shown to the Hon'ble ITAT, Agra during the course of hearing of the appeal. In the present case under appeal for AY 2011-12, no such details of computation of income of Rs.1,10,00,000/- has been filed, Therefore, I could not examine the correctness of the amount of Rs.1,10,00,000/- declared in the return filed by the assessee as unrecorded income computed on the basis of impounded document. Coupled with this fact, I have also found that the assessee is wavering in his stand taken with respect to unrecorded income earned by him, first he has declared Rs.1,50,00,000/-, then he has retracted to Rs.1,10,00,000/- and again he has offered the balance amount of Rs.40 lac for taxation by putting condition for non-imposition of penalty u/s 271(1)(c). I have already discussed by relying on the decision of the Hon'ble Supreme Court in case of Mak Data (P) Ltd. Vs CIT-II (supra) that such conditional surrender has no sanction of law and once, an amount has been offered by the assessee for taxation, he cannot dispute that amount in appeal as it has been Allahabad High Court in case of Sterling Machine Tool vs. CIT (supra). Therefore, contrary to the facts of the case of the assessee for AY 2009-10, during the year under consideration, I have found that there is no basis for retraction of the surrendered amount from Rs.1,50,00,000/- to Rs. 1,10,000/-. Thereafter again, no basis has been given for offering the difference amount of Rs.40,00,000/- during the assessment proceeding for taxation but such offer made by putting up a condition of non imposition of penalty has been found to be not being as per the provisions are of the Income Tax Act because under the Income Tax Act, if any offer or surrender of income is made for taxation, such offer or surrender is accepted by the Assessing Officer without accepting any condition regarding non-imposition of penalty as the decision on imposition of penalty is to be taken as per law as provided under the Income Tax Act as held by the Hon'ble Supreme Court in the case of Mak Data (P) Ltd. Vs CIT-U (supra). As per law, such income surrendered by the assessee during the assessment proceedings is to be taxed as income of the assessee

(appellant) as he has failed to explain the basis for his retraction by not giving detailed calculation of income of Rs.1,10,00,000/- made on the basis of impounded document as it was done in AY 2009-10. While making retraction of the amount of income from Rs.1,50,00,000/- made during survey to Rs. 1,10,00,000/- shown in the return of income filed, the Ld. AR has referred to a decision of Hon'ble Allahabad High Court in the case of Dr. S.C. Gupta Vs. CIT reported in 248 ITR 782 in which, it has been held that it is a settled law that though an admission is an extremely important piece of evidence, it cannot be said to be conclusive and it is open to the person who has made to show that, it is not correct. I have considered this decision and I find that this decision is against the assessee because after referring to the above principle of surrender as held by the Hon'ble Supreme Court in Pullangode Rubber Produce Co. Ltd. Vs. State of Kerala (1973) 91 ITR 18 (SC), the Hon'ble Allahabad High Court has held that a statement made voluntarily by the assessee could form the basis of assessment and mere fact that the assessee retracted the statement, could not make the statement unacceptable. In this regard, it has also been clarified in this decision that the burden lay on the assessee to establish that the admission made in the statement at the time of survey was wrong and in fact, there was no additional income. The relevant part of this decision is reproduced as under for a ready reference -

"As regards the assessee contention that the statement having been retracted the assessing officer should have independently come to a conclusion that there was additional income as sought to be assessed and that there was no material to support that there was such income, this contention in our view is not correct. As held by the Supreme Court in Pullangode Rubber Produce Co. Ltd. Vs. State of Kerala (1973) 91 ITR 18 (SC) an admission is an extremely important piece of evidence thought, is not conclusive. Therefore a statement made voluntarily by the assessee retracted the statement could not make the statement unacceptable. The burden lay on the assessee to establish that the admission made in the statement at the time of survey was wrong and in fact there was no additional income. This burden

does not even seem to have been attempted to be discharged. Similarly, P.K. Palwankar Vs. CGT (1979) 117 ITR 768 (MP) and CIT Vs. Mrs. Doris S. Luiz (1974) 96 ITR 646 (Ker) on which also, Ld. Counsel for the assessee placed reliance are of no help to the assessee. The Tribunals order is concluded by findings of fact and in our view no question of law arises. The application are accordingly, rejected."

In the present case under appeal, since the assessee (appellant) has failed to establish that the admission made in the statement at the time of survey was wrong by not giving a detailed computation of his income from impounded document stated to be only Rs.1,10,00,000/- instead of Rs.1,50,00,000/- surrendered in the statement recorded during survey and he could also not prove that such statement was recorded under duress, by following the above decision of the Hon'ble Allahabad High Court, the total amount of surrendered income of Rs.1,50,00,000/- should be assessed in the hand of the assessee instead of Rs.1,10,00,000/- shown in the return of income. Therefore, I confirm the addition of Rs.40 lac and all the grounds taken in appeal disputing this addition are dismissed."

5. Ld. Counsel submitted that the assessee made surrender of income as per statement recorded, during the course of survey (APB, Pages 5 to 8), as follows:

AY 2009-10	Rs.50 lacs,
AY 2010-11	Rs.1.00 crore and
AY 2011-12	Rs.1.50 crore

6. The Id. Counsel further submitted that the assessee has declared in the return of income of Rs.36 lacs as against Rs. 50.00 lacs for AY 2009-10, Rs.1 crore for AY 2010-11 and Rs.1.10 crore

against 1.50 for AY 2011-12 against the surrendered income as per the statement recorded during the course of survey. He contended that even if the assessee has not filed any breakup even then the entire material was with the Assessing Officer. She could have verified the amount shown as additional income in the return filed with the seized material. Without verifying with the seized material, the Assessing Officer has made addition only on the basis of surrender being made during the course of survey which is legally wrong.

