

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "G" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA.No.515/Del./2015
Assessment Year 2011-2012

Shri Subhash Chand Gupta Delhi PAN AAAPG2554K C/o. Sh. Kapil Goel, Advocate, F-26/124, Sector- 7, Rohini, Delhi – 110 085.	vs	The DCIT, Central Circle-4, New Delhi.
(Appellant)		(Respondent)

For Assessee :	Shri Kapil Goel, Advocate
For Revenue :	Shri S.S. Rana, CIT-D.R.

Date of Hearing :	21.08.2018
Date of Pronouncement :	07.09.2018

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by Assessee has been directed against the Order of the Ld. CIT(A)-XXXIII, New Delhi, Dated 30.10.2014, for the A.Y. 2011-2012.

2. We have heard the Learned Representatives of both the parties and perused the findings of the authorities below and considered the material available on record.

3. Briefly the facts of the case are that a search and seizure operation under section 132 of the I.T. Act, 1961 was carried-out on 21.01.2011 in DS Group of Cases. M/s Dharampal Satyapal Group is engaged in manufacturing and trading of Chewing Tobacco and premium pan masala besides other businesses. The group is also involved in Food Products, Packing, Hospitality, Rubber, Steel and Education business. The assessee filed his return of the income for assessment year under appeal on 29.09.2011 declaring total taxable income of Rs.32,130/-. The income was declared under the Head "Income from House Property, Income from Business and Profession and Other Sources". The A.O. completed the assessment under section 153A/143(3) vide Order dated 18.03.2013 determining the total income of assessee at Rs.54,46,250/- by making three additions i.e., Rs.2,14,120/-,

Rs.2 lakhs and Rs.50 lakhs. The Ld. CIT(A) dismissed the appeal of the assessee. The assessee challenged the above three additions in all the grounds of appeals.

4. On Ground No.1, the assessee challenged the addition of Rs.2,14,120/- on account of unexplained investment in gold coins. During the course of search and seizure operation at Locker No.293, maintained with HDFC Bank, Sector-19, Noida, gold coins aggregating in value to Rs.2,14,120/- were found. As the assessee has failed to furnish any satisfactory explanation of the source of the acquisition of the said gold coins, the entire coins aggregating in value to Rs.2,14,120/- were seized. The assessee explained before A.O. that jewellery belongs to different family members. The details of family jewellery along with wealth tax returns and purchase bills were filed. The A.O. however, noted that assessee failed to explain the source of acquisition of entire jewellery consisting of gold coins found from the locker of the assessee. During the course of statement recorded under

section 132(4) of the I.T. Act, assessee was not able to explain the source of investment in gold coins. The A.O. accordingly made addition of Rs.2,14,120/- under section 69A of the I.T. Act because assessee could not explain investment in gold coins.

5. The Ld. CIT(A) noted that addition has been made on the basis of 13 gold coins found during the course of search weighing 101 grams treating as unaccounted. The Ld. CIT(A) noted that the issue is of gold coins and not of jewellery. The assessee has not declared gold coins in the wealth tax return. The Ld. CIT(A) accordingly, confirmed the addition and dismissed this ground of appeal of assessee.

6. During the course of arguments, the Learned Counsel for the Assessee did not argue this ground of appeal. In the absence of any explanation or arguments from the side of the assessee, no interference is required in the matter. However, it may be noted that the issue pertains to recovery of unaccounted 13 gold coins found during the course of search,

for which, no explanation was made before the authorities below. Whatever explanation was given either for declaring the jewellery in wealth tax return or jewellery possessed by family members was irrelevant to the matter in issue. In the absence of challenge to the findings of the authorities below, Ground No.1 of appeal of assessee is dismissed.

7. On ground No.2, assessee challenged the addition of Rs.2 lakhs made on account of unexplained cash. During the course of search and seizure proceedings at the residence of the assessee, cash of Rs.2,75,000/- was found and cash of Rs.1,50,000/- was also seized. From the Locker No.293 maintained with HDFC Bank, Sector-19, Noida, cash of Rs.50,000/- was found. The same was also seized as the assessee failed to explain the source. With regard to source of the cash found during the course of search and seizure proceedings, assessee submitted before A.O. the details of cash found from Locker and Residence. The A.O. noted that assessee has not produced any credible evidence in respect of

source of the cash found. The assessee merely submitted that assessee is 60 years old and is regular income tax payee since the decades and cash was kept for any contingency but could not explain the source of the cash found during the course of search. Further, no explanation was given with regard to the cash kept in the Locker. The assessee merely submitted that cash is out of his regular withdrawals and savings. The A.O. did not accept the contention of assessee because source of the cash found during the course of search was not explained through any evidence or material on record. The A.O. considering the withdrawals made by assessee during the year extended the benefit of Rs.1,25,000/- and considered it to be explained. The remaining cash of Rs.2 lakhs was treated as unexplained cash and added to the income of assessee under section 69A of the I.T. Act.

