

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH : SMC : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER

ITA No.2159/Del/2018  
Assessment Year: 2009-10

Sunil Kumar Aggarwal,  
B-174, Ground Floor,  
Nirman Vihar, Vikas Marg,  
Delhi – 110092.

Vs. ITO,  
Ward-61(5),  
New Delhi.

PAN: AAGPA1651B

(Appellant)

(Respondent)

Assessee by : Shri K.P. Ganguli, Advocate  
Revenue by : Shri P.S. Thuingaleng, Sr.DR

Date of Hearing : 10.12.2018  
Date of Pronouncement : 19.12.2018

ORDER

This appeal by the assessee is directed against the order dated 31<sup>st</sup> January, 2018 of the CIT(A)-20, New Delhi relating to Assessment Year 2009-10.

2. The facts of the case, in brief, are that the assessee is a doctor and filed his return of income on 30<sup>th</sup> March, 2010 declaring total income of Rs.1,77,510/-. The case of the assessee was reopened by issue of notice u/s 148 on the ground that the assessee has received cash payment of Rs.2 lakh during F.Y. 2008-09 which was largely unaccounted for as per the information received from the DCIT, Circle 1, New Delhi. The assessee, in response to the same, submitted that the original return filed on 20<sup>th</sup> March, 2010 may be treated as return filed in response to notice u/s 148. On

being asked by the assessee to issue the reasons recorded, the Assessing Officer supplied the following reasons:-

“.....As per the information, a survey u/s 133A had taken place in the case M/s Advance Therapeutics Pvt. Ltd.... Further, it was noticed that assessee has made cash payment to various Medical Professional which were largely unaccounted. The detail in respect of Dr. Sunil Agarwal is as under:-

NAME	PAN	AMOUNT & DATE OF PAYMENT	MODE OF PAYMENT
SH. SUNIL KUMAR AGGARWAL	AAGPA1651B	1,00,000/- 02Aug2008 10,000/- 28 Aug 2008 90,000/- 15 Oct 2008	CASH

3. The assessee filed its objections to such reopening of the assessment. However, the Assessing Officer vide order dated 07.11.2016, disposed of the objections by rejecting the same. Thereafter, the Assessing Officer recorded the statement of Shri Gurmeet Singh Chugh, MD of M/s Advanced Therapeutics Pvt. Ltd., which was recorded on oath u/s 131(1) (1A) of the IT Act during which Shri Chug had stated that he does not recollect the same since the matter is of the year 2008. The assessee was provided with copy of the statement of Shri Chug. However, he expressed his unwillingness to cross-examine Shri Chug. The Assessing Officer, therefore, made addition of Rs.2 lakh on the basis of the ledger account impounded during the course of survey operation in the case of Advanced Therapeutics Pvt. Ltd. and the statement of Shri Gurmeet Singh Chug during the course of survey.

4. Before the CIT(A), apart from challenging the addition on merit, the assessee also challenged the validity of the reassessment proceedings. However, the Id.CIT(A) rejected both the grounds i.e., the grounds challenging the validity of reassessment

proceedings as well as the ground on merit. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:-

“1. That, on the facts and in the circumstances of the case CIT (Appeals)-20 erred in law and on facts in not admitting addition ground taken by the appellant which reads as under-

That on the facts and in circumstances of the case ITO Ward 61(5) New Delhi was not justified in the opening of the case u/s 147 of Income Tax Act 1961, on the basis of statement recorded of a third party and also not providing the appellant an opportunity to cross examine and also not confronting the assessee with a copy of statement which was used against him.

The Hon'ble Commissioner of Income Tax (Appeal)-20 may consider admission of the above mentioned ground of appeal for adjudication. This is a legal ground of jurisdiction which goes to the roots of the proceedings and facts of which are already available of record. Reliance in this regard is placed on the decision of Hon'ble apex court in the case of National thermal power company limited vs. Commissioner of Income Tax (1998) 229/ITR 383(SC).

2. That, on the facts and in the circumstances of the case CIT (Appeals)-20 erred in law and on facts in not admitting additional evidence U.R. 46 (A) of Income Tax Rules, 1962.

3. That, on the facts and in the circumstances of the case CIT (Appeals)-20 was not justified in confirming the addition of Rs. 2,00,000/- made by A.O. without disposing off the objections of the appellant to the notice u/s 148 of the Income Tax Act, 1961 by passing a speaking order.

4. That the assessee craves leave to urge any other ground before or at the time of hearing or amend the existing ground of appeal.”

5. The ld. counsel for the assessee strongly challenged the order of the CIT(A). He submitted that the addition was made solely on the basis of statement of Shri Gurmeet Singh Chug during the course of survey u/s 133A of the IT Act. Relying on various decisions, he submitted that the statement recorded during the course of survey does not have any evidentiary value unless it is backed up by corroborative evidences. Referring to the decision of the Hon'ble Madras High Court in the case of CIT vs. S.

Khaderkhan Son reported in (2008) 300 ITR 157 (Mad.), he submitted that the Hon'ble High Court in the same decision has held that section 133A does not empower any IT authority to examine any person on oath, hence, any such statement has no evidentiary value and any admission made during such statement cannot by itself be made the basis for addition. He submitted that the SLP filed by the Revenue against the above addition was dismissed by Hon'ble Supreme Court as reported in 352 ITR 480. He submitted that similar view has been held in the case of K. Velayutham vs. ACIT in Writ Petition No.33917 to 33920 of 2017 and in the case of P. Mathews & Sons vs. CIT reported in (2003) 263 ITR 101 (Ker.). Referring to the statement recorded by the Assessing Officer during the course of assessment proceedings, he submitted that Shri Chug has categorically stated in his statement that he has not paid any amount to the assessee Dr. Sunil Kumar Aggarwal and the Assessing Officer has conveniently ignored the relevant answer of Shri Chug. He accordingly, submitted that the addition made by the Assessing Officer and sustained by the CIT(A) is not justified.

6. So far as the validity of the reassessment proceedings are concerned, he submitted that the Assessing Officer has merely relied on the information received from the ACIT Circle 1(1), New Delhi and has not applied his independent mind. Relying on various decisions including the decision of the Hon'ble Delhi High Court in the case of CIT vs. G & G Pharma (2015) 384 ITR 147 (Del) and various other decisions, he submitted that where the Assessing Officer had not made any effort to discuss the material on the basis of which he formed the *prima facie* view that the income had escaped assessment, the basic requirement of section 147 that the

Assessing Officer has to apply his mind in order to form reasons to believe that income had escaped assessment which had not been fulfilled. Accordingly, reassessment proceedings were to be held invalid. Relying on various other decisions in the paper book, he submitted that similar view has been taken. He further submitted that the Assessing Officer has not disposed of the objections by passing a speaking order. He accordingly, submitted that both legally and factually, the addition made by the Assessing Officer is not justified.

7. The Id. DR, on the other hand, heavily relied on the orders of the Assessing Officer and CIT(A).

8. I have heard the rival arguments made by both the sides and perused the material available on record. I find the Assessing Officer on the basis of information received from the DCIT, Circle 1(1), New Delhi that the assessee has received cash payment of Rs.2 lakh during F.Y. 2008-09, reopened the assessment by issue of notice u/s 148. While making the addition, the Assessing Officer referred to the statement of Shri Gurmeet Singh Chug, MD of Advanced Therapeutics Pvt. Ltd. which was recorded on oath during the course of survey operation u/s 133A of the IT Act dated 6<sup>th</sup> December, 2008. He also referred to the statement of Shri Chug recorded during the course of assessment proceedings wherein he had stated that since it is a matter of the year 2008 he does not recall the same. On the other hand, the Id.CIT(A) upheld the action of the Assessing Officer on the ground that Shri Chug had made the statement during the course of survey at his premises u/s 133A and certain ledgers