7. In support, he relied upon the order passed in his own case in ITA No. 191/Agr/2013 AY 2009-10, dated 31.07.2013 by ITAT Agra Bench, where it is observed that *“the reply of the assessee filed before the Assessing Officer at the assessment stage is furnished on record, in which the assessee explained each and every seized paper and for several documents, it was explained that the same do not relate to the assessee or that the profit margin was very lower. The detailed calculation submitted before the Assessing Officer was not subjected to any verification by the authorities below. Thus, the assessee on the basis of the impounded material during the course of survey has been able to show that admission made at the time of survey surrendering the amount of Rs.50 lacs was not correct and did not show correct state of facts. The figures/calculation shown by the*

assessee was based on factual figures, in which no mistakes have been pointed out by the authorities below as well as the by the Id. DR during the course of arguments. Therefore, in the facts and circumstances of the case, the addition of 14,00,000/- could not be made against the assessee on the basis of mere admission.”

8. We find that the assessee has surrendered Rs.1.50 Crore whereas in the return he has disclosed additional income of Rs. 1.10 Crore only. The question is to decide whether the difference of Rs. 40 lacs can be treated as additional income of the assessee in view of order of ITAT Agra, (Supra) in the assessee's own case.

9. The Id CIT(A) has discussed that the ITAT, Agra has deleted the amount of Rs.14 lac in AY 2009-10 stating to be conditional surrendered income because in that assessment year, detailed calculation of income of Rs.36 lac out of total surrendered income of Rs.50 lac was filed and such calculation was also shown to the ITAT, Agra during the course of hearing of the appeal; that in the present case under appeal for AY 2011-12, no such details of computation of income of Rs.1,10,00,000/- has been filed, and therefore, he could not examine the correctness of the amount of Rs.1,10,00,000/- declared in the return filed by the assessee as unrecorded income

computed on the basis of impounded document. Coupled with this fact, he has also found that the assessee is wavering in his stand taken with respect to unrecorded income earned by him, first he has declared Rs.1,50,00,000/-, then he has retracted to Rs.1,10,00,000/- and again he has offered the balance amount of Rs.40 lac for taxation by putting condition for non-imposition of penalty u/s 271(1)(c).

10. since the assessee has failed to establish that the admission made in the statement at the time of survey was wrong by not giving a detailed computation of his income from impounded document stated to be only Rs.1,10,00,000/- instead of Rs.1,50,00,000/- surrendered in the statement recorded during survey and he could also not prove that such statement was recorded under duress, by following the above decision of the Hon'ble Allahabad High Court, the total amount of surrendered income of Rs.1,50,00,000/- should be assessed in the hand of the assessee instead of Rs.1,10,00,000/- shown in the return of income. Therefore, the Ld. CIT(A) has confirmed the addition of Rs.40 lac and all the grounds taken in appeal disputing this addition are dismissed.

11. On the objection of the Id. DR as regards to non-filing of breakup of the additional income of Rs. 1.10 Crore and the finding of the Id CIT(A), the Id. Counsel submitted pleaded that in that case my case may kindly be sent back to the Assessing Officer for verification of the additional income shown from the seized material and further to file breakup of Rs. 1.10 Crore. as it was filed in A.Y. 2009-10. The Id. Counsel contended that similar was the position in A.Y. 2009-10 in which the Assessing Officer made the addition of Rs. 14 Lac being the balance amount of the surrender made during survey and as shown in the return filed. Hon'ble ITAT Agra Bench deleted the addition.

12. From the above, it emerges that in A.Y. 2009-10 breakup of the amount of Rs. 36 lacs have been filed during the course of assessment proceedings which was shown as additional income in the return filed whereas in the year under consideration the breakup of the amount of Rs. 1.10 Crore has not been filed according to the authorities below.

13. In view of the above, we remit this matter to the Assessing Officer to verify the surrender of income of Rs.1.50 crores as per the statement recorded during the course of survey with reference to

impounded material resulting into impugned addition of Rs.40.00 lacs, as observed and confirmed by Id. CIT(A). The assessee is required to furnish such details of computation of income of Rs.1,10,00,000/- so that the Assessing Officer could examine the correctness of the amount of Rs.1,10,00,000/- declared in the return filed by the assessee as unrecorded income computed on the basis of impounded document. The Assessing Officer should give sufficient opportunity of being heard to the assessee as per the principle of natural justice. No doubt, assessee shall cooperate in fresh proceeding before the Assessing Officer.

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

Order pronounced, in the open Court on 07/02/2018.

**Sd/-
(A. D. JAIN)
JUDICIAL MEMBER**

**Sd/-
(DR. MITHA LAL MEENA)
ACCOUNTANT MEMBER**

Dated: 07/02/2018

Aks

Copy forwarded to:

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

ASSISTANT REGISTRAR

		Date	
1.	Draft dictated (DNS)	22.01.2018	PS
2.	Draft placed before author	06.02.2018	PS
3.	Draft proposed & placed before the second member		JM/AM
4.	Draft discussed/approved by Second Member.		JM/AM
5.	Approved Draft comes to the Sr.PS/PS		PS/PS
6.	Kept for pronouncement on		PS
7.	File sent to the Bench Clerk		PS
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		