8. The assessee reiterated the submissions before the Ld. CIT(A). The assessee also filed copy of the wealth tax return to show that cash was declared in the wealth tax

returns for A.Ys. 2010-2011 and 2011-2012. The Ld. CIT(A), however, noted that in A.Ys. 2010-2011 and 2011-2012 assessee has declared cash in wealth tax returns for Rs.1,35,518/- and Rs.75,612/-. The date of search is 21.01.2011. The assessee is required to disclose all the cash in the wealth tax returns. Since in assessment year under appeal the cash was declared in wealth tax return of Rs.75,612/- only, therefore, it was held that A.O. has already given sufficient benefit to the assessee of Rs.1,25,000/-. The Ld. CIT(A), accordingly, dismissed this ground of appeal of assessee.

9. After considering the rival submissions, we do not find any merit in this ground of appeal of assessee. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and submitted that the amount of Rs.2 lakhs is available to assessee out of cash withdrawals time to time. There is no merit in the explanation of the assessee. It is not in dispute that during the course of search

cash was found from the premises of the assessee as well as from the Locker maintained by him. The assessee could not produce any credible evidence in respect of source of the cash found during the course of search. The assessee explained that cash is available to him out of withdrawals made earlier which was kept for any contingency. However, such explanation was not supported by any cogent evidence. The assessee also tried to explain that cash was declared in the wealth tax return. However, in assessment year under appeal, assessee has declared cash of Rs.75,612/- in wealth tax returns, therefore, there were no evidence filed by assessee to explain availability of the cash with him and the source thereof. The authorities below were, therefore, justified in considering it to be unexplained cash found during the course of search. Therefore, addition has been correctly made against the assessee. Ground No.2 of appeal of assessee is dismissed.

10. On ground No.3, assessee challenged the addition of Rs.50 lakhs. The A.O. noted that during the course of search

and seizure proceedings at B-7, 8, Sec-3, Noida, the business premises of various concerns controlled by the assessee, an amount of Rs.73,90,360/- was found. Out of the same, cash of Rs.60,00,000/- was also seized. During the course of statement under section 131 of the Income Tax Act given before the Deputy Director of Income Tax (Inv.), the assessee submitted that the cash of Rs.50,00,000/- was received by him as advance for sale of property belonging to M/s.Arsus Organics and Packaging (P) Ltd. (in short "M/s. AOP Pvt. Ltd.,") which was received by Mr. Sudhir Jain from farmers at Patodi. The explanation filed by the assessee during the course of assessment proceedings are reproduced in the assessment order in which the assessee submitted that in order to avoid the litigation, inability to produce in person, the persons who have made the advances and to buy the peace of mind, the assessee offered the sum of Rs.50 lakhs for taxation, subject to no penal action. Since assessee explained inability to produce such person from whom advance was received and amount offered for taxation, the same is added to the total

income of the assessee, as income of assessee from undisclosed sources.

11. The assessee challenged the addition of Rs.50 lakhs before Ld. CIT(A). The written submissions of the assessee is reproduced in the appellate order, in which, same facts have been reiterated that the amount belong to M/s. AOP Pvt. Ltd., and that in order to avoid litigation and inability to produce the persons who have given advance to the assessee, the assessee offered the amount for taxation. The assessee further explained that no adverse inference can be drawn against the assessee because the version of the assessee is supported by seized paper PB-46 and presumption under section 292C comes to rescue of the assessee. The assessee at the initial stage made the same statement which is supported by audited balance-sheet of beneficial company M/s. AOP Pvt. Ltd., as on 31.03.2011. The tax should be levied on the right person and that affidavit of the prospective buyer should not be rejected.

There is no estoppel against the statute. Mere non-production of the buyer would not justify the addition.

12. The Ld. CIT(A) considering the explanation of assessee noted that cash was found from the business premises of the assessee. The assessee relied upon seized paper which has notings of 'Bayana'. The assessee has surrendered Rs.50 lakhs in his hand on account of Rs.50 lakhs received from Shri Om Prakash and Shri Umad Singh but he did not produce them. Therefore, in order to buy peace of mind, assessee surrendered amount for taxation. The Ld. CIT(A), therefore, found that assessee failed to prove identity and creditworthiness of Shri Om Prakash and Shri Umad Singh. The statement of assessee was recorded on 27.01.2011 immediately after search, but, assessee could not give details of persons who have given cash as advance to the assessee at the time of search as well as in the subsequent proceedings. The statement of assessee is reproduced in the appellate order to show that assessee failed to explain the identity and details

of the persons who had given advances to the assessee. The Ld. CIT(A) also found that the seized paper PB-46 has not been signed by Shri Om Prakash and Shri Umad Singh. In the seized paper only 20=00 and 30=00 have been mentioned. The affidavits of the alleged buyers are contradictory because the seized paper contained the word 'Bayana', but, mode of payment is not mentioned. The Ld. CIT(A), therefore, found that assessee failed to prove that cash of Rs.50 lakhs found during the course of search belongs to M/s. AOP Pvt. Ltd. The Ld. CIT(A), accordingly, confirmed the addition and dismissed this ground of appeal of assessee.

13. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and referred to PB-20 which is reply filed before A.O. dated 28.02.2011, copy of the balance-sheet dated 27.08.2011 of M/s. AOP Pvt. Ltd., ending 31.03.2011, PB-46 seized paper and PB-104 and 105 affidavits of the alleged buyers. Learned Counsel for the Assessee submitted that assessee discharged initial burden to

prove the availability of the cash which belong to the company and that assessee has been making the same submissions since beginning, therefore, for non-production of the buyers, no addition should be made in the hands of the assessee. Learned Counsel for the Assessee relied upon Judgment of the Hon'ble Supreme Court in the case of DCIT vs. T. Jayachandran in Civil Appeal No.4341 of 2018 arising out of SLP.No.22112 of 2013 dated 24.04.2018 and submitted that since assessee was only a conduit between buyer and M/s. AOP Pvt. Ltd., therefore, no addition in the hands of the assessee should be made. In the alternative contention, he has submitted that addition of Rs.2 lakhs may be given telescoping benefit out of addition of Rs.50 lakhs.

14. On the other hand, Ld. CIT-D.R. relied upon the Orders of the authorities below and submitted that A.O. asked for source of the cash found during the course of search which assessee did not explain. When assessee can file affidavits of the buyers, why assessee cannot produce them before A.O. is

not explained. When amount was shown in the balance-sheet of M/s. AOP Pvt. Ltd., there were no reason to surrender the amount in question for taxation. This itself proves that assessee has no explanation whatsoever to explain the source of the cash found during the course of search. There were no written agreement for sale of the property and huge cash was found during the course of search which is not explained by assessee. The Ld. D.R. relied upon the following decisions.

14.1. In the case of Sukh Ram vs., ACIT, Central Circle-2, New Delhi (2006) 285 ITR 256 (Delhi) the Hon'ble Delhi High Court held that *"where pursuant to a search conducted at residential premises of assessee, huge sum of cash was found, for which assessee explained that said cash belonged to certain organisation but did not bring any material on record to substantiate his explanation and, moreover, verification of books of account of said organization showed no connection with cash recovered from assessee, in said circumstances*

assessee was to be treated as owner of said cash, and same was to be added to income of assessee under section 69A.”

14.2. In the case of R. Mallika vs., CIT (2017) 79 taxmann.com 117 (SC) *“the Hon’ble Supreme Court dismissed the SLP against Madras High Court's ruling that where assessee had not discharged burden as regards source from which investment had been made, investment in property was an unexplained investment and same was rightly added to the income of assessee.”*

15. We have considered the rival submissions. It is not in dispute that cash of Rs.50 lakhs relevant to the issue under appeal was found from possession of the assessee. The cash is an unidentifiable movable property. Whosoever is having possession of the same is lawful owner of the same. The burden is upon such person only to explain how such cash has been found in his possession. Section 110 of the Evidence Act provides *“When the question is whether any person is owner of anything of which he is shown to be in possession, the*

burden of proving that he is not the owner is on the person who affirms that he is not the owner.” In the present case, since assessee was found in possession of huge cash during the course of search and seizure operation, which is also not disputed by the assessee, therefore, the assessee is lawful owner of the cash found during the course of search. Since the assessee claimed that the seized cash in question belongs to M/s. AOP Pvt. Ltd., therefore, burden is upon assessee to prove that he is not the owner of the cash so found and seized during the course of search. The assessee during the course of search was not able to explain the source of the cash found. Thereafter, immediately his statement was recorded under section 131 of the I.T. Act on 27.01.2011 after search, he was not able to provide the details of the persons who have given cash of Rs.50 lakhs to him. He has submitted that he would provide the details of such man later on. It was not a small amount found during the course of search. It was a huge amount of Rs.50 lakhs. Therefore, it is difficult to believe that assessee would not be knowing about the name and address

of the persons who have given cash to him prior to the search. Later on, the assessee explained that the cash belong to M/s. AOP Pvt. Ltd., as advance was given on their behalf by Shri Om Prakash and Shri Umad Singh. The assessee relied upon the seized paper, copy of which is filed at page-46, in which it is only mentioned as 'Bayana' for land of ARSUS. Against the names of Shri Umad Singh and Shri Om Prakash 20=00 and 30=00 respectively have been mentioned. The seized paper is not signed by these persons. The 'Bayana' for land could be that advance given by M/s. AOP Pvt. Ltd., to these persons. But, assessee claimed it to be that this amount is paid by these two persons to the assessee for and on behalf of M/s. AOP Pvt. Ltd. Thus, nothing can be taken in favour of assessee in this regard. Thus, Section 292C could not be applied in favour of assessee. Since the assessee could not explain the source of the cash found during the course of search at the time of conducting the search or in the statement recorded later on, therefore, contention of assessee is incorrect and afterthought that cash belong to M/s. AOP Pvt. Ltd., as was

paid by Shri Umad Singh and Shri Om Prakash. The assessee also relied upon the balance-sheet of M/s. AOP Pvt. Ltd., ending on 31.03.2011 dated 27.08.2011 in which the aforesaid company has mentioned Rs.50 lakhs as advance against the property. However, Learned Counsel for the Assessee was not able to explain that, when balance-sheet of M/s. AOP Pvt. Ltd., was prepared on 27.08.2011, what was the necessity for the assessee to surrender the amount in question for taxation before A.O. in the letter dated 28.03.2013 (PB-20). When assessee was aware of the fact that alleged cash belong to the company, there were no reason for him to surrender the amount in question for taxation at assessment proceedings. The assessee also filed affidavit of the alleged purchasers Shri Umad Singh and Shri Om Prakash, copy of the same are filed at pages 104 and 105 of the paper book, in which, they have explained that both of them are farmers and source of the payment was out of income earned, cash drawn from their bank account. But, no copy of the bank account have been filed. Further, the signature of Shri Om

Prakash is found different on his affidavit and the receipt executed by him, copy of which is filed at page-106 of the paper book. The assessee further failed to explain that when both the alleged purchasers have executed their affidavits on 27.02.2013, why such persons could not be produced before A.O. for examination on oath in order to find-out the truth in the matter. The assessee in his reply dated 28.02.2013 (PB-20) filed before A.O, filed copy of the affidavits of both the alleged purchasers before A.O. However, assessee again offered the amount for taxation and did not contest the addition before A.O. The conduct of the assessee is not above board as assessee failed to explain the contradictions in his statement and failed to explain that on the face of the explanation filed by assessee why ultimately assessee made surrender of Rs.50 lakhs before A.O. The A.O. passed the assessment order on 18.03.2013, therefore, ample opportunity was given to the assessee to retract from his written statement filed on 28.02.2013 surrendering the amount in question for the purpose of taxation. However, assessee did not do so in the

matter. It is not a case of mere non-production of Shri Umad Singh and Shri Om Prakash before the authorities below because the assessee ultimately failed to prove the identity, creditworthiness of both the persons to make genuine advances to the assessee. It appears that explanation of assessee is an afterthought which it is not supported by any evidence. The burden upon assessee to prove the source of the cash found during the course of search and that the cash belong to M/s. AOP Pvt. Ltd., has not been discharged by assessee through any cogent and reliable evidence. Learned Counsel for the Assessee relied upon decision of the Hon'ble Supreme Court in the case of DCIT vs. T. Jayachandran in Civil Appeal No.4341 of 2018 arising out of SLP (C) No.22112 of 2013 dated 24.04.2018 in which the issue was "*Whether additional interest payable to the PSUs cannot be assessed as income of the respondent/assessee ?*". In this case, the respondent/assessee acted as a broker to the Indian Bank in purchase of the securities from different financial institutions.

The facts of the case are distinguishable and would not support the case of the assessee.

15.1. In the present case, huge unaccounted cash was found and seized during the course of search from assessee which is not disputed by the assessee. Whatever explanation was given by the assessee later on was not supported through any evidence or material on record. Therefore, the authorities below have correctly considered it to be unexplained cash found during the course of search and rightly treated as income of assessee from undisclosed sources. The addition of Rs.2 lakhs on account of cash found is independent to this issue. Therefore, no telescoping benefit can be given. No interference is called for in the matter. Ground No.3 of appeal of the assessee is accordingly dismissed.

16. In the result, appeal of assessee is dismissed.

Order pronounced in the open Court.

Sd/-
(L.P. SAHU)
ACCOUNTANT MEMBER
Delhi, Dated 07th September, 2018
VBP/-

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT "G" Bench
6.	Guard File

// BY Order //

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Delhi.