आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल रॉव, न्यायिक सदस्य एवं श्री भागचन्द, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI BHAGCHAND, AM

आयकर अपील सं./ITA No. 280/JP/2016
निर्धारण वर्ष/Assessment Years : 2006-07.

| Shri Atal Bihari Gupta<br>13, Ghanshyam Colony,<br>Bans Badanpura,<br>Jaipur. | बनाम<br>Vs. | The Income Tax Officer,<br>Ward 1(3),<br>Jaipur. |
|---|---|---|
| स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. ABDPG 2308 P | | |
| अपीलार्थी/Appellant | | प्रत्यर्थी/Respondent |

निर्धारिती की ओर से/Assessee by : Shri Shrawan Kumar Gupta (Advocate)
राजस्व की ओर से/ Revenue by : Smt. Seema Meena (JCIT)

सुनवाई की तारीख/ Date of Hearing : 13.03.2018.
घोषणा की तारीख/ Date of Pronouncement : 24/05/2018.

आदेश/ ORDER

PER VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 27TH January, 2016 of ld. CIT (A)-I, Jaipur for the assessment year 2006-07. The assessee has raised the following grounds of appeal :-

" 1.1. The impugned assessment order u/s 143(3)/148 dted 28.03.2014 is bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence the same may kindly be quashed.

1.2. the action taken u/s 147 by the ld. AO is bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence the same may kindly be quashed.

2. Rs.1,00,000/-: The ld. CIT (A) has grossly erred in law as well as on the facts of the case in confirming the addition of Rs. 1,00,000/- made by the AO on account of commission/brokerage income which has not been received by the assessee there was only adjustment of payment or entry. Hence the addition so made by the AO and confirmed by the CIT (A) is totally contrary to the provisions of law and facts on the record and hence the same may kindly be deleted in fully.

3. Rs.1,00,000/-: The ld. CIT (A) has grossly erred in law as well as on the facts of the case in confirming the addition of Rs. 1,00,000/- made by the AO on account of payment made for purchase of plot as undisclosed income when the payment was not made in the year under consideration the same was made in the year 2006-07 from the disclosed source. Hence the addition so made by the AO and confirmed by the CIT (A) in this year is totally contrary to the provisions of law and facts on the record and hence the addition may kindly be deleted in full.

4.1. Rs. 48,11,525/-: The ld. CIT (A) has grossly erred in law as well as on the facts of the case in confirming the addition of Rs. 48,11,525/- made by the AO on account of alleged 25% share of profit from the sale of properties of Balaji Nagar only on the basis of rough and dumb document found in the possession of third party and statement of third parties which has not been cross examined. Hence the addition so made by the AO and confirmed by the CIT (A) without rebutting our facts and legal position is totally contrary to the provisions of law and facts on the record and hence the addition may kindly be deleted in full.

4.2. The ld. CIT (A) has grossly erred in law as well as on the facts of the case in confirming the addition on assumptions and suspicion, without proving that the assessee has really earned such profit or received any land in place of profit and also erred in proving that there were any partnership firm or AOP or company or any investment done by the assessee. Hence also the addition so made by the AO and confirmed by the CIT (A) is totally contrary to the provisions of law and facts on the record and hence the addition may kindly be deleted in full.

4.3. The ld.AO has also erred in law as well as on the facts of the case in making trading addition without invoking the provisions of Sec. 145(3) and allowing the deduction of business expenditures. Hence also the addition so made by the AO is totally contrary to the provisions of law and facts on the record and hence the addition may kindly be deleted in full.

5. The ld. AO has grossly erred in law as well as on the facts of the case in charging interest u/s 234B & C. The appellant totally denies it liability of charging of any such interest. The interest, so charged, being contrary to the provisions of law and facts, may kindly be deleted in full.

6. the appellant prays your honor indulgences to add, amend or alter of or any of the grounds of the appeal on or before the date of hearing."

**Ground No. 1 is regarding validity of reopening of the assessment.**

2. The assessee is an Individual and derives income from business of property broking. The assessee filed his return of income for the year under consideration on 31st March, 2007 which was processed under section 143(1) of the I.T. Act. There was a survey under section 133A conducted at the business premises of M/s. Vedang Colonizers Pvt. Ltd. on 13/14.08.2012 wherein certain incriminating documents were impounded which includes Annexure AA-2 containing 69 pages. During the course of survey, statement of Shri Rajesh Tambi @ Ratan Tambi, the Director of the said company was recorded. Shri Tambi in his statement stated that Balaji Vihar-II Scheme was developed by M/s. Laxmi Grah Nirman Sahkari Samiti in which he along with other persons has done the work of brokerage. Further, the assessee in partnership with Shri Ram Avtar Gupta and three other persons have also done some transactions of purchase and sale of properties and earned profits. Since the assessee did not disclose any income from purchase and sale of properties, the AO proposed to reopen the assessment by issuing the notice under section 148 on 21st March, 2013. In the reassessment proceedings, the assessee objected to the addition on account of income from transactions of purchase and sale of the properties in Balaji Vihar-II. However, the AO made the addition of

Rs. 48,11,525/- on account of 25% share of profit from sale of properties in Balaji Vihar-II. Apart from this addition, the AO has also disallowed/made the addition on account of commission/brokerage income as well as the payment made by the assessee for purchase of plot. The assessee challenged the action of the AO before the ld. CIT (A), however, could not succeed.

3. Before us, the ld. A/R of the assessee has submitted that notice under section 148 can be issued only when there is escapement of income and the AO has reason to believe that an income chargeable to tax has escaped assessment for any assessment year. In the case of the assessee there is no escapement of any income as the assessee disclosed all the income in the return of income. However, the AO had reopened the case only on the basis of some rough notings found in the rough pages in case of third party and their statements. In the absence of cross examination of third party as well as in the absence of any tangible material showing that the assessee had actually earned or derived any profit from the alleged transactions of sale of properties, there was no escapement of income by the assessee. The ld. A/R has further contended that for reopening of the assessment under section 147/148, the AO must have "reason to believe" and not "reason to suspect." The word "believe" has to be understood in contradiction of suspicion or opinion. It indicates something concrete or reliable. The AO has reopened the assessment in order to conduct an enquiry and find out whether the assessee has derived or earned any income which has escaped assessment. In support of his contention he has relied upon the decision of Hon'ble Jurisdictional High Court in case of Mukesh Modi vs. DCIT, 366 ITR 418 (Raj.) as well as decision of Hon'ble Punjab & Haryana High Court in case of CIT vs. M/s. Sahil Knit Fab, 249 CTR 454

(P&H) and submitted that the Hon'ble High Court has held that reopening of the assessment is permissible to bring to tax escaped income and not to make investigation or verification. Thus the ld. A/R has contended that the reopening in the case of the assessee is bad as the AO has reopened on the basis of suspicion and not his belief that income assessable to tax has escaped assessment.

3.1. On the other hand, the ld. D/R has relied upon the orders of the authorities below and submitted that the AO was having tangible material impounded during the course of survey under section 133A which reveals the transactions of purchase and sale of properties which has not been disclosed by the assessee and, therefore, the entries found in the impounded material is sufficient to form the belief that the income assessable to tax has escaped assessment.

4. We have considered the rival submissions as well as the relevant material on record. We note that the return of income filed by the assessee on 31st March, 2007 was processed under section 143(1) on 13th June, 2007 at the returned income of Rs. 1,37,412/-. Thus it is clear that the assessee did not declare and disclose any business transactions of purchase or sale of properties. Subsequently, the AO has reopened the assessment by recording the reasons as under :-

