

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

श्री रमेश सी शर्मा, लेखा सदस्य के समक्ष
BEFORE: SHRI RAMESH C SHARMA, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No. 1308/JP/2018
निर्धारण वर्ष / Assessment Year : 2009-10

Harbans Lal Khurana, C-84, Karmchari Colony, Ashok Vihar, Alwar.	बनाम Vs.	I.T.O., Ward 2(1), Alwar.
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: ACQPK 2714 B		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri P.C. Parwal (CA)
राजस्व की ओर से / Revenue by : Ms. Anuradha (JCIT)

सुनवाई की तारीख / Date of Hearing : 20/03/2019
उदघोषणा की तारीख / Date of Pronouncement : 26/03/2019

आदेश / ORDER

PER: R.C. SHARMA, A.M.

This is an appeal filed by the assessee against the order of Id.CIT(A), Alwar dated 25/09/2018 for the A.Y. 2009-10 in the matter of order passed U/s 147/143(3) of the Income Tax Act, 1961 (in short the Act).

2. In this appeal, the assessee is aggrieved for the reopening of the assessment and the addition of Rs. 4.00 lacs U/s 69 of the Act made on account of unexplained investment in the land.

3. Rival contentions have been heard and record perused. In this case, the assessment was reopened on the basis of statement of Shri Madan Mohan Gupta recorded during the search at his business premises and also on the basis of documents found during the course of search. So far as the reopening is concerned, I found that after recording speaking reasons, the Assessing Officer concluded that the income has escaped assessment. Accordingly, I do not find any infirmity in the order of the Assessing Officer for reopening of the assessment.

4. In so far as the merit of the addition is concerned, exactly under similar facts and circumstances, the issue has been decided in the case of Dharendra Singh Vs. ITO in ITA No. 1273/JP/2018 with two other appeals vide order dated 25/3/2019, wherein the Tribunal have deleted the addition on merit after observing as under:

“6. Now I come to the merit of the addition, I found that the Assessing Officer observed at pages 2 to 15 of the order that in search at business premises of Shri Madan Mohan Gupta dated 23.05.2013, incriminating documents were found and seized which revealed that the assessee made payment of Rs.2,68,330/- and Rs.2,670/- towards boundary expenses by receipt no. 53 dated 07.07.2008 through cheque and Rs.4,66,660/- as ‘on-money’. He referred to the relevant extract of the statement of Shri Madan Mohan Gupta u/s 132(4) reproduced at pages 10-13 of the order to conclude that assessee made ‘on-money’ payment at the rate of Rs.2,000 per sq. yard and

thus, made addition of Rs.4,66,660/- u/s 69 of the Act. By the impugned order, the Id. CIT(A) has confirmed the action of the Assessing Officer. On the issue of opportunity of cross examination, it was held that Shri Madan Mohan Gupta is not third party as he was the owner of the plots. All the documents on the basis of which assessment was made were provided to the assessee. Accordingly, it was held that the contention raised by the assessee as to the denial of cross examination by the Assessing Officer does not carry much weight and thus, confirmed the addition.

7. *After going through the order passed by the lower authorities, I observe that both the lower authorities have not placed any material on record to show that the assessee had paid alleged 'on-money' of Rs.4,66,660/-. Neither in the seized documents found from Shri Madan Mohan Gupta nor in the statement recorded u/s 132(4), he admitted that he received any amount from the assessee by way of 'on- money'. In fact, in reply to question nos. 25 to 27 of his statement u/s 132(4) with reference to the amount of Rs. 1,60,96,000/- as referred by the Ld. CIT(A), he stated that he does not remember that what is this working but it may be with reference to commission with respect to certain property which he offered for tax. In statement u/s 131(1) dated 24.02.2016 and 29.02.2016 recorded by the AO in course of his assessment proceedings, he has categorically admitted that he has sold the plots to the Rajasthan Tehsildar Sewa Parishad at the rate of Rs.1,150 per sq. yard on which he earned profit of Rs.87,20,000/- which he has already offered for tax and the remaining profit of Rs. 1,60,96,000/- is not his profit but profit of the Parishad but to purchase peace of mind, he has surrendered this amount in his hand. Thus, from the reading of the statement of Shri Madan Mohan Gupta and the papers found from him, it is evident that there is nothing to suggest that allottees of the plot have paid any 'on-money' on purchase of the plot. In fact, the assessee has not purchased any*

plot from Shri Madan Mohan Gupta rather he was allotted the plot by the Rajasthan Tehsildar Sewa Parishad and thus, there is no privity of contract between the assessee and Shri Madan Mohan Gupta. Therefore, no question of payment of alleged 'on-money' by the assessee to Shri Madan Mohan Gupta arises for consideration.

8. *I also observe that Annexure-A-3 referred by the Assessing Officer in his order is a register where the details of the plot allotted to various persons is noted. As per this register, the name & address of the person to whom the plots were allotted, the area of the plot, the amount receivable from these persons at the rate of Rs. 1,150 per sq. yard, and the amount due to them after adjusting Rs.30,000/- received from the Rajasthan Tehsildar Sewa Parishad on account of these persons is noted. Thus, this Annexure nowhere suggests that any 'on-money' has been received by Shri Madan Mohan Gupta from the allottees of plot. At the time of possession of the plot, the final receipt is issued for the entire amount received and that receipt no. is also mentioned in this register. Thus, in these papers there is no evidence that any 'on-money' has been paid by the assessee. Further, opportunity to cross examine Shri Madan Mohan Gupta was not provided even when specifically asked for on the ground that he is not a third party ignoring that assessee has not purchased any plot from him rather it is the Rajasthan Tehsildar Sewa Parishad who have allotted the plot to the assessee under the scheme framed by them. The Jodhpur Bench of the Tribunal in the case of Shri Mehtab Singh Ujjawal Vs. ITO in ITA No. 271/Jodh/2018 vide order dated 18/01/2019 wherein exactly similar addition was deleted by the Tribunal after observing as under:*

5. *Rival contentions have been heard and record perused. The issue under consideration is squarely covered by the decision of Tribunal in the case of Shri Deva Ram Suthar in ITA*

No.342/Jodh/2018 wherein exactly similar addition was deleted by the Tribunal after observing as under:-

- “7. Rival contentions have been considered and record perused. I had also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by learned AR and DR during the course of hearing before us in the context of factual matrix of the case. From the record I found that the assessee had purchased Plot No. 84 measuring 233.33 Sq.yards in the residential project "Revenue Residency" at Village Peepla Bharatsing, (Jaisinghpura-Muhana Road), Bhankrota, Tehsil-Sanganer, Jaipur developed by Shri Madan Mohan Gupta in F.Y.2008-09 relevant to A.Y.2009-10 for total purchase consideration of Rs.2,68,330/- for plot and Rs.2,670/- for boundary total Rs.2,71,000/- (Rs.1150/-perSq.Yard). Thus, total investment by assessee is Rs.2,71,000/- out of this amount Rs. 1,90,000/- was paid through bank by taking personal loan and balance Rs.81,000/- was given in the financial year 2007-08.
8. In the assessment order, the AO alleged that the assessee has paid to the seller Shri Madan Mohan Gupta on money of Rs.4,66,660/- for the purchase of plot no.84 having total area of 233.33 Sq.Yards
9. In reply to the same, assessee submitted as under:-
- “a. That the allegation of the Id.AO is baseless and imaginary and not maintainable.
- b. The Id.AO has relied upon the statement of Shri Madan Mohan Gupta recorded by the I.T. Authorities on 23.05.2013 during the course of search. But from reading the reply given by Shri Madan Mohan Gupta in the statement, it is clearly conveyed that Shri Madan Mohan Gupta sold the land for Rs.1150/- per Sq.Yard. and the appellant paid as purchase consideration to the seller Madan Mohan Gupta a sum of Rs.2,71,000/-.
- c. That the entire fabric being woven against the appellant for treating the alleged payment of on money go around the statement of Shri Madan Mohan Gupta. It is submitted that after thought statement carry no weight under the law

and they are against the spirit of natural justice because they have no evidence value.

- d. That except the above statement of Shri Madan Mohan Gupta there was no supporting evidence available with the Id.AO which could corroborate that on money of Rs.4,66,660/- was paid by the appellant to Shri Madan Mohan Gupta.*
 - e. That while making the allegation the Ld.AO has relied upon the statement of Shri Madan Mohan Gupta course of search proceedings.*
- 10. Assessee also asked before the AO to provide opportunity for the cross examination of the person on whose statement addition was made. However, no such opportunity was provided neither by the AO nor by the CIT(A). Thus, without affording cross examination, the AO has made addition on the basis of statement of Shri Madan Mohan Gupta u/s 69 being unexplained investment and added the same in assessee's income. However, there was no corroborative material available with the AO for making addition. As per our considered view, not providing opportunity of cross examination amount to violation of principle of natural justice, a serious flaw which makes the order null and void.*
- 11. For this purpose, reliance can be placed on the decision of Hon'ble Supreme Court in the case of Andaman Timber Industries 281 CTR 241 wherein it was held that not allowing assessee to cross-examine witnesses by adjudicating authority though statements of those witnesses were made as basis of impugned order, amounted in serious flaw which made impugned order nullity as it amounted to violation of principles of natural justice. The precise observation of the Hon'ble Supreme Court was as under :-*

"Not allowing the appellant 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 appellant 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 appellant disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the appellant. 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 appellant. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. 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."

12. *Reliance can also be placed on the on the decision of Bombay High Court in the case of Ashish international in 1TA No.4299/Murn/2009 dated 22/02/2011, wherein Court held as under:-*

"The question raised in this appeal is, -whether the Tribunal justified in deleting the addition on account of bogus purchases allegedly made by the appellant from M/s. Thakkar Agro Industrial Chem Supplies P. Ltd. According to the revenue, the Director of M/s. Thakkar Agro Industrial Chem Supplies P.Ltd. in his statement had stated that there were no sales/ purchases but the transactions were only accommodation bills not involving any transactions. The Tribunal has recorded a finding of fact that the appellant had disputed the correctness of the above statement and admittedly the appellant was not given any opportunity to cross examine the concerned Director of M/s. Thakkar Agro Industrial Chem Supplies P. Ltd. who had made the above statement. The appellate authority had sought remand report

at that stage the genuineness of the statement has not been established by allowing cross examination of the person whose statement was relied upon by the revenue. In these circumstances, the decision of the Tribunal being based on the fact, no substantial question of law can be said to arise from the order of the Tribunal. The appeal is dismissed with no order as to costs "

13. *Reliance is also placed on the decision of Bombay High Court in the case of H.R. Mehta in its order dated 07/07/2016. The Hon'ble High Court held as under:-*

"The assessee is bound to be provided with the material used against him apart from being permitted to cross examine the deponents. The denial of such opportunity goes to root of the matter and strikes at the very foundation of the assessment order and renders it vulnerable."

14. *Applying proposition of law laid down by Hon'ble Supreme Court and High Court as discussed above, I do not find any merit for the addition made by AO merely on the basis of statement, when there is no corroborative material with AO suggesting the alleged addition, without allowing assessee an opportunity to cross examine the person on whose statement addition was made. Accordingly, AO is directed to delete the addition so made.*
15. *Before parting with the matter, I observe that Ld. AR had placed on record order of ITAT Jaipur Bench in the case of Navrtattan Kothari vs. ACIT in ITA No.425/Jp/2017 in which proceedings initiated u/s.148 was quashed. However, the facts of this case are entirely distinguishable from the facts of instant case, in so far as in the case of Navrattan Kothari (supra) reopening of assessment after four years of assessment framed u/s.143(3)/153 was quashed, whereas in the instant case, no assessment was framed u/s.143(3) and only return was processed u/s.143(1). Accordingly, it is not going to help the assessee in any manner.*
16. *In the result appeal of assessee is allowed in terms indicated hereinabove.*

S.A.No.07/Jodh/2018

17. *As I have already disposed assessee's appeal on merit, the stay application filed by the assessee become infructuous.*

18. *In the result, appeal filed by assessee is allowed in terms indicated hereinabove and stay application is dismissed as infructuous."*

9. *In view of the above facts and circumstances, I do not find any merit in the addition so made by the Assessing Officer and confirmed by the Id. CIT(A), hence, the Assessing Officer is directed to delete the same.*

5. As the facts and circumstances are same, respectfully following the order of the Tribunal as stated above, I do not find any merit in the addition so made by the Assessing Officer and confirmed by the Id. CIT(A), hence, the Assessing Officer is directed to delete the same.

6. In the result, appeal of the assessee is allowed in part in terms indicated hereinabove.

Order pronounced in the open court on 26th March, 2019

Sd/-
(रमेश सी शर्मा)
(RAMESH C SHARMA)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 26th March, 2019

*Ranjan

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

1. अपीलार्थी / The Appellant- Harbans Lal Khurana, Alwar.
2. प्रत्यर्थी / The Respondent- The I.T.O., Ward 2(1), Alwar.
3. आयकर आयुक्त / CIT

4. आयकर आयुक्त(अपील)/The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/ Guard File (ITA No. 1308/JP/2018)
आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar