

**आयकर अपीलीय अधिकरण “ए” न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, PUNE**

**सुश्री सुषमा चावला, न्यायिक सदस्य, एवं श्री डी. करुणाकरा राव , लेखा सदस्य, के समक्ष।
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM**

आयकर अपील सं. / ITA Nos. 943 & 944/PUN/2015

निर्धारण वर्ष / Assessment Years 2008-09 & 2009-10

The Deputy Commissioner of Income Tax,
Central Circle-1,
Nashik.

.....अपीलार्थी / Appellant

बनाम / V/s.

Shri Anil Shantilal Gandhi,
502, Harekrishna Apartment,
Behind Central Point Hotel,
Near BSNL Office, Ramdaspath,
Nagpur-440 010.
PAN : AEFPG4257A

.....प्रत्यर्थी / Respondent

प्रत्याक्षेप सं. / CO. Nos. 33 & 39/PUN/2017

निर्धारण वर्ष / Assessment Years 2008-09 & 2009-10.

Shri Anil Shantilal Gandhi,
502, Harekrishna Appartment,
Behind Central Point Hotel,
Near BSNL Office, Ramdaspath,
Nagpur-440 010.
PAN : AEFPG4257A

..... प्रत्याक्षेपक/ Cross objector

बनाम / V/s.

The Deputy Commissioner of Income Tax,
Central Circle-1,
Nashik.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Pramod Shingte

Respondent by : Shri Ajay Modi.

सुनवाई की तारीख / Date of Hearing : 15.03.2018	घोषणा की तारीख / Date of Pronouncement : 28.03.2018
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आदेश / ORDER**PER SUSHMA CHOWLA, JM**

These two appeals filed by the Revenue are against the consolidated order of Commissioner of Income Tax (Appeals)-12, Pune dated 13.03.2015 relating to assessment years 2008-09 & 2009-10 against order passed under section 143(3) r.w.s. 153A of the Income Tax Act, 1961 (in short 'the Act'). The Assessee has filed cross objections with regard to the appeals filed by the Revenue.

2. The Revenue has raised following grounds of appeal in ITA No.943/PUN/2015:-

"1. On the facts and in the circumstances of the case and in law, whether the Ld. CIT(A) erred in deleting the addition of Rs.6,30,000/- , held to be the unexplained income of the assessee, without appreciating the fact that the assessee could not substantiate his claim that the value mentioned in the seized paper is merely current valuation of a duly accounted property and that during the year under consideration, the assessee had admitted to have earned undisclosed income of Rs. 10.28 lakhs, which has been offered to tax?"

2. On the facts and in the circumstances of the case and in law, whether the Ld CIT(A) has erred in deleting the addition of Rs.2,91,28,500/- , held to be unexplained income of the assessee, without appreciating the fact that the contention of the assessee that the pertinent notings on the seized material were merely scribbling or purchase related, has been properly rebutted in the assessment order, before reaching to the conclusion that it represented the assessee's undisclosed income?"

3. On the facts and in the circumstances of the case and in law, whether the Ld.CIT(A) has erred in failing to confirm the peak of the amounts mentioned in the seized documents?"

4. The appellant craves, leaves to add, alter, modify, delete or amend any of the grounds, as per the circumstances of the case.

5. The appellant prays leave to adduce such further evidence to substantiate its case, as the occasion may demand."

3. The assessee has raised following grounds in CO. No. 33/PUN/2017:

“ 1. On the facts and circumstances of the case, the learned CIT(A)-12, Pune had rightly deleted an addition of Rs.6,30,000/- made to undisclosed income by Assessing Officer on the basis Page No. 77 of document No. Annexure – B/3. The said represents estimated Market Value of the flat as on 12.06.2007, which was purchased by assessee by sale deed registered on 28.11.1997 at a total cost of Rs.2,84,700/-, which is duly recorded in the regular books of assessee. The valuation of the flat was made for the purpose of net worth of assessee for seeking admission of his son Rajan in U.S. University.

2. On the facts and circumstances of the case and in absence of any corroborative evidence relating to money lending activities, the learned CIT(A)-12, Pune had rightly deleted the addition of Rs.2,91,28,500/- made to the undisclosed income by Assessing Officer on the basis of some scribbling / rough noting on Page Nos. 1 to 9 of documents marked Annexure – B/1.

3. The assessee prays that the deletion of Rs.6,30,000/- and Rs.2,91,28,500/- made by learned CIT(A)-12, Pune may kindly be sustained.

4. The assessee craves leave to add, amend, alter or vary any ground at the time of hearing.”

4. Out of this bunch of four appeals, two appeals are filed by Revenue and assessee has filed cross objections against the appeals filed by the Revenue. Since issues involved in the said appeals are same, we proceed to decide the present appeals by this consolidated order for the sake of convenience. However, reference is being made to the facts in ITA No. 943/PUN/2015.

5. The Revenue is aggrieved by the order of Commissioner of Income Tax (Appeals) in deleting the addition of Rs.6,30,000/- made by the Assessing Officer holding it to be unexplained income of the assessee. Further, vide ground No. 2 in appeal; the Revenue is aggrieved by the order of CIT(A) in deleting the addition of Rs.2,91,28,500/- made on the basis of noting on the seized materials. Further, vide ground No. 3 in appeal, Revenue has raised issue against the order of Commissioner of Income Tax (Appeals) in failing to confirm the peak of the amount mentioned in the seized documents.

6. In assessment year 2009-10, the Revenue has raised issue against deletion of similar addition of Rs.10,00,000/- and in not confirming peak of the amount found mentioned in the noting. The cross objections filed by the assessee for the respective assessment years are in support of the order of Commissioner of Income Tax (Appeals).

7. Briefly stated in the facts of the case, search and seizure action u/s. 132 of the Act was conducted in the Ashoka Group of cases on 20.04.2010. The assessee was one of the Directors of Ashoka Group of Companies. The assessee had filed original return of income u/s. 139 of the Act declaring total income of Rs. 24,27,340/-. Notice u/s. 153A of the Act was issued to the assessee who in response, thereto, filed return of income declaring total income of Rs. 32,55,690/- including income declared u/s. 132(4) of the Act at Rs.10,28,354/-. During the course of search and seizure, page No. 77 & 78 of Annexure B/3 of the seized documents were found and it contained financial statements containing the details of salary, immovable property etc. of the assessee and his family members. On page No. 78, the details of immovable property of Rs. 6,30,000/- were given. The assessee was asked to explain the source of the said investments. In reply, the assessee submitted that all the investments/income mentioned on the said pages were duly recorded in his and family member's books of accounts. The Assessing Officer noted that assessee failed to furnish any supporting evidence in this regard. Thus, investment of Rs.6,30,000/- was treated as unexplained investment of the assessee and was added to the assessee's income.

8. Further, during the course of search action, a diary marked Annexure B/1 was seized, in which, various notings were found to be made on pages 1 to 9. The said notings were confronted to the assessee and he was asked to explain the same. The notings were reproduced at Pages 3 and 4 of the assessment order. In reply, the assessee pointed out that these notings were rough scribbling and had no relation with income or expenses. He was Divisional Head for the Nagpur Division of Ashoka Buildcon Ltd. He pointed that some scribbling were made from time to time. But the notings were only rough notings and had no evidentiary value. The assessee pleaded these were dumb documents. The Assessing Officer vide Para 6.3 held that the submissions made by assessee were not acceptable for the following reasons:

“a. The notings are not on any scrap of paper, but are made in a proper diary and on separate pages in a neat manner. Although subsequently some pencil scratches are made across the notings to make them appear as scribbling.

b. The entries on each page open with initials and a sum and thereafter the monthly details are noted below the same.

c. The notings contain month, year, amounts, but no details of any product or material. Therefore, the said notings cannot be pertaining to any supplier, sub-contractor or purchases as is contended by the assessee.

d. The names like Ravi, Mutha, Balu, etc. are appearing in the said notings. The assessee has not submitted any details in respect of the said names. The said names are sufficient links to help the assessee remember the transactions, if it had been pertaining to some rough notings of viability, purchase or sub-contract. But the assessee has not mentioned anything in respect of the said names.

e. The assessee has admitted the diary to have been used and maintained by himself. The notings are made by him.

f. Admittedly, the assessee was Divisional Head of Nagpur. Still, for so called scribbling, no notepad or scribble pad has been used by him. Instead he has claimed to have used a small conspicuous diary making the notings in codes.

g. The dates appearing in the notings are from July 2007 to June 2008. No scribble pad is maintained for such a long period.”

9. After verification of the various entries and names appearing against the entries, the Assessing Officer made reverse calculation and worked out that amount mentioned were interest amount and in cash. It was also clear from reverse calculation that amounts were loan amount. The Assessing Officer alleged that notings were made in code system. Since the transactions were not recorded regularly in the books of account, the Assessing Officer held the said notings to be details of money lending activities of the assessee. The income from the money lending activity was computed as per details under para 6.6 of assessment order at Rs.2,91,28,500/- and the same was added to the income of assessee.

10. Before CIT(A), assessee pointed out that from the face of page No. 77 under the head immovable property, it was clearly mentioned as valuation of Flat No. 302 in Sushil Bhawan, Balraj Marg, Dhantoli, Nagpur. The assessee explained that the valuation of Rs.6,30,000/- and the statement referred at pages 77/78 of Annexure B/3 were made for securing admission of assessee's son in the University of Texas. It was

explained that flat was purchased on 4th September, 1996 for total cost of Rs. 2,84,700/-. The said investment was reflected in the Balance Sheet submitted to the Department. The said submissions of the assessee were forwarded to the Assessing Officer to submit remand report. The Assessing Officer vide remand report dated 23.02.2015 which is reproduced under Para 2.1.2 at page 5 of the appellate order admitted that seized page No.77 of the Annexure B/3 shows that flat to be valued at Rs. 6,30,000/-. The assessee was asked to explain the source. The Assessing Officer was of the view that assessee had purchased the said property at Rs.6,30,000/- as against sale consideration shown at Rs.2,65,000/- and balance amount of Rs. 3,65,000/- was the undisclosed income of the assessee.

11. The CIT(A) observed that the assessee had duly disclosed the flat in his return of income and hence, investment made in the flat was not unaccounted as stated by the Assessing Officer. The Assessing Officer had mixed up the concept of the 'cost' with the 'market value' by making addition of the 'market value' of the flat. The CIT(A) further held that the year of the investment in the flat was 1996 and hence, addition could not be made in A.Y.2008-09 which was not the year of investment.

12. With regard to the second addition of Rs.2,91,28,500/- which was made by decoding entries at pages No. 1 to 9 of the diary seized during the course of search on the premise that the assessee was engaged in money lending business. The assessee filed the submissions before the CIT(A) which are reproduced in Para 2.2.4 at page 11 and 12 of the appellate order. The assessee claimed by way of alternate contention that if at all any addition was to be confirmed with respect to the notings in seized diary, seized from residence of assessee, the same had to be made on the basis of peak calculation. The assessee pleaded that the addition could at the most to be of Rs. 1,29,00,000/- for the alleged investment in money lending business, Rs.9,28,500/- for interest in A.Y.2008-09, assuming the decoding of the Assessing Officer was correct.

The assessee however, objected to the decoding made by the Assessing Officer. The assessee was of the view that in case, addition is made on account of relevant money lending business then telescoping benefit of the same should be allowed against various investments made by assessee totaling Rs.1,15,28,474/-.

13. In the remand report, the Assessing Officer contended that assessee had not denied ownership of seized diary or the facts that notings in this Annexure B/1 were made by him. The assessee on the other hand had failed to describe nothings pertaining to the year 2007 and 2008. The contention of the assessee that neither any promissory note nor any signed cheque or any pawned valuable with the tag of name of any person was found during the course of search. The Assessing Officer found no merit in the said plea of the assessee and was of the view that additions needs to be made in entirety. The assessee filed rejoinder and objected to the findings of the Assessing Officer in the remand report. The CIT(A) observed that sufficient evidence was not available with the Assessing Officer to make addition. The Assessing Officer's conclusion to the assessee having derived income from it's money lending business as per CIT(A) was far-fetched considering the available evidence. In the absence of any information or any other evidence to conclude that the assessee was carrying money lending business, the CIT(A) held that there was no merit in the interpretation of the Assessing Officer. The scanned pages of the diary are reproduced at Pages No. 18 to 21 of the appellate order. On perusal of the same, CIT(A) observed that the Assessing Officer had got the theory of onus of proof and burden of proof wrongly. Where the assessee had already stated notings were either scribbling or related to purchase etc., CIT(A) held that Assessing Officer had to prove that how the assessee was incorrect, which the assessee as per CIT(A), had done to some extent. However, the burden of proof was upon the Assessing Officer to prove that the contents in the seized diary represent the assessee's income and it was not for the assessee to prove that the entries in the seized paper do not represent his income. Since there was no other evidence that the assessee carried

on money lending activity, hence , there was no merit in the aforesaid addition made by Assessing Officer of Rs. 2,91,28,500/-.

14. The Revenue is in appeal before the Tribunal against the deletion of both the additions.

15. The Ld. DR for the Revenue pointed out that assessee was one of the Directors in Ashoka Buildcon Ltd. During the course of search and seizure on 20.04.2010, pocket size diary was found. Referring to the first issue of valuation of flat, Ld. DR pointed out that flat was purchased in the year 1996 and valuation of the flat at Rs.6,30,000/- was mentioned on one page. In this regard, he placed reliance on the order of Assessing Officer. In respect of second issue, the Ld. DR for the Revenue pointed out that even the CIT (A) has not doubted the ownership of the Diary. He further stated that these were not rough notings but entries were mentioned in meticulous manner and on decoding figures matched i.e between the entries of interest and loan amount. The Ld. DR for the Revenue placed reliance on the ratio laid down by the Hon'ble Bombay High Court in the case of Shri Surendra M. Khandar Vs. ACIT and others, ITA No. 715 of 2000 wherein, the assessee did not deny the documents nor rebutted the presumption and the nothing were added as income of the assessee therein. The Ld. DR referring to the ratio laid down in the case of Shri Surendra M. Khandar Vs. ACIT and others (supra.) wherein during the course of search, documents were found which made it clear that the document in fact was the document for return of money already advanced, the Hon'ble High Court held that considering documentary evidences, though presumption were rebuttable, but in the instant case, the assessee had not discharged the burden and hence, amount was added in the hands of assessee. As per section 132(4)(a) of the Act the presumption is against the assessee but as held by Hon'ble Bombay High Court, the said presumption is rebuttable presumption. In any case, in order to make addition in the hands of assessee, evidence found should be complete; otherwise, there is no merit in making addition in the hands of the assessee.

16. The Ld. AR for the assessee in reply stated that assessee was Divisional Head of Ashoka Group of Companies. During the course of recording statement u/s. 132(4) of the Act, seized papers were confronted; assessee stated that he did not remember the same. But on later date, it was explained that these rough scribbling of estimated or allied notes, had no relation with the income or expenses. It was clearly stated that these were not debts. The Ld. AR for the assessee pointed out that the figures were not prefixed with any currency. The scribblings do not form any books of accounts. Before CIT(A), the plea was made without prejudice and the same not be admitted at all. Referring to the order of CIT(A), he pointed out that in the absence of any other corroborative evidences, the addition was deleted by CIT(A). In the absence of any allegation of money lending activity, decoding of Assessing Officer was a presumption which had no basis. He further submitted that the assessee during the course of search had declared additional income of Rs.90,00,000/- which was offered in the return of income. He pointed out that cross objections filed by assessee were in support of order of CIT(A).

17. We have heard the rival contentions and perused the record. In the facts of the present case, search and seizure action u/s.132 of the Act was conducted on the Ashoka Group of cases on 20.04.2010. The assessee was one of the Directors of Ashoka Group . The assessee during the course of search offered additional income of Rs. 90,00,000/- which was declared in the respective years. During the year under consideration, the assessee had offered additional income of Rs.10,28,354/- over and above income originally declared in the return of income filed. The issue which arises in the present appeal is in respect of documents found and seized during the course of search. Document No. 77 and 78 of Annexure B/3 were found from the possession of assessee. At page No. 77 as explained by assessee was declaration of value of the property at Rs. 6,30,000/-. The said property was purchased by assessee in the year 1996. The assessee explained that the figure of Rs. 6,30,000 depicted value of the property as on

date, but not the cost. The cost of the property was declared in the balance sheet filed by assessee. The Assessing Officer made addition on the presumption that the said sum of Rs.6,30,000/- was the cost of flat. The CIT(A) deleted the same. We find merit in the order of CIT(A) in deleting the aforesaid addition. The said property was purchased in the year 1996 and in case there was extra investment over and above the declared investment then addition, if any, had to be made in the year of investment, not in the year under appeal. In the absence of any valid document found proposing the said investment in the year under appeal, there was no merit in making aforesaid addition in the hands of assessee. Accordingly, ground No. 1 raised by Revenue is dismissed.

18. Coming to the second issue raised in the present appeal i.e. in relation to the diary found from possession of the assessee. The diary had certain scribbling which were maintained as per Assessing Officer meticulously. A perusal of the scanned pages in the appellate order reflect that the assessee had mentioned names in short form and as against figure written i.e. 10.00 in one case date 30th Jun 08 was mentioned. On the next page No. 3 of diary, name of 'S. M' is mentioned and figures 75.00 and 25.00 are also mentioned. On page No. 4 of diary, name of 'G.K' is mentioned and figure mentioned as 100-8.9.08 and 25-22.12.07. Similar notings were also made on the other pages also. The Assessing Officer decoded the same by holding the said figures in lakhs and worked out the loan amount. The Assessing Officer computed the income from the money lending business of assessee including loan and the interest at Rs.2,91,28,500/-. The case of the assessee before Authorities below was that the assessee was not engaged in money lending business and did not have any debts. The assessee also explained that these jottings were during the course of carrying on his duties as part of Ashoka group of Company. The assessee also pleaded that no other incriminating documents like promissory note or signed cheque were found which would establish the case of Department. Under section 132(9) of the Act, it is provided that the persons from whose custody documents/books of accounts were found then presumption is that the said books of accounts or documents belongs to the said persons. Then the onus is

upon the said person to explain the contents of the said documents. In the present case, the assessee's contention is that the same were rough scribbles. A perusal of scanned pages reveals that there were some names in short form and code figures were mentioned. However, there was no clarity as to the names of the persons or the figures or the purpose. In the absence of the same, there is no merit in the exercise carried out by the Assessing Officer in this regard, in so called decoded loan amount and the interest figure. A perusal of the scanned pages of diary reveals that no exact figure has been mentioned. But the Assessing Officer decoded interest on the same which was without any basis. Further, no other incriminating document was found to establish the case of money lending. At best, the same was dumb document. In the totality of the facts and circumstances, we find no merit in the exercise carried out by the Assessing Officer. Upholding the order of CIT(A), ground No. 1 to 3 raised by the Revenue are dismissed and the cross objections filed by assessee in support of the order of CIT(A) are also dismissed.

19. The facts and issues raised in ITA No.944/PUN/2015 are similar to facts and issues raised in ITA No.943/PUN/2015 and accordingly, our decision in ITA No. 943/PUN/2015 would apply *mutatis-mutandis* to ITA No.944/PUN/2015. Cross objections in CO. No. 33 & 39/PUN/2017 are dismissed.

20. In the result, appeals of the Revenue and cross objections of the assessee are dismissed.

Order pronounced on this 28th day of March, 2018.

Sd/-
(D. KARUNAKARA RAO)
लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य/JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 28th March, 2018
SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-12, Pune.
4. The CIT(Central), Nagpur.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

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आदेशानुसार / BY ORDER,

निजी सचिव /Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.