> *" The assessee (PAN-ABDPG 2308 P) filed his return for A.Y. 2006-07 of income on 31.03.2007 declaring total income of Rs. 1,37,412/-, which was processed u/s 143(1) on 13.06.2007 at returned income. During the course of survey u/s 133A conducted on 13/14.08.2012 at the business premises of M/s. Vedang Coloniser Pvt. Ltd., E-61, Malviya Nagar, Jaipur certain incriminating documents were found and impounded by ITO Ward 6(1), Jaipur for further verification. On verification of impounded documents it is noticed that following transactions have been recorded in the documents impounded named as Annexure-AA :-*

*Page No. 63 and 51 Annexure-AA: Rs.2,93,75,979 (Balaji Vihar Nayala Road)*

*Page No. 63 Annexure-AA : Rs. 48,11,525/- as profit*

*Page No. 48 Annexure-AA : 17,00,000/- = 1,00,000*

*Page 42 Annexure-AA : Rs.17,00,000/- 1.4.05 to 30.3.08 (Firoj Khan cash book)*

*Page 37 Annexure-AA : Rs. 1,00,000/- 1.4.05 to 1.5.05 (Firoj Khan sundry debtors group summary)*

*Page 34 Annexure-AA : Rs. 18,00,000/- 1.4.05 to 31.4.05.*

*Page 30 Annexure-AA : Rs.2,50,000/- 31.3.2006*
*(M&R A/c)*

*Since the assessee has made investment of Rs. 2,93,75,979/- in the Real Estate i.e. Balaji Vihar Nayal Road which has not been disclosed in his return of income. Further an amount of Rs. 48,11,525/- has also been written as profit. It means that assessee has earned profit from real estate business to the extent of Rs. 48,11,525/- which has not been disclosed. Further as per impounded documents named as Annexure-AA at page No. 42 which is shown as cash book of Sh. Firoz Khan in which an amount of Rs. 17,00,000/- has been shown as deposit from Atal Gupta. It is established that the assessee has made further investment in real estate from undisclosed income. The entries records from 1.4.2005 to 31.3.2008 in the cash book of Sh. Firoj Khan which are not verifiable from the assessment records of the assessee. Further on page 30 an amount of Rs. 2,50,000/- has been shown as deposit in M&R account which is also not verifiable from the assessment records of the assessee. These transactions pertains to A.Y. 2006-07. I, therefore, have reasons to believe that income chargeable to tax totaling Rs. 3,80,36,904/- (2,93,75,979+48,11,525+17,00,000+1,00,000+18,00,000+ 2,50,000) has escaped assessment within the meaning of section 147 of the IT Act. Accordingly proceedings u/s 147 are initiated by issue of notice u/s 148 of the I.T. Act 1961 after obtaining prior approval of the Addl. CIT, Range-1, Jaipur vide letter No. 2752 dated 21.03.2013.*

*Dated : 21.03.2013.*

*Sd/-*
*Assessing Officer,*
*Ward 1(3), Jaipur.*
*21/03/2013*

*Dated: 21-03-2013 Notice u/s 148 issued.*

*Sd/-*
*Assessing Officer,*
*21/03/2013"*

Thus the AO has recorded the reasons that as per the impounded documents the assessee had made investment of Rs. 2,93,75,979/- in the Real estate i.e. Balaji Vihar-II, Nayala road. The said investment was not disclosed in the return of income filed by the assessee. Further, an amount of Rs. 48,11,525/- was found in the impounded document as profit from the property transactions being share of assessee which was also not disclosed in the return of income. Apart from these transactions, the AO also noted that as per the cash book of Shri Firoz Khan, an amount of Rs. 17,00,000/- is shown as deposit from the assessee. Therefore, all these new facts revealed by the impounded material during the survey conducted under section 133A constitute tangible material to form the belief that the income assessable to tax in the hands of the assessee has escaped assessment. The ld. A/R has forcefully contended that the AO has reopened the assessment on the reason to suspect and not on the reason to believe. However, we note that the impounded documents revealed the transactions of purchase and sale of the properties and the name of the assessee is found mentioned against the land dealing transactions. Therefore, when the assessee has not declared any income on account of transactions in real estate and further the other transactions recorded in the impounded material were also not disclosed by the assessee in the return of income, it certainly constitute a reason to believe that an income assessable to tax in the hands of the assessee has escaped assessment. At the time of reopening of the assessment what is required to be only a prima facie belief that the income chargeable to tax has escaped assessment and the AO is not required to establish the correctness of the material forming the basis of such belief. Accordingly, in view

of the above facts and circumstances of the case, we do not find any error or illegality in the reopening of the assessment and the impugned order of ld. CIT (A) qua this issue. The decisions relied upon by the ld. A/R of the assessee will not help the case of the assessee when a new source of income was detected during the survey and post survey enquiry as revealed in the impounded material as well as the statement recorded under section 131 of the Act.

**Ground nos. 2 to 4 are regarding the additions made by the AO based on the impounded material as well as the statement of Shri Rajesh Tambi recorded under section 131 of the Act.**

5. The ld. A/R of the assessee has raised an objection against the statement of Shri Rajesh Tambi relied upon by the AO on the ground that when the assessee was not given an opportunity of cross examination and the said statement was recorded at the back of assessee, then the addition made by the AO based on the statement is not sustainable. In support of his contention he has relied upon the decision of Hon'ble Supreme Court in case of Andaman Timber Industries vs. Commissioner of Central Excise, 127 DTR 241 (SC).

5.1. On the other hand, the ld. D/R has submitted that the addition was not made merely on the basis of statement of Shri Rajesh Tambi but the said statement was corroborated by the impounded material and, therefore, the AO was justified in making the addition. He has relied upon the orders of the authorities below.

6. We have considered the rival submissions as well as the relevant material on record. The AO has made the addition on account of the share of profits in the property dealing of Balaji Vihar-II Scheme along with 3 other partners as well as brokerage income earned by the assessee which was detected during the course of

survey under section 133A in case of M/s. Vedang Colonizers Pvt. Ltd. on 13/14.08.2012. The impounded documents/records were confronted with Shri Rajesh Tambi, the Director of the said company, who had explained the nature of transactions and the parties involved in those transactions. Therefore, the basis of the addition is clearly the impounded material which has been explained by Shri Rajesh Tambi in the statement recorded under section 131. The impounded material itself does not reveal all the facts which are sufficient to reach to the conclusion that the assessee is having a particular share in the profits of the transactions and rather the nature of transaction is also not clear from the entries in the impounded documents. Therefore, the statement recorded under section 131 of Shri Rajesh Tambi is an important link which forms the basis of the addition made by the AO. It is also not in dispute that the assessee was not given an opportunity to cross examine Shri Rajesh Tambi. The Hon'ble Supreme Court in the case of Andaman Timber Industries vs. CCE (supra) while dealing with the issue has held in para 5 to 8 as under :-

> *"5. We have heard Mr. Kavin Gulati, learned senior counsel appearing for the assessee, and Mr. K. Radhakrishnan, learned senior counsel who appeared for the Revenue.*
>
> *6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating*

*Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.*

*7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.*

*8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice."*

In view of the decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries vs. CCE (supra) and since the assessee did not specifically demand the

cross examination of Shri Rajesh Tambi during the assessment proceedings, therefore, in view of the facts and circumstances of the case, we set aside the matter to the record of the AO to give an opportunity to the assessee to cross examine Shri Rajesh Tambi and then adjudicate the issue of addition made by the AO as per law.

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

Order pronounced in the open court on 24/05/2018.

| Sd/- | Sd/- |
|---|---|
| ( भागचन्द) | ( विजय पाल रॉव ) |
| (BHAGCHAND) | ( VIJAY PAL RAO ) |
| लेखा सदस्य / Accountant Member | न्यायिक सदस्य / Judicial Member |

जयपुर / Jaipur
दिनांक / Dated:- 24/05/2018.
das/

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

1. अपीलार्थी / The Appellant- Shri Atal Bihari Gupta, Jaipur.
2. प्रत्यर्थी / The Respondent-The ITO Ward 1(3), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File {ITA No. 280/JP/2016}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar