आयकर अपीलीय अधिकरण, पुणे न्यायपीठ "ए" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

श्री डी. करुणाकरा राव , लेखा सदस्य
एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

BEFORE SHRI D.KARUNAKARA RAO, AM
AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA Nos. 680 to 682/PUN/2015
निर्धारण वर्ष / Assessment Years : 2008-09 to 2010-11

DCIT, Central Circle-2(1),
Pune .... अपीलार्थी/Appellant

Vs.

Shri Shivaji Bhagwanrao Jadhav,
Row House No.79/80,
Himali Co-op. Housing Society,
Erandwane, Pune – 411 004
PAN : AAKPJ7226M .... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No. 699/PUN/2015
निर्धारण वर्ष / Assessment Year : 2010-11

Shri Shivaji Bhagwanrao Jadhav,
Row House No.79/80,
Himali Co-op. Housing Society,
Erandwane, Pune – 411 004
PAN : AAKPJ7226M .... अपीलार्थी/Appellant

Vs.

DCIT, Central Circle-2(1),
Pune .... प्रत्यर्थी / Respondent

C.O.No.10/PUN/2018
(Arising out of ITA No.680/PUN/2015)
A.Y. 2008-09

Shri Shivaji Bhagwanrao Jadhav,
Row House No.79/80,
Himali Co-op. Housing Society,
Erandwane, Pune – 411 004
PAN : AAKPJ7226M .... Cross Objector

Vs.

DCIT, Central Circle-2(1),
Pune .... Appellant in the appeal

Assessee by : Shri Kishor Phadke & Shri Vikas Agarwal
Revenue by : Shri Achal Sharma

सुनवाई की तारीख / Date of Hearing : 19.04.2018		घोषणा की तारीख / Date of Pronouncement: 25.04.2018

आदेश / ORDER

PER D. KARUNAKARA RAO, AM :

There are 5 appeals under consideration involving assessment years 2008-09, 2009-10 and 2010-11. The appeal ITA No.680/PUN/2015 filed by the Revenue and C.O.No.10/PUN/2018 filed by the assessee are the appeals pertaining to A.Y. 2008-09 raising a legal issue relating to the validity of making additions without having incriminating material in a case of unabated assessment. ITA No.681/PUN/2015 is filed by the Revenue for the A.Y. 2009-10. There is neither a Cross Objection nor cross appeal filed by the assessee for this assessment year. ITA No.682/PUN/2015 filed by the Revenue and ITA No.699/PUN/2015 filed by the assessee are the cross appeals for the A.Y. 2010-11.

Summarising the issues for all the 3 assessment years assessee filed a chart giving appeal-wise/assessment year-issues and the said chart is extracted here as under :

Mr. Shivaji B. Jadhav – summary of grounds of appeal

I.T. Department's Grounds	*A.Y. 2008-09 ITA No.680*	*A.Y. 2009-10 ITA No.681*	*A.Y. 2010-11 ITA No.682*
CIT(A) not justified in adopting Municipal Tax value for taxing Income from House property	*5,35,641*	*6,64,082*	*6,40,419*
CIT(A) not justified in deleting addition on account of profits earned from sale of land at GEORAI without appreciating that the said transaction was an adventure in nature of trade	*5,43,85,990*		
Assessee's Grounds			*A.Y.2010-11 ITA No.699*
No addition for Adhoc declaration made during statement recorded during search proceeding, which was subsequently retracted and no any corresponding material found during search			

2. We shall take up the assessment year-wise issues in the following paragraphs. First, we shall take up the Cross Objection with a legal issue raised by the assessee and then the appeal by the Revenue for the A.Y. 2008-09.

C.O.No.10/PUN/2018 – A.Y. 2008-09 (By Assessee)

3. **Condonation of delay of 312 days :** Before us, at the outset, Ld. Counsel for the assessee brought our attention to the CO and submitted that the same is filed with the delay of 312 days and submitted that the delay is due to a reasonable cause and the details are provided in the affidavit dated 14-02-2018. Bringing our attention to the said affidavit, Ld. Counsel brought our attention to the relevant paras which are extracted as under :

> *"2. Against the order of the Ld. AO, I preferred appeal before the Ld.CIT(A)-12, Pune.*
>
> *3. One of the ground raised before the Ld.CIT(A)-12, Pune; pertained to jurisdiction assumed by the Ld. AO u/s.153A of the ITA, 1961; though no incriminating material was found w.r.t. additions made.*
>
> *4. The Ld.CIT(A)-12, Pune while deciding the appeal dismissed the ground w.r.t. incriminating material but allowed the appeal by considering the merits of the case.*
>
> *5. As such I did not prefer further appeal as the issue was decided in my favour. However, aggrieved with the order of the Ld.CIT(A)-12, Pune, the Income Tax Department preferred appeal before the Honourable ITAT, Pune Bench.*
>
> *6. While preparing for the hearing scheduled on 12-02-2018, it was realized that Cross Objections ought to have been filed against the appeal preferred by the Income Tax Department.*
>
> *7. As such assessee is now filing the Cross Objection after realizing the same.*
>
> *8. However, in all this process, the stipulated time of filing of cross-objection was missed out, leading to delay of 308 days (sic) in filing the cross-objection. The said delay is totally unintentional and may please be condoned."*

4. On considering the above, we find there exists a reasonable cause and therefore the delay is condoned and the Cross Objection is admitted for adjudication.

5. Cross Objections raised by the assessee are extracted as under :

> *"1. The Ld.CIT(A)-12, Pune erred in law and on facts in not appreciating that addition made w.r.t. of Georai Land is without any incriminating material found during the course of search on 08-09-2010. The Ld. IT Authorities ought to have appreciated that the transaction of sale of Georai Land was duly reflected in the books of accounts, financial statements etc. and was available before the Ld. AO.*
>
> *2. The Ld.CIT(A)-2, Pune erred in law and on facts in not appreciating that addition made w.r.t. deemed income from let out properties is without any incriminating material found during the course of search on 08-09-2010.*
>
> *3. Assessee craves leave to add/modify/alter/delete all/any of the grounds of the grounds of cross objection."*

6. Brief facts of the case for the year includes that the assessee is an individual and is engaged in execution of Irrigation Contracts and generation of energy from windmills. Assessee filed the return of income declaring total income of Rs.25,86,730/- including agricultural income. There was search and seizure action u/s.132 of the Act related to Shraddha group of cases on 08-09-2010. Assessee disclosed Rs.10.99 crores on account of on-money payments in purchase of lands and suppression of closing stock etc. Assessee filed the return of income in response to notice u/s.153A of the Act. AO determined the assessed income at Rs.5,49,21,631/- which includes deemed income of Rs.5,35,041/- on account of let out of properties.

7. During the First Appellate proceedings for the A.Y. 2008-09, CIT(A) discussed both the issues of capital gains on sale of Gevrai land as well as income on rental properties. CIT(A) held that the addition on account of Gevrai land is not sustainable and directed the AO to accept

the claim made by the assessee. In effect, the Revenue's allegation that the said sale of land constitutes an Adventure in the nature of trade stands dismissed. Regarding the deemed income on rental properties, CIT(A) did not approve the Revenue's stand of estimating the rental income of the properties @7.5% of the value of the property He directed the AO to adopt the rental value as per the Municipal Tax.

8. Aggrieved with the same, Revenue is in appeal vide ITA No.680/PUN/2015. In this regard, assessee raised the above Cross Objection and mentioned that the addition made by the AO is unsustainable in law as this is a case of non-abated assessment and therefore, the additions if any have to be restricted to the incriminating material gathered by the Revenue in the search and seizure action.

9. **Non-abated Assessment :** Elaborating the facts on the above, Ld. Counsel submitted that assessee filed the return originally u/s.139(1) of the Act on 31-07-2008. Considering the same, due date expiry for issue of notice u/s.143(2) of the Act is 30-09-2009. However, the Department never issued any such notice. There was search and seizure action in this case on 08-09-2010 and the notice u/s.153A of the Act calling for return of income was issued on 11-08-2011. Considering the chronology of events mentioned above, it is the case of the assessee that the return filed by the assessee on 31-07-2008 constituted a completed assessment/non-abated assessment. Relying on various decisions in this regard, Ld. Counsel for the assessee submitted that the additions if any have to be made in the assessment in a case of non-abated assessment has to be confined to the incriminating information/documents gathered by the Department in the search and seizure action from any of such information gathered by the AO in the post search investigations. Bringing our attention to the nature of

additions made by the AO in the assessment made u/s.153A of the Act, Ld. Counsel submitted that the AO made couple of additions on account of (1) adopting Municipal Tax value for income from House Property and (2) profits earned on sale of Gevrai lands. Mentioning that the addition on account of income from House Property is undoubtedly without any incriminating papers, Ld. Counsel submitted that the second addition on account of Geverai lands refers to an agreement to sale, a copy of which is placed at pages 114 to 116 of paper book along with English Translation. He fairly mentioned that the said documents is seized from the premises of the assessee and submitted that the said paper is not incriminating one from any point of view, i.e., ownership, value, schedule of payments. Further, bringing our attention to the entries in the balance sheet of earlier years, Ld. Counsel demonstrated that this particular land is accounted for in the books of account/financial statements of the assessee. Pages 113A to 113F of the paper book are relevant. Assessee also demonstrated the fact that the lands were acquired by the assessee and they belong to him before they were sold for earning the gains. The fact that these lands were accounted in the books of account and the same constitutes accounted transactions and the said agreement to sale does not come in the definition of incriminating material/documents. From this point of view, the said agreement to sale (the said seized document) did not constitute an incriminating material for the AO to assume jurisdiction and make addition in a completed assessment, like the present one.

10. Ld. DR for the Revenue relied heavily on the order of the AO and submitted that the case of the AO is that the sale of land constitutes an Adventure in the nature of trade. He also mentioned that the said agreement was seized by the Revenue during search & seizure action and therefore, AO is justified in making addition on this account.

11. We heard both the parties on this legal issue of validity of making addition based on the seized paper if it constitutes an incriminating material or otherwise. Regarding the Gevrai lands in question, we find in the earlier assessment years, relevant transactions on this land acquisition and sale are found duly accounted in the books of account/financial statements. This finding of ours is confirmed by the entries in the balance sheet mentioned above (page 113A of the paper book). Regarding the sale transaction, it is also evident that the amounts received by the assessee in response to proposed sale were also equally accounted in the books of account (page 113F of the paper book) where name of Mr. Ajay Shivajirao Jadhav is found has received the amount of Rs.2.90 crores against sale of Aurangabad Land (Gevrai Land) Mr. Amit Shivajirao Jadhav also received the equal amount. It is also an undisputed fact that other payments received by the assessee are found accounted in the books of account. It is also not the case of the Revenue that the assessee received on-money payments and there is evidence to support the same. From this point of view, it is an undisputed fact that, in principle, the said agreement to sale seized by the Department during the course of search & seizure action is an accounted transaction and therefore it is not an incriminating document for the AO to rely on for making additions of any kind in the search assessment, like the present one. In our view, it is settled legal proposition of law that the additions if any have to be allowed to be made in the non-abated assessment only based on incriminating material and the same gets strength in view of the judgments of jurisdictional High Court in the case of CIT Vs. Continental Warehousing Corporation 374 ITR 645 (Bom.), CIT Vs. Gurinder Singh Bawa 79 taxmann.com 398 and CIT v. Murli Agro Products Ltd. 49

taxmann.com 172. Therefore, in our view, the objection raised by the assessee in the appeal is allowed.

12. In the result, the Cross Objection of the assessee is allowed.

ITA No.680/PUN/2015 – A.Y. 2008-09 (By Revenue)

13. Revenue raised the following grounds :

> *"1. On the facts and circumstances of the case, the Ld. CIT(A) was not justified in deleting the addition made by the Assessing Officer on account of business profits on sale of land in A.Y. 2008-09 by holding the same as long term capital gain to be taxed in A.Y. 2011-12 without appreciating the fact that the sale transaction was actually an adventure in the nature of trade as against the capital gain declared by the applicant in the later year.*
>
> *2. On the facts and circumstances of the case, the Ld. CIT(A) was not justified in deleting the addition made by the A.O. on account of income from let out properties without appreciating that municipal value does not represent the fair rent which a property can fetch if let out. It is computed very mechanically by the corporation and is not revised periodically.*
>
> *3. The order of Ld. CIT(A) may be vacated and that of the Assessing Officer be restored.*
>
> *4. The appellant crave leave to add, alter, amend, and modify any of the above grounds of appeal."*

From the above, it is evident that the Revenue raised couple of issues, i.e. (1) adopting Municipal Tax value for income from House Property and (2) profits earned on sale of Gevrai lands. These additions are emanating from the assessment made by the AO u/s.143(3) r.w.s. 153A of the Act.

14. As held by us while adjudicating Cross Objection No.10/PUN/2018 of the assessee that the addition made by the AO is unsustainable in law in view of the absence of incriminating material. Therefore, adjudication of the issues raised by the Revenue becomes an academic exercise. Accordingly, the grounds raised by the Revenue are dismissed as academic.

15. In the result, appeal of the Revenue is dismissed.

ITA No.681/PUN/2015 – A.Y. 2009-10 (By Revenue)

16. The core ground raised by the Revenue in its appeal reads as under :

> *"1. On the facts and circumstances of the case, the Ld.CIT(a) was not justified in deleting the addition made by the AO on account of income from let out properties without appreciating that municipal value does not represent the fair rent which a property can fetch if let out. It is computed very mechanically by the corporation and is not revised periodically."*

17. Relevant facts include that the AO in the course of assessment proceedings that in the preceding A.Y. 2007-08, the annual let out value of vacant house properties were determined @7% of the investment value. Relying on the judgment of CIT Vs. Radhika Devi Dalmiya 125 ITR 134 (Allahabad High Court the AO estimated the annual let out value of the property at Rs.6,26,235/-. During the First Appellate Proceedings, the CIT(A) allowed the claim of the assessee and commented upon the judgment of CIT Vs. Radhika Devi Dalmiya that it is specific on its own facts and not applicable to the case of the assessee.

18. On hearing both the parties and perusing the order of CIT(A), we find it relevant to extract the findings given by the CIT(A) at para Nos. 2.5.3 to 2.5.5 and the same reads as under :

> *"Findings:*
>
> *2.5.3 I have considered the facts and arguments of the Appellant. I find that the Appellant has total 9 properties. He has declared one property as self-occupied, two let out and six properties vacant. The Appellant has declared loss in the income from house property. The Appellant has adopted the municipal valuation as the NAV, however, the learned AO stated that according to the law, as amended by the Finance Act, 2002, the Appellant's case falls under section 23(1)(a) according to which, ALV should be the sum for which, the property might reasonable be expected to let from year to year.*

2.5.4 Although I agree with the learned AO, however, I find that in Pune Municipal Area, property is levied u/s.127(1)A of the Maharashtra Municipal Corporation Act. The amount of the property tax payable is based on the Municipal Valuation Municipal valuation determines the Annual Rebatable Value (ARV) of the property on the basis of the locality of the property, its sq.ft. area, its nature of use (residential or commercial etc.) and type of construction (RCC, temporary etc.). Rateable Value broadly represents the annual rent that the property could have been let for on the open market. Therefore, when Municipal valuation represents the annual rental value of the property, I do not find any justification to resort to other method of determining ALV, such as % of return on the investment made in the property. According to me, the learned AO's reliance on the case of Radhika devi Dalmia misplaced.

2.5.5. However, the municipal valuation should be of the AY concerned, in absence of the municipal ARV of the relevant AY, the learned AO's action would be justified. Accordingly, I confirm the addition with respect to the property, if the ARV of the particular property is not of the AY concerned and delete the addition made by the learned AO, if the ARV is of the relevant assessment year."

It is settled legal proposition that so long as Municipal values are available the same becomes bindings and therefore, the decision of the AO in calculating the rental value based on any other method is unsustainable in law. Therefore, the above conclusion drawn by the CIT(A) on this issue is fair and reasonable and it does not call for any interference. Accordingly, the grounds raised by the Revenue are dismissed.

19. In the result, appeal of the Revenue is dismissed.

We shall now take up the cross appeals pertaining to A.Y. 2010-11

ITA No.682/PUN/2015 – A.Y. 2010-11 (By Revenue)

20. The core ground raised by the Revenue in this appeal reads as under :

"1. On the facts and circumstances of the case, the Ld.CIT(a) was not justified in deleting the addition made by the AO on account of income from let out properties without appreciating that municipal value does not represent the fair rent which a property can fetch if let out. It is computed very mechanically by the corporation and is not revised periodically."

21. We find the above ground raised by the Revenue is identical to the ground raised by the Revenue in A.Y. 2009-10. We have decided the issue against the Revenue and confirmed the conclusions drawn by the CIT(A) on this issue. Following the same reasoning, we dismiss the grounds raised by the Revenue for this assessment year too.

22. In the result, appeal of the Revenue is dismissed.

ITA No.699/PUN/2015 – A.Y. 2010-11 (By Assessee)

23. Grounds raised by the assessee are extracted here as under :

> *"1. The Hon'ble CIT(A)-12, Pune erred in law and on facts in confirming addition made by learned DCIT, Cen. Circle2(1), Pune amounting to Rs.54,00,000/-, on account of adhoc declaration made during search proceedings carried out u/s.132 of the ITA, 1961. Hon'ble CIT(A)-12, Pune ought to have appreciated the fact that except for the self declaration, there was no any corresponding evidence found during the course of search.*
>
> *2. The Hon'ble CIT(A)-12, Pune erred in law and on facts in treating appellant's retraction of statement as unreliable and not genuine, merely on the ground that retraction was made on 19-09-2011, i.e. around one (1) year after the date of admission and hence an afterthought.*
>
> *3. The appellant craves leave to add/modify/delete/amend all/any of the grounds of appeal."*

24. Briefly stated relevant facts are that during the assessment AO noticed that assessee has constructed huge bungalows at Hadashi and incurred an expenditure on account of land development. When the same was confronted, assessee offered a sum of Rs.54 lakhs towards the omissions or commissions. On finding that there is no omission or commission at the time of filing of return of income assessee did not offer the same and retracted to that extent on this issue. However, relying on the statement given by the assessee on 06-10-2010, the AO proceeded to make addition of Rs.54 lakhs on this account and reasoned that the said retraction has been done after a year and therefore, it is an afterthought and does not have any evidentiary value. While making the said addition, the AO relied on the decision of Pune

Bench of the Tribunal in the case of Hotel Kiran Vs. ACIT 82 ITD 453, Relevant discussion is given at pages 3 and 4 of the assessment order. During the First Appellate proceedings, CIT(A) confirmed the addition made by the AO by holding as under :

> *"Findings*
>
> *2.14.4 I have considered the facts and arguments of the Appellant. I find that the search on the Appellant was conducted on 08-09-2010 and the Appellant admitted the additional income on account of the unexplained investment in Hadashi Bungalow in the statement recorded on 06-10-2010 and subsequently, retraction was filed on 12.09.2010. This chronology show that the Appellant's statement declaring additional income was not recorded on the date of the search but was recorded all most one and half months after the search. Therefore, when the Appellant's statement was recorded on 06.10.2010, the Appellant presumably gave his statement after consulting chartered accountants and advisors. The Appellant has given the statement when he was fully aware of its consequences and has given it after considering all the aspects.*
>
> *2.14.5 On the other hand, the retraction is made after one and quarter year from the date of the statement. The huge gap between these two statements makes the retraction unreliable. More importantly, the Appellant has given the reason for the retraction as he was under pressure. As discussed, when the statement was recorded after one and half month from the date of the search, the appellant was not under pressure but was well aware of the significance of the recorded statement. Therefore, the Appellant's explanation of retraction is not credible. Further, as held in the case of Surjeet Singh Chhabra v Union of India 1997 AIR SC 2570, customs officers are not police officers, admission made by the deponent before them binds the maker. This ratio is applicable to the facts of the case as Income Tax Officers are not police officers. Further, by admission, the Appellant prevented further investigation in the issue as held in case of Hotel Kiran v ACIT (2002) 82 ITO 453 (Pune). It is settled that the retraction is permitted, if there is cogent evidence to support it as held in the case of Vinod Solanki v Union of India [2009] 239 ELT 157 (SC). Further, as held in the case of Krishan Lal Shiv Chand Rai v CIT (1973) 88 I7R 293 (P&H) that in case of retraction, burden of proof is on the assessee. I do not find any such evidence with the Appellant discharging its onus. Hence, I agree with the learned AO that the Appellant's retraction is unreliable and not genuine. Accordingly, I confirm the addition of Rs.54,00,000/-."*

25. Before us, Ld. Counsel for the assessee submitted that this disclosure of Rs.54 lakhs offered by the assessee for the year under consideration is without any basis or any incriminating material. Therefore, the retraction made by the assessee on 12-09-2011 is sustainable. It is not the case of the Revenue that there is common issue which attracts disclosure of said additional income. Ld. Counsel

for the assessee relied on various High Court judgments/decisions in support of the assessee's submissions and filed a chart showing the summary of cases where retraction has been accepted.

26. Ld. DR for the Revenue relied on various decisions to suggest that the AO merely made addition stating but for the disclosure of Rs.54 lakhs the investigation wing abruptly stopped the proceedings on the bonafide belief. With the retraction in mind, there is no sufficient time available to the AO for investigating into the issue. Therefore, Ld. DR argued that either the addition should be confirmed or the matter should be remanded to the file of AO for examining the seized material for want of any unattended issues if any that requires disclosure of additional income of Rs.54 lakhs. In this regard, Ld. DR relied on the decision of Nagpur Bench of the Tribunal in the case of DCIT Vs. Sanmukhdas Wadhwani 85 ITD 734.

27. After hearing both the parties and on perusing the orders of the Revenue we find the AO has merely relied on the statement given by the assessee and he did not go into the issues that requires disclosure of additional income of Rs.54 lakhs. On these facts, we find the issue requires remanding to the file of AO for verification of the seized material. We find the Pune Bench of the Tribunal in the case of Poonawalla Investments and Industries Pvt. Ltd., in ITA No.1685/PUN/2015, dated 18-04-2018 for the A.Y. 2012-13 on identical facts remanded the issue to the file of AO by observing as under :

> *"28. Ground no.5 relates to inclusion of income of an amount of Rs.1 crore which was offered as contingency in the statement u/s.132(4) of the act. Relevant facts are that the assessee was covered u/s.132 of the Act and the same resulted in disclosure of undisclosed income. Details are given in Para nos. 13 and 13.1 (pages 55 to 60) of the order of CIT(A). Accordingly, Rs. 1 crore was offered against the contingencies if any to be set off against the discrepancies/omissions. While filing the return of*

income, and adhering to the said statement u/s.132(4) of the Act, said amount of Rs. 1 crore was offered as undisclosed income of the assessee for the year. Accordingly, the same was taxed although no specific discrepancies/omissions were brought to the notice of the assessee. Assessee did not raise any issue before the AO. However, before the CIT(A), assessee submits that said contingency of Rs.1 crore should not be taxed and the same is required to be excluded from the undisclosed income offered by the assessee. CIT(A) rejected the said demand of the assessee as per the discussion given in para 13.2 of his order. Thus, CIT(A) decided this issue against the assessee.

29. To sum up his finding, in the said para, the CIT(A) held that the claim made by the assessee that such income of Rs.1 crore may be excluded from the total income assessed by the assessee as no discrepancies were found during the assessment proceedings, cannot be accepted as the said additional income was offered voluntarily in the return of income. If accepted, the assessed income shall be lower than the returned income. The alternative claim of the assessee for set off of such contingencies against other disallowances u/s.14A of the Act made by the AO was also rejected despite the existence of the favourable decision of the Tribunal in the group cases of the assessee (M/s. Adurjee Brothers Pvt. Ltd.). Aggrieved with the order of CIT(A) the assessee is in appeal before us.

30. Before us, Ld. Counsel for the assessee submitted that similar issue with some variance came up for adjudication before the Tribunal in a case belonging to the same group named M/s. Adurjee Brothers Pvt. Ltd. (supra). In this case, the demand of the assessee was for set off of the other disallowances made u/s.14A of the Act against such contingency disclosure. The Tribunal allowed the argument of the assessee on this issue of set off. Contents of Para No.12 of the order of the Tribunal in ITA No.1067/PN/2014 dated 13-06-2014 are relevant and therefore we proceed to extract the same as under :

> *"12. We find merit in the alternate contention of the Ld. Counsel for the assessee that the amount of Rs.75 lakhs offered to tax in the statement recorded u/s.132(4) be set off against the disallowance calculated under the provisions of section 14A r.w. Rule 8D. Admittedly, the assessee had made disclosure of Rs.75 lakhs voluntarily as additional income under the head "Contingencies" to cover any other errors, omissions or discrepancies. The submission of the Ld. Counsel for the assessee that the amount of Rs.75 lakhs was voluntarily offered and there was no detection of any incriminating material or undisclosed income could not be controverted by the Ld. Departmental Representative. We, therefore, find merit in the submission of the Ld. Counsel for the assessee that the amount of Rs.75 lakhs offered by the assessee as undisclosed income to cover any errors, omissions or discrepancies in computing the taxable income should be set off against the disallowance made u/s.14A r.w. Rule 8D of the I.T. Act.* ***We, therefore, set aside the order of the CIT(A) and direct the AO to restrict the disallowance u/s.14A r.w. Rule 8D to Rs.18,19,294/- i****.e. (Rs.93,24,674 – Rs.75,00,000/-). Grounds of appeal No.1 to 3 by the assessee are accordingly partly allowed.*

31. From the above, we find the Tribunal permitted for setting off the disallowance of expenditure u/s.14A of the Act against the said buffer disclosure of income. In that case, Rs. 75 lakhs was offered as buffer and the issue of disclosure u/s.14A of the Act created the additional income exceeding the said buffer disclosure of Rs.75 lakhs. Further, in

the said decision, the income assessed never fell below the returned income. However, there is no discussion or decision of the Tribunal on the issue of reduction of the disclosed returned income. Therefore, we shall proceed to analyse the legal scope on this issue.

Legal scope on the sanctity of returned income – if the assessed income be less than the returned income.

32. On this issue, Ld. Counsel for the assessee submitted that it is a settled legal proposition in favour of the Assessee and against the Revenue. For this, Ld counsel relied on various binding judgments of Apex Courts and others. We shall now proceed to analyse each of them here as under.

*33. To start with, we will take up the Apex Court's judgment in the case of Commissioner of Income-tax v. Shelly Products [2003] 261 ITR 367 (SC), the Apex Court held in favour of refunding of the excess taxes paid (of advance tax as well as self-assessment tax) out of **abundant** caution or owing to error or non taxability. Held portion of this judgment is extracted as under :*

> *"However, failure or inability of the Revenue to frame a fresh assessment should not place the assessee in a more dis-advantageous position than he would have been in if a fresh assessment were made. In a case where the assessee chooses to deposit, **by way of abundant caution**, advance tax or tax on self assessment which is in excess of his liability on the basis of the return furnished or, if there is an arithmetical error or inaccuracy, it is open to the assessee to claim refund of the excess tax paid in the course of the assessment proceedings. He can certainly make such a claim before the concerned authority calculating the refund. Similarly, if the assessee has, by mistake or **inadvertence** or on account of ignorance, included in his income **any amount which is exempted from payment of income-tax, or is not income within the contemplation of law,** he may likewise bring this to the notice of the assessing authority, which, **if satisfied,** may grant him relief and refund the tax paid in excess, if any. Such matters can be brought to the notice of the concerned authority in a case where a refund is due and payable, and the authority concerned, on being satisfied, shall grant appropriate relief."*

*34. In the case of Gujarat Gas Company Ltd. Vs. JCIT (245 ITR 84) the Hon'ble Gujarat High Court held that the instruction of the CBDT Circular No.549 (Para No.5.12 dated 31-10-1989 is ultra-vires when the said instruction mandates the AO against making the scrutiny assessments **at the figure less than that returned** by the assessee. Relevant held portion of this judgment reads as under :*

> *"Held, that the circular in question refers to assessments which are to be made u/s.143(3) of the Act. The circular directs that in a particular type of cases, i.e. in scrutiny cases u/s.143(3) of the Act, the income can neither be assessed at a figure lower than the returned income nor the loss assessed at a figure higher than the loss nor further refund given except what was due on the basis of the returned income. Thus, by issuance of the circular, the quasi-judicial officer is directed to assess cases of particular nature in a particular manner. The Assessing Officer being bound by it had abdicated his function and did not act independently and, therefore, there was no question of alternative remedy which was a futile remedy. In fact, the jurisdiction had been exercised by the*

Central Board of Direct Taxes by issuing the circular and, therefore, the order of the Assessing Officer was without jurisdiction. The court had to exercise its jurisdiction under article 226. The order of the Assessing Officer to the extent it stated that the total income would be the returned income, was to be set aside, ***with a direction to the Assessing Officer to make assessment without keeping in mind the Central Board of Direct Taxes Circular dated 31-10-1989."***

35. The same Hon'ble Gujarat High Court again in the case of CIT Vs. Milton Laminates Ltd. vide Tax Appeal No.1022 of 2010 dated 24-01-2012 held the issue in favour of the Assessee and against the Revenue. Revenue took the issue to the Hon'ble High Court on the issue, if the Tribunal's direction to the AO to allow complete effect to the order of the CIT(A) without restricting the income to the returned income. In this case, after giving effect to the order of the CIT(A), the income assessed has fallen below the returned income of the assessee. The Hon'ble High Court upheld the order of the Tribunal. Relevant lines from this judgment also are extracted as under :

"7. In view of the above, we do not find any reason to interfere with the Tribunal's ultimate conclusion in allowing the assessee's appeal. Though some of the observations may not appeal to us, nevertheless, for the reasons somewhat different from those recorded by the Tribunal we come to the same conclusion. Decision of the Apex Court in case of ***Shelly Products & Others*** *(supra), was rendered in very different background. It was a case where the assessee had filed return. Assessee had paid self assessment tax on the income disclosed in the return. Tribunal on appeal by the assessee held that the order of the assessment passed by the Assessing Officer was ab-initio void since he had no jurisdiction to deal with such proceedings. Revenue sought reference before the High Court. When such reference was pending, the assessee applied to the department for refund of the tax paid. It was in this background the Apex Court expressed the opinion that liability to pay income tax does not depend on assessment being made and failure or inability to frame fresh assessment after earlier assessment is set aside or nullified in appropriate proceedings, does not disentitle the assessee to claim refund of the advance tax and tax paid on self assessment because to that extent the assessee had admitted his liability to pay tax in accordance with law. Facts of the present case are therefore, different. In case of hand, the assessment was not rendered null. In fact such assessment, which according to the order of CIT(Appeals) had become final tax liability of the assessee, came lower than that declared by him in the return filed."*

(1) To sum up, from the above, it is obvious that the fetters imposed by the CBDT, on the AOs, when it comes to assessing the income of assessee lower than the returned income, are held ultra vires. Further, the Hon'ble Apex Court also held that the taxes paid by the assessee as a matter of abundant caution, i.e. by way of Advance or Self Assessment Taxes, needs to be refunded after due verification of the claims.

(2) Ld. Counsel for the assessee filed various decisions of the Tribunal demonstrating that the 'contingency' disclosure are entitled to refund after due verification. In this regard, Ld. Counsel for the assessee filed written note on 'Contingency issue' stating that the return of income

filed by the assessee constitutes a notional undisclosed income as part of the total income. The same should not become an impediment for assessing the income of the assessee based on the principles relating to the Real Income theory. According to him, the income offered by the assessee in the return of income is not sacrosanct and what matters is the AO's finding on the assessed income of the assessee. The assessed income can be lower than the returned income. Relying on the decision of Nagpur Bench of the Tribunal in the case of DCIT Vs. ***Sanmukhdas Wadhwani*** *85 ITD 734, Shri R.S. Abhyankar, Ld. Counsel for the assessee submitted that where the assessee himself returned his undisclosed income on adhoc basis without giving any break-up for the same and when the subsequent working submitted by him reveals that the undisclosed income actually assessable in the hands of the assessee is lower than the returned income, the same has to be assessed at such lower income based on the concept of Real Income. Only condition specified in the said decision relates to the verification and correctness of the statements so submitted giving the detailed working before the AO. Relevant portion is extracted as under :*

> *"12. It is observed that a similar issue in the context of regular assessment arose for consideration before the Hon'ble Delhi High Court in the case of CIT v. Bharat General Insurance Co. Ltd. [1971] 81 ITR 303 wherein it was held by their Lordships that even if an assessee declares an income in the return, the Assessing Officer cannot assess it merely on that basis and he has to consider its taxability in the light of other circumstances de hors the admission made in the return. In the case of Narayanan v. Gopal AIR 1960 SC 235, the Hon'ble Supreme Court has held that an admission in the return is not conclusive and it would be decisive only if not subsequently withdrawn or proved to be erroneous. It is well- established that the object of an assessment is to determine the correct income and consequently the correct tax liability. In our opinion, this settled position equally holds good in the matter of block assessment also since the scope of undisclosed income assessable in the block assessment is specifically provided and the procedure for determination of such income is also clearly laid down. In these circumstances, any amount which is not assessable as undisclosed income for the block period cannot be assessed as such merely for the reason that the same was declared by the Assessee in the return for block period and* ***there cannot be such estoppel against the statute. It, therefore, follows that if the assessee commits a patent mistake of fact or law while filing his return of undisclosed income under section 158BC, he cannot be assessed on such incorrect income merely on the basis of admission made in the return.***
>
> *13. . . . . .In such circumstances, when a detailed working made subsequently by the assessee of undisclosed income revealed that the total undisclosed income assessable in the hands of the Assessee was lower than the returned income, we are of the opinion that the same has to be assessed at such lower amount going by the concept of real income especially when the said working was verified and found to be correct by the Assessing Officer."*

36. Similar proposition was affirmed by the Hon'ble Delhi High Court in the case of CIT Vs. Bharat General Insurance Company Ltd. 81 ITR 303 wherein it is held that when the assessee declares income in the return, the AO cannot assess merely on that basis and has to consider its liability in the light of other circumstances de hors the admission made by him in the return. Ld. Counsel for the assessee also referred to the other

judgment in the case of Ester Industries Ltd. Vs. CIT 316 ITR 260 (Delhi). According to this judgment, suo moto disallowance leading to increased returned income can always be verified by the AO in the assessment and decrease the returned income, even if it falls below the amount of total income returned by the assessee in the return of income. In this case, the Hon'ble High Court restored the matter for such verification. Relevant portion of the judgment are extracted as under :

> *"11. According to us, the Tribunal ought to have examined the issue as to whether the fact that assessee had made an admission with respect to an addition / disallowance in its original return or in the revised return would ipso facto bar the assessee from claiming an expense or disputing an addition if it is otherwise permissible under law. This is so especially in view of the circumstances, that the Assessing Officer while making the additions / disallowances did not call upon the assessee to furnish any explanation. The upshot of the submission made by the learned counsel for the assessee, is that, had the assessee been given an opportunity by the Assessing Officer it could have demonstrated that no additions or disallowances were called for, in view of the binding precedents of Courts and/or Tribunal in respect of each of the addition/disallowance. The observations made in the Tax Audit Report could not have formed the basis of additions/ allowances by the Assessing Officer. On this aspect of the matter the observations in the judgment of the Supreme Court in the case of Pullangode Rubber Produce Co. Ltd. v. State of Kerala [1973] 91 ITR 18 being apposite are extracted hereinbelow:*
>
> *It is no doubt true that entries in the account books of the assessee amount to an admission that the amount in question was laid out or expended for the cultivation, upkeep or maintenance of immature plants from which no agricultural income was derived during the previous year. An admission is an extremely important piece of evidence but it cannot be said that it is conclusive. It is open to the person who made the admission to show that it is incorrect. (p. 20).*
>
> *11.1 We find that the Tribunal instead of examining the matter from this angle has repeated the order passed in the first round without due application of mind to the issues which called for adjudication.*

37. The Nagpur Bench of the Tribunal in the case of DCIT Vs. Sanmukhdas Wadhwani (supra) held categorically that the "income not assessable as undisclosed income of the assessee cannot be assessed as such" merely because assessee declared the same through a statement in search action. Admission made by the assessee in the return of income is no sacrosanct. AO is under statutory obligation to make assessment of assessee based on the facts of case and as per the provisions of Act. In other words, coming to the facts of the assessee, if the said sum of Rs. 1 crore is not assessable to tax as income of the assessee, the same ought not be assessed even if the assessed income comes to a lower figure qua the returned income.

38. We have considered the above legal scope of the principle relating to the lower figure of assessed income qua the returned income. Further, we have heard the parties and perused the written submissions of the Ld. Counsel for the assessee. Further also, we perused the reasoning given by the CIT(A) while dismissing the claim of the assessee. We find the contents of Para No.12 of his order are relevant. For the sake of

completeness of this order, we proceed to extract Para No.13.2 of the CIT(A) :

> *"13.2 . . . . . To sum up, the fresh claim made by the appellant during the present proceedings that such income of Rs.1,00,00,000/- may be excluded from the total income assessed by the Assessing Officer as no discrepancies were found during the assessment proceedings cannot be accepted as the additional income was offered voluntarily in the return of income. The alternate claim of the appellant for set off of such contingencies against other statutory disallowance made by the AO also cannot be accepted as discussed above. Ground of appeal No.8 stands rejected."*

The CIT(A) denied the claim of the assessee ignoring the settled legal propositions on the topic. The reasons given above by the CIT(A) are artificial and not supported by the legal precedents.

39. The CBDT issued a Circular No.549 dated 31-10-1989 imposing fetters on the AOs for not determining the assessed income at a lower figure than the returned income. The said Circular was held ultra vires by the higher judiciary in the case of Gujarat Gas Company Ltd. (supra). Infact, it is the duty of the AO to make an assessment basing on the facts of the case and as per the provisions of the I.T. Act. In the case of Shelly Products (supra), the Hon'ble Apex Court held that the advance tax/self assessment tax paid as part of an abundant caution are required to be refunded on verification of the claim of the assessee. The Nagpur Coordinate Bench of the Tribunal in the case of DCIT Vs. Sanmukhdas Wadhwani (supra) held that the assessed income can be lower qua the returned income of the assessee. Further, the Tribunal held in this case, any amount which is not assessable as undisclosed income of the assessee cannot be assessed merely for the reason assessee declared in the return of income. There cannot be such estoppels against the statute if the assessee itself finds a patent mistake of fact while filing the return of income assessee cannot be assessed on such incorrect income merely on the basis of admission made by him in the return of income.'

40. In the instant case, considering the above settled legal propositions, we proceed to examine availability of facts relating to the present case. In the return of income, assessee merely offered an amount of Rs.1 crore towards contingency. Meaning thereby that incase the AO makes certain additions basing on same facts or legal issues, the said disclosure amount of Rs.1 crore should be considered for set off/adjustment etc. In case AO failed to make such additions, the said amount of Rs.1 crore is not required to be assessed as income of the assessee. It is an admitted fact that the AO made addition u/s.14A of the Act in the assessment u/s.153A of the Act in the absence of any incriminating material. This addition is made over and above the said contingency amount of Rs.1 crore. However, we find while discussing in the preceding paragraph this disallowance u/s.14A is unsustainable in this assessment as the same does not have strength of any incriminating material. In other words, the AO made an unsustainable addition u/s.14A of the Act and taxed the said amount of Rs.1 crore-contingency income without making adjustment the said amount of Rs.1 crore. In any case, we deleted said disallowance u/s.14A of the Act. Therefore, the question of adjustment is only an academic exercise. Ignoring the same, we now have to decide that the said amount of Rs. 1 crore is assessable to tax in the light of the above legal scope relating to this addition.

41. The AO has not brought any issue or facts relating to the undisclosed income specific to the said sum of Rs.1 crore. In such circumstances, we are of the opinion that the decision of the Nagpur

Bench of the Tribunal in the case of DCIT Vs. Sanmukhdas Wadhwani (supra) becomes relevant to the facts of the present case. As such, we proceed to dismiss the voluntary-centric reasoning given by the CIT(A) for denying the claim of the assessee regarding the issue of taxation of the said amount of Rs.1 crore. Considering the above, we are of the opinion that the AO is directed to verify the working of total undisclosed income assessable in the hands of the assessee going by the concept of real income. He shall grant reasonable opportunity of being heard to the assessee. AO is directed to apply the ratio laid down by the above referred judgments in general and the ratio laid down by the Nagpur Bench of the Tribunal in the case of DCIT Vs. Sanmukhdas Wadhwani (supra) while arriving at the assessed income of the assessee. AO shall not consider the so-called voluntary disclosure of the said amount of Rs. 1 crore as the same does not amount to any voluntary disclosure in a real sense. Had it been really voluntary, the assessee would not have raised this issue before us. It is the requirement of the statute that the AO shall make assessment strictly as per the provisions of the law and determine the assessed income accordingly. For applying the said legal principles as well as the judgments and the order of the Nagpur Bench of the Tribunal, we remand this issue to the file of the AO for the limited purpose of adjudication of the issue relating to taxability of the contingency amount of Rs.1 crore. Accordingly, this ground by the assessee is allowed pro tanto."

28. From the above, it is evident that the onus is on the AO to establish the omissions and commissions if any before taxing the buffer disclosure of Rs.54 lakhs by the AO. As such, AO did not examine this aspect of the issue. Therefore, with similar directions to the AO, we remand the issue to the file of AO (supra). Accordingly, this issue is adjudicated pro tanto. The grounds raised by the assessee are allowed for statistical purposes.

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

30. To sum up, ITA Nos. 68O to 682/PUN/2015 filed by the Revenue are dismissed. Cross Objection No.10/PUN/2018 filed by the assessee is allowed and ITA No. 699/PUN/2015 filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on this 25th day of April, 2018.

Sd/- Sd/-

(VIKAS AWASTHY) **(D. KARUNAKARA RAO)**
न्यायिक सदस्य /JUDICIAL MEMBER **लेखा सदस्य / ACCOUNTANT MEMBER**
पुणे Pune; दिनांक Dated : 25th April, 2018
सतीश

आदेश की प्रतिलिपि □ ग्रेषित/Copy of the Order forwarded to :

1. □ पीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. The CIT(A)-12, Pune
4. CIT-12, Pune
5. विभागीय प्रतिनिधि, आयकर □ पीलीय □ धिकरण, "A Bench" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

Senior Private Secretary
आयकर □ पीलीय □ धिकरण ,पुणे / ITAT, Pune