

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत
**IN THE INCOME TAX APPELLATE TRIBUNAL
 SURAT BENCH, SURAT**
 श्री सी.एम.गर्ग, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्य के समक्ष
**BEFORE SHRI C.M.GARG, JUDICIAL MEMBER
 AND SHRI O.P.MEENA, ACCOUNTANT MEMBER**

आ.अ.सं./I.T.A No.2576/AHD/2015/SRT
 निर्धारण वर्ष/Assessment Year : 2010-11

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| The Income Tax Officer, Ward-2(2)(4), Old Ward-5(4), Surat. | Vs. | Swastik Enterprise, 3 rd & 4 th Floor, Sargam House, Opp.Andhjan Schook, Ghod Dod Road, Surat – 395 007. [PAN: ABEFS 2397 F] |
| अपीलार्थी Appellant | | प्रत्यर्थी/Respondent |

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| निर्धारिती की ओर से /Assessee by | Shri Ketan Jagirdar - CA |
| राजस्व की ओर से /Revenue by | Shri S.R.Meena - Sr.DR |

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| सुनवाई की तारीख/ Date of hearing: | 07.08.2018 |
| उद्घोषणा की तारीख/Pronouncement on | 23.08.2018 |

आदेश /O R D E R

PER O. P. MEENA, ACCOUTANT MEMBER:

1. This appeal filed by the Revenue is directed against the order of learned Commissioner of Income tax (Appeals)-1, Surat (in short “the CIT (A)”) dated 29.06.2015 pertaining to Assessment Year 2010-11, which in turn has arisen from the order passed by the Income Tax Officer, Ward-5(4), Surat (in short “the AO”) dated 28.03.2013 under section 143(3) of Income Tax Act, 1961 (in short ‘the Act’).

2. Grounds raised by the Revenue read as follows :

“1. On the facts and circumstances of the case and in Law, the Ld.CIT(A) has erred in deleting the addition of Rs.1,42,63,900/- made by the AO on protective basis being the difference in the sale consideration shown by the assessee on the ground that this addition has been confirmed by him in the cases of other persons without appreciating the fact that confirmation of additions in the cases of these other persons has not reached finality.

2. The Ld.CIT(A) should have considered this aspect while deleting the addition on protective basis, that the addition made on substantive basis has not reached finality. Hence, it is prayed that the cases of the assessee wherein substantive additions have been made may kindly be clubbed with this cases before deciding the issue at hand by Hon'ble ITAT.

3. On the facts and in the circumstances of the case and in Law, the Ld.CIT(A), Surat ought to have upheld the order of the Assessing Officer. It is, therefore, prayed that the order of the Ld.CIT(A)-I Surat may be set-aside and that of the Assessing Officer's order may be restored.”

3. All the above grounds are being considered together as issue is common. Briefly stated the facts of the case are that the assessment was completed on 28.03.2013 determining total income at Rs.1,14,94,429 by making addition of amount of short term capital gain after adjusting the loss of Rs.27,69,471 claimed by the assessee. It was noticed that the assessee has sold a property of 1903.11 sq.mtrs to Bharat Singh S.Waghela and Deepti J.Patel partners of M/s.Maitry Motors for a consideration of Rs.2.03 crores. Shri Dharmeshbhai H.Patel, Shri Yogeshbhai H.Patel and Nitinbhai H.Patel (3 brothers were confirming parties). On enquiry from the Mehsana Urban Co.operative Bank Ltd. it was noticed that Shri Dharmeshbhai H.Patel, Shri Nitinbhai H.Patel received Rs.68 lakhs each and Shri Yogeshbhai H.Patel Rs.67 lakhs.

Thus, these 3 persons received a total consideration of Rs.2.03 crores as confirming parties from the purchaser of the above property. The Assessing Officer, however observed that the sale agreement submitted by the assessee is an afterthought as the same was not registered. Therefore, the balance amount of Rs.1,42,63,900/- (Rs.2,03,00,000/- (-) Rs.60,36,100/-) was added to the total income of the assessee on protective basis. Since the above 3 confirming parties have received the sale consideration of Rs.2.03 crores as reflected in their bank accounts. Their cases were reopened and the different amount of Rs.1,42,63,900/- was added to their total income on substantive basis.

4. Being aggrieved, the assessee filed appeal before the CIT(A), and the Id.CIT(A) vide his order dated 29.06.2015 has allowed the appeal of the assessee by observing as under :

“.....the amount of addition Rs.1,42,63,900/- was confirmed in the hands of 3 brothers on substantive basis. Once, the finding has been reached that amount belongs to S/Shri Dharmesh H.Patel, Yogesh H.Patel and Nitin H.Patel and not to the assessee, there is no justification of making addition in the hands of the assessee. The same income cannot be taxed twice. Besides this, the impugned amount was deposited in the respective bank account of 3 brothers and they actually enjoyed the fruit of this money. This amount has never reached to the assessee. As per 'real income theory' also, the assessee has received only Rs.60,36,100/- which has been found reflected as sales in the P & L a/c. It is also matter of fact that AO has not brought any evidence on record to establish that actually the assessee received the money i.e. Rs.1,42,63,900/- and not the 3 brothers. The confirming party i.e. Dharmes & his brothers nor the buyer parties have alleged that the assessee received any sale consideration over and above Rs.60,36,100/-. I agree with the contention of the assessee that neither the income of Rs.1,42,63,900/- accrued to or received by the assessee and therefore, the same cannot be taxed in its hands. Considering the above discussion and facts of the case, the

addition of Rs.1,42,63,900/- made in the hands of the assessee on "protective basis" is hereby ordered to be deleted."

5. Being aggrieved, the Revenue has filed appeal this Tribunal. However, on a query from bench the ld.Departmental Representative(DR) submitted a letter from the Assessing Officer (AO) dated 02.08.2018 in respect of Shri Dharmesh H.Patel, Shri Yogesh H.Patel and Shri Nitin H.Patel stating that the appeal filed by the assessee in these cases were dismissed by the CIT(A) and there is no appeal filed before the ITAT as against the said dismissal of appeal. Therefore, the ld.Counsel for the assessee submitted that since the assessment in the case of 3 brothers has attained finality in whose cases substantive addition was made. Therefore, protective addition made in the case of assessee has been rightly deleted.

6. We have heard the rival submissions and perused the material on record and find that the substantive additions made in the hands of 3 brothers has been sustained by the CIT(A) and there is no further appeal appears to have been filed before the Tribunal by these 3 persons. Therefore, the protective addition made in the case of assessee does not survive, hence, same is rightly deleted, by the ld.CIT(A). In view of this, we do not find any

reason to deviate from the findings of CIT(A), hence, same is upheld and Revenue 3 grounds of appeal are dismissed.

7. However, the Revenue is at liberty to move Miscellaneous Petition, if it is discovered that there is appeal by the above named 3 persons before the Tribunal for recalling of this order of the Tribunal.

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

9. The order pronounced in the open Court 23-08-2018.

Sd/-

(सी.एम.गर्ग /C.M. GARG)

न्यायिकसदस्यतथा/JUDICIAL MEMBER लेखासदस्यकेसमक्ष /ACCOUNTANT MEMBER

सुरत/ Surat, दिनांक Dated: 23rd Aug, 2018/S.Gangadhara Rao, Sr.PS

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

/ / TRUE COPY / /

Assistant Registrar, Surat