were found depicting the payment to various members wherein the name of the assessee was also mentioned. It is the submission of the Id counsel for the assessee that the Revenue authorities do not have the power to record the statement of a person during the course of survey u/s 133A and such statement has no evidentiary value. It is also his submission that during the statement recorded u/s 131(1) (1A), Shri Gurmeet Singh had categorically stated that he has not given any cash payment to the assessee. However, the Assessing Officer has conveniently ignored those replies and simply reproduced the answer to question No.8. I find merit in the above argument of the Id. counsel for the assessee. It has been held in various decisions that section 133A does not empower any IT Authorities to examine any person on oath and, therefore, any such statement has no evidentiary value and any admission made during such statement cannot by itself be made the basis for addition. I further find Mr. Chug in his statement recorded on oath u/s 131 of the IT Act during the course of assessment proceedings in the case of the assessee on 17<sup>th</sup> October, 2016 has submitted as under:-

Question Number 5	Survey operation u/s 133A of the I.T.Act. 1961 were carried out by the Department on 06/12/2008 at 2 <sup>nd</sup> Floor Metro Tower 1 LSC, New Rajender Nagar, New Delhi-110060 from the papers/documents impounded during the course of survey, it is noticed that your company has made the cash payment of Rs. 2,00,000/-on various dates to one Dr,Sunil Agarwal (PAN- AAGPA1651B) during the period 12/07/2008 to 12/11/2008, as per record seized. Please explain the nature of this cash payment whether this is sale or commission or service charge. Also explain whether TDS was deducted on this amount.
Answer No.5	It is denied that any cash payments was ever paid to Dr. Sunil Agarwal or any other cardiologist ever. There were a few entries made against the name of few doctors

	which were related to allocations for marketing activities/ total business done/ expects business during the month or quarters etc.
Question number 6.	Please produce the evidence/proof/receipt if any available with the company on the basis of which huge amount of case of Rs 2,00,000/- was paid to Dr Sunil Agarwal (PAN- AAGPA1651 B)
Answer Number 6.	It is denied that any cash payments was ever paid to Dr. Sunil Agarwal or any other cardiologist ever.
Question Number 7	Please also explain whether Dr, Sunil Agarwal (PAN-AAGPA1651B) was on panel of Max Hospital for rendering any services, during the period 2008-09 relevant to A/Y 2009-10, Do you have any idea about this
Answer Number 7	I have no idea about the association of Dr. Sunil Agarwal with Max Hospital.
Question number 8	I am showing you copy of ledger account of M/s Advance Therapeutics Pvt. Ltd which were impounding during the course of survey operation conducted u/s 133A of the I.T. Act on 06/12/2008 at 2 <sup>nd</sup> Floor Metro Tower, 1 LSC, New Rajender Nagar, New Delhi-110060. Please explain the same.
Answer Number 8	Since it is a matter of the year 2008 I don't recall the same
Question number 9	Do you want to say anything'
Answer number 9	No I don't want say anything. I am submitting copy of ITR along with all enclosures and Assessment order pass under section 143(3) of the I.T act by the then DCIT Circle-1 (1), Delhi.

9. From the above, it is clear that Shri Chug, at the time of survey, had made certain statements which was retracted during the course of recording of his statement subsequently. As had been held earlier, the IT authorities have no power to record statement during the course of survey and such statement has no evidentiary value. Thus, in the instant case, there are conflicting statements: one made during the course

of survey which has no evidentiary value and the other during the course of assessment proceedings, where the said person has denied to have made any cash payment to the assessee. It is also not discernible from the orders of the authorities below as to whether any such addition has been made in the hands of other recipients whose name appear in the list of such impounded material recovered from the premises of M/s Advance Therapeutics Pvt. Ltd. In this view of the matter, I am of the considered opinion that the addition made by the Assessing Officer and sustained by the CIT(A) is not justified. Accordingly, I direct the Assessing Officer to delete the same. Since the assessee succeeds on merit, the ground challenging the validity of reassessment proceedings is not being adjudicated as they become academic in nature.

10. In the result, the appeal filed by the assessee is allowed.

The decision was pronounced in the open court on 19.12.2018.

Sd/-

(R.K. PANDA)  
ACCOUNTANT MEMFBER

Dated: 19<sup>th</sup> December, 2018

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Copy forwarded to

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi.