

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'C' BENCH,  
NEW DELHI

BEFORE MS. SUSHMA CHOWLA, JUDICIAL MEMBER  
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

ITA No. 2026/DEL/2016  
[A.Y 2010-11]

M/s Godwin Construction Pvt Ltd Vs.  
A - 151, Defence Colony  
Meerut

The A.C.I.T  
Central Circle  
Meerut

PAN: AAEEG 1843 R

(Applicant)

(Respondent)

Assessee By : Shri Sandeep Sapra, Adv  
Department By : Shri A.K. Saroha, CIT- DR

Date of Hearing : 16.12.2019  
Date of Pronouncement : 18.12.2019

**ORDER**

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order of the Commissioner of Income Tax [Appeals] - IV, Kanpur dated 03.03.2016 pertaining to assessment year 2010-11.

2. The grievances of the assessee read as under:

*“1. The appellant is a Pvt. Ltd. Co. carrying on the business of colony development and construction and filed Return of Income declaring income of Rs.32,35,290. The assessment for the year was completed under Section 153A/ 143(3) of the IT Act, 1961 at a total income of Rs. 1,16,77,033/-. The A.O. while completing the assessment made additions of Rs.11,41,743/-, Rs.70,00,000/- and Rs.3,00,000/- under Section 68 of the IT Act.*

*2. Aggrieved by the above additions the appellant filed an appeal before the learned CIT Appeals-IV, Kanpur who vide order dated 03.03.2016 has deleted the addition of Rs.70,00,000/-. He has confirmed the addition of Rs.3,00,000/-. He has directed the assessment of the amount of Rs. 11,41,743/- in the hands of M/s Godwin Hospitality Pvt. Ltd and deleted the said addition in the hands of the appellant.”*

3. Briefly stated, the facts of the case are that a search operation was carried out at the premises of the assessee on 09.09.2010. Statutory notices u/s 153A of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short] were issued and served upon the assessee, pursuant to which the assessee filed its return of income.

4. During the course of scrutiny assessment proceedings and on perusal of the impounded document, which contains details of payment of Rs. 9 lakhs to one contractor whereby six lakhs was paid in cheque and remaining Rs. 3 lakhs were paid in cash. The Assessing Officer found that none of these cash payments are reflected in the print outs of cash book. The assessee was asked to show cause as to why the amount of Rs. 3 lakhs should not be added to the income of the assessee as unexplained expenditure. On receiving no plausible reply, the addition of Rs. 3 lakhs was made.

5. The assessee carried the matter before the Id. CIT(A) but without any success.

6. Before us, the Id. counsel for the assessee stated that detailed written submissions were filed before the Id. CIT(A) wherein it was strongly contended that the paper neither contained the name of the assessee nor the name of any contractor and also not the name of any employee. It was further argued that the said document is a dumb document and no additions can be made on the basis of the same.

7. The contention of the assessee did not find any favour with the Id. CIT(A) who upheld the addition made by the Assessing Officer. The relevant findings of the Id. CIT(A) read as under:

"5.7 I have carefully gone through the assessment order, written submission' filed as well as verbal arguments made by the Ld. A.R.. It may be seen that **A.O.** has clearly mentioned in the assessment order that there are entries on the seized paper which records payment by way of cheque as well as cash. The appellant deny only about the cash transaction & does not dispute the entry by way of cheque. The noting in the paper clearly suggests that appellant had made cash transaction which were not recorded in its books of account. Therefore, I am of the opinion that these noting represent unaccounted cash transaction and I do not agree with the arguments/submission of appellant. Cases relied upon by Ld. Ar. are distinguishable on facts and not applicable in the case. Therefore, addition made by A.O. on this ground is hereby confirmed."

8. Before us, the Id. counsel for the assessee reiterated what has been stated before the lower authorities and drew our attention to the relevant submissions made before the Id. CIT(A) vide letter dated 27.01.2016 which is placed at pages A to E of the paper book. Referring to the impounded document, the Id. counsel for the assessee

pointed out that the same does not contain any details relating to the payer or payee. The ld. counsel for the assessee further stated that even the cheque amount mentioned therein does not belong to the assessee.

9. Per contra, the ld. DR supported the findings of the Assessing Officer.

10. We have given thoughtful consideration to the orders of the authorities below. Exhibit 58 of the paper book is the impounded document on the basis of which additions have been made. It is true that the said document does not contain any names, either of the payer or the payee. It is equally true that few payments have been made by cheques and others are in cash.

11. The following reply before the ld. CIT(A) needs special mention:

*"The Id. A.O. for making the impugned addition has referred to Annexure-A-3 seized from 199/1, Gagan Vihar, Rohta Road, Meerut, the residential premises of an employee, Mr. Gyanendra, who work with the appellant as an Account officer. The photocopies of the pages nos. 1-9 of Annexure A-3 as*

*referred to by the Id. A.O. are placed at page no.56 to 66 in the paper book. The noting of the Id. A.O. that no reply regarding the same was submitted by the appellant is factually incorrect as in response to the query no.22 of the notice dated 09.10.2012 " As per page nos.1-9 3, impounded from 199/1, Gagan Vihar, Rohta Road, Meerut, which is the detail of payment of Rs.9 Lacs to one of the contractor where by Rs.6 lacs was paid in cheque and balance in cash i.e Rs50,000/-, Rs.50,000/- on 12.01.2009, Rs.50,000/- on 02.02.2010 Rs.50,000/- on 13.02.2010, Rs.50,000/- on 18.02.2010 and Rs.50,000/- on 27.02.2010*

*None of these cash payments are reflected in the printout of cash ' taken on 04.10.2010. To show casue why amount of Rs.3 lacs should not be added the income as unexplained expenditure in vide para 22 of reply dated Nil it has been submitted as under:-*

*"This point needs for the clarification at your end as we could not relate to it. It may however be mentioned that Mr. Gyanendra, whose premises was searched was also constructing his house at that time and he may have made cash payments for his house construction. "*

*It seems that the Id. A.O. has made addition on the basis of page no.3 of Annexure-A-3 as referred to above, from where it is not at all apparent that as to whom the said loose /*

*papers relates. The paper neither contained the name of the appellant nor the name of any contractor and also not the name of any employee. The Id. A.O. in the body of/ assessment order also has not mentioned the name of the contractor but has only mentioned that "to one of the contractor". The findings of the Id. A.O. is totally vague. The loose papers relied upon by the Id. A.O. is a dumb document and the addition made on the basis of such dumb document is totally unjust and unwarranted and' deserves to be deleted. Reliance is placed on the judgment in the case of SMC SHARE<sup>1</sup> BROKERS LTD. vs. DEPUTY COMMISSIONER OF INCOME TAX (Delhi Tribunal) (2007) 109 TTJ 0700 as cited hereinabove."*

12. The contents of the aforesaid reply clearly contradicts the findings of the Assessing Officer that no reply was filed by the assessee to the show cause notice. In our considered opinion, when the assessee has specifically denied the contents of the said document, then it was incumbent upon the Assessing Officer to demonstrate that the cheque entries are found in the books of account of the assessee. In that case, other contents of the documents cannot be brushed aside lightly. But until this is proved/demonstrated, no adverse inference should be drawn. We, therefore, in the interest of justice and fair play, restore this issue to the file of the Assessing Officer. The

Assessing Officer is directed to examine the reply of the assessee and make necessary verification and enquiry and decide the issue afresh after giving reasonable and fair opportunity of being heard to the assessee. Accordingly, Ground No. 1 is allowed for statistical purposes.

13. Facts relating to Ground No. 2 are contained in para 5.3 of the order of the first appellate authority and the same read as under:

"5.3 I find force in the argument of Ld. A.R. Since, paper 4A 6 suggest payment by way of cheque as well as cash and the cheque entries pertain to M/s. Godwin Hospitality (P) Ltd.. Therefore it is logical to infer that cash transaction would also pertain to same entity. Therefore, I am of the opinion that the cash should not be assessed in the hands of appellant and addition is therefore deleted here. However, Since it has been inferred that it pertains to M/s. Godwin Hospitality Pvt.Ltd., the A.O. is directed to assess it, in the hands of M/s. Godwin Hospitality Pvt.Ltd. for A.Y. 2010-11."

14. The assessee is aggrieved by the directions of the ld. CIT(A) to assess the income in the hands of Godwin Hotel Pvt Ltd. It is the say of the ld. counsel for the assessee that once the ld. CIT(A) has deleted the addition in the hands of the assessee, grievance of the assessee is

over. The ld. CIT(A) directed the Assessing Officer in assessee's appeal to make additions in the hands of some other assessee. Reliance was placed on the decision of the co-ordinate bench in the case of Shri Sanjay Thakur in ITA Nos. 3785 & 3786/DEL/2015 dated 12.07.2018.

15. Per contra, the ld. DR strongly supported the findings of the ld. CIT(A).

16. We have given thoughtful consideration to the orders of the authorities below. We have carefully perused Form No. 35 being Appeal Memo before the first appellate authority. The assessee has challenged the addition of Rs. 11,41,743/- and while deciding this ground, the ld. CIT(A) held that "*Cash should not be assessed in the hands of the appellant and the addition, is therefore, deleted here.*"

17. Once the ld. CIT(A) has decided the ground in favour of the assessee, the ld. CIT(A) should not have given any direction to the Assessing Officer to make additions in the hands of some other assessee. Similar issue was decided by the co-ordinate bench in ITA Nos. 3785 & 3786/DEL/2015 [supra]. The relevant findings read as under:

*“9. We have given thoughtful consideration to the orders of the authorities below. It is not in dispute that the assessment order framed u/s 153C of the Act was quashed by the first appellate authority. Before the amendment by Finance [No. 2] Act, 2014 the provisions of section 251 read as under:*

*“In disposing of the appeal, the Commissioner (Appeals) as the case may be, has following powers :*

*(i) to confirm, reduce, enhance or annual the assessment*

*(ii) to confirm, cancel, enhance or reduce the penalty imposed ; and*

*(iii) in other cases to pass such orders in the appeal as he thinks fit.*

*The Commissioner (Appeals), as the case may be, will not pass any order enhancing the tax liability or a penalty or reducing the amount of refund without giving a reasonable opportunity to the appellant of being heard. He may pass orders on matters which may not have been referred to him.*

*Explanation. In disposing of an appeal, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, even if such matter was not raised before by the appellant [Section 251].”*

10. *It can be seen from the above that this provision empowers the appellate authority in an appeal against the order of assessment to confirm, enhance or annul the assessment. Before 1.6.2001, there was one more power and the same reads as under:*

*“Or he may set aside the assessment and refer the case back to the AO for making fresh assessment in accordance with the directions.”*

11. *The CBDT in its Circular has also clarified that the power of the appellate commissioner does not include the power to set aside the assessment.*

12. *In our considered opinion, action of the first appellate authority has no sanction of law as powers of the CIT(A) have been set out in section 251 of the Act. The CIT(A) has no power to send the matter back to the file of the AO for making fresh decision on the issue. Once the assessment order was quashed the CIT(A) has transgressed the power given to him u/s 251(1) of the Act by giving direction to the AO to take action u/s 147/148 of the Act. Such directions are uncalled for and deserve to be expunged from the findings of the first appellate authority. We accordingly direct the AO to read the order of the first appellate authority without direction to take action u/s 147/148 of the Act.”*

18. On finding parity on the facts, we direct the Assessing Officer to read the order of the first appellate authority without the directions given in para 5.3 of his order mentioned elsewhere. Ground No. 2 is, accordingly, allowed.

19. In the result, the appeal of the assessee in ITA No. 2026/DEL/2016 is partly allowed.

**The order is pronounced in the open court on 18.12.2019.**

Sd/-

**[SUSHMA CHOWLA]  
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]  
ACCOUNTANT MEMBER**

Dated: 18<sup>th</sup> December, 2019

VL/

Copy forwarded to:

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

Asst. Registrar,  
ITAT, New Delhi

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