

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E', NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.2748/Del/2017
Assessment Year: 2010-11

Shri Tajender Kakkar, D-7/7176, Sector-D, Vasant Kunj, New Delhi	Vs.	ITO, Ward-24(4), New Delhi
PAN :ABMPK6252B		
(Appellant)		(Respondent)

Appellant by	None
Respondent by	Ms. Rakhi Vimal, Sr.DR

Date of hearing	07.01.2020
Date of pronouncement	10.01.2020

ORDER

PER O.P. KANT, AM:

This appeal by the assessee is directed against order dated 27/02/2017 passed by the Id. Commissioner of Income-tax (Appeals)-34, New Delhi [in short 'the Ld. CIT(A)'] for assessment year 2010-11 raising following grounds:

- 1. One the facts and in law, learned CIT(A) has erred in dismissing the appeal and on sustenance of additions of Rs.1,30,00,000/- made by the AO "On Protective Basis" in the hands of the appellant without taking due cognizance of the submissions made before the said AO as well as before the said CIT(A) supported with documentary evidences.*
- 2. On the facts and in law impugned additions of Rs.1,30,00,000/- made by the AO and sustained by the CIT(A) "On Protective Basis" in the hands of the appellant may kindly be deleted.*

2. At the outset, we may like to mention that neither anybody represented on behalf of the assessee nor any adjournment has been moved by the assessee despite notifying for the hearing of the appeal. In view of the facts and circumstances, we were of the opinion that the assessee was not interested in prosecuting the appeal accordingly, the appeal was heard ex-parte qua, the assessee after hearing arguments of Revenue.

3. Briefly stated facts of the case are that a cash of Rs.1,72,67,000/- was found seized by the Directorate of Revenue Intelligence (DRI) at the premises of Shri Rajiv Gulati. After following due process of law, the said amount was requisitioned by the Income Tax Department. Out of the said amount of Rs.1,72,67,000/-, the amount of Rs.1,30,00,000/- was admitted by the assessee as belonging to him during survey proceedings which were conducted at the premises of the assessee.

3.1 But later, on assessee did not offer the amount in the return of income and the cheques given during the course of survey against tax payments were also dishonoured. The Assessing Officer assessed the income at Rs.1.3 crores in the case of the assessee on protective basis and substantive addition was made in the case of the Shri Rajiv Gulati. On further appeal by the assessee against the protective addition, the Ld CIT(A) upheld the protective addition on the ground that the assessee did not file any evidence to support that Sh. Rajiv Gulati has finally accepted the addition in his hand . The relevant finding of the ld. CIT(A) is reproduced as under:

“5.4 On page 2 of the assessment order, the AO has provided the relevant portion of the statement of Shri Tajender Kakkar recorded during the course of survey and the relevant question No. 20 to 23. As per this statement given by the assessee during the course of survey, in response to the query regarding the statement given by Sh. Rajeev Gulati to DRI, Mumbai that out of total cash found at his residence, the cash amounting to Rs. 1,30,00,000/- belonged to the appellant, the appellant Stated in survey that he agrees with the statement of Sh. Rajeev Gulati that Rs.1.30 Crores found at the residence of Sh. Rajeev Gulati belongs to appellant only. The appellant also stated that he has given this amount to Sh. Rajeev Gulati as advance against purchase of agriculture land in Rohtak. This amount was paid in cash only. This amount was paid from 28/12/2009 to 31/01/2010. On being asked about the source of this cash, the appellant stated that this amount was earned by him by way of sale/purchase of Agriculture land in 2009-10 and also by getting some income as a property consultant. On being asked whether the said income of Rs. 1,30,00,000/- has been duly reflected in your regular books of accounts and whether taxes have been paid on this income, the appellant categorically stated, rather reiterated that stating that he has already told that he had earned this income in 2009-10 by sale/purchase of Agriculture land and also earned some income as property consultant/broker and this cash/income was not reflected in my regular books of account. In fact he stated that no books of account were maintained by him. He clarified very categorically that he had paid Rs.1.30 Crores to Sh. Rajeev Gulati from this income and expressed his complete willingness to pay taxes on this undisclosed income earned from 01/04/2009 to 31/03/2010.”

3.2 Aggrieved, the assessee is in appeal before the Tribunal.

4. The Ld. DR submitted that in view of no evidence that Sh. Rajiv Gulati has finally accepted unexplained cash of Rs.1.30 Crore as his income, the Ld. CIT(A) is justified in retaining the addition in the hands of the assessee on protective basis. She submitted that even before the ld. CIT(A), the assessee took a ground that this income was to be assessed in the hands of the assessee on substantive basis.

5. We have heard the submission of the Ld. DR and perused the relevant material on record. The ld. CIT(A) in the impugned

order has mentioned that first appellate authority in the case of Sh. Rajiv Gulati has upheld addition of Rs.1.30 cores in respect of cash of Rs.1.30 crores seized from him and rejected the contention of the assessee (Sh. Tajender Kakkar) that said cash belonged to him. The relevant part of the impugned order is reproduced as under:

5.10 During the course of appellate proceedings, appellant's AR has also submitted a copy of order passed by Id. CIT(A) in the case of Sh. Rajeev Gulati, upon whom search was conducted by DRI, Mumbai and cash amounting to Rs. 1,72,67,000/- was found in his premises. In his case, CIT(A)-XXIV vide his appeal order dated 25.03.2014 in appeal no. 101/13-14 passed in the case of Sh. Rajeev Gulati, upon whom search was conducted by DRI, Mumbai, has upheld the addition made by the AO in the hands of Sh. Rajeev Gulati on substantive basis, in respect of portion of the cash amounting to Rs. 1,30,00,000/- found at the premises of Sh. Rajeev Gulati which was stated to be belonging to the appellant Sh. Tejender Kakkar. The findings of CIT(A) in the case of Sh. Rajeev Gulati, provided in the para-5 of his order dated 25.03.2014 are reproduced as under:

"5. I have carefully considered the submissions made by the Ld.AR and have gone through the assessment order. It is undisputed fact that the DRI, Customs, Mumbai have searched the place of residence at Mumbai of the appellant on 03.02.2010 and had seized an amount of Rs.1,72,67,000/-. The appellant's statement was recorded by the DRI for alleged involvement of some beneficiaries, it is alleged by the appellant that his impugned statement was obtained by DRI during unlawful detention between 03.02.2010 to 05.02.2010 under threat/coercion and physical assault etc. It is further alleged that impugned statement is retracted by the appellant before the said DRI. After following due legal procedure, impugned seized amount of Rs.1,72,67,000/- was requisitioned u/s.132A by the ADIT (Inv), Unit - IV (1), New Delhi on 02.08.2010. Statement of the appellant as well as one Shri Tajender Kakkar was recorded by the ADIT (Inv.), Unit-IV(l), New Delhi and case was transferred to the charge of the assessing officer, who after allowing due opportunity of hearing, have passed the assessment order on 28.03.2013. After verifying the assessment —records of the appellant as well as records of said Shri Tajender Kakkar (P. A. Number: ABMPK6252B), I am convinced that the appellant has failed to give satisfactory explanation of source of cash seized by DRI,

Mumbai and requisitioned by the/ADIT (Inv), Unit - IV (1), New Delhi from the place of residence at Mumbai of the appellant. Initial search by the DRI, Mumbai with intention to avoid custom duty evasion by importer / clearing agents. Though said DRI, Mumbai have not found any incriminating materials from the appellant and, therefore, it acquitted / exonerated the appellant and no charge is framed against him. But such action of DRI has no consequence on investigation made by the income tax department due to availability of huge cash of Rs. 1,72,67,000/- found in possession of the appellant. It is seen that the appellant has already owned up an amount of Rs. 42,67,000/- as his business income and also disclosed in his return of income filed on 15.10.2010 and before initiation of proceedings u/s.153 A. Further, Statements given by the appellant as well as by Shri Tajender Kakkar before the income tax authorities for impugned sum of Rs. 1,30,00,000/- are unreliable and far from truth. I fully endorse the view of the assessing officer that due to inconsistencies in the statements of the appellant as well as that of Shri Tajender Kakkar, these statements are after thought statements with intention to escape tax under the Income Tax Act, 1961 on said amount of Rs.1,30,00,000/-.It is noticed that a survey action u/s.133 A was taken on 11.12.2010 against said Shri Tajender Kakkar. Though he admitted that he has deposited Rs.1,30,00,000/- with the appellant and the said sum was earned during the F. Y. 2009 - 10 and has voluntarily offered Rs. 1,40,00,000/- as his undisclosed income for assessment year: 2010-11 (even though he filed his return of income for assessment year : 2010 - 11 u/s. 139(1) on 16.07.2010 declaring income of Rs.2,52,790/- only) and issued 3 post dated cheques of Rs.14,00,000/- each. It is further noticed that said Shri Tajender Kakkar has not filed revised return of income disclosing undisclosed income of Rs.1,40,00,000/- and all the post dated cheques are not honoured by his bank. Said Shri Taiender Kakkar alleged to have not maintained books of account in support of his alleged acceptance of ownership impugned sum Rs.1,30,00,00/- deposited with the appellant for alleged purchase of plot of land at Haryana. I am fully convinced that Shri Tajender Kakkar is a man of straw and his alleged statement of ownership impugned sum Rs. 1,30,00,000/- is lack of genuineness and he creditworthiness and source of fund is not established. The appellant has not brought any material on record to show as to how the cash of Rs. 1,30,00,000/- alleged to have been received from Shri Tajender Kakkar was carried/ delivered by/to him in Mumbai from Delhi. The claim of appellant that impugned sum of Rs.1,30,00,000/- belongs to Shri Tajender Kakkar and same was deposited with the appellant for alleged purchase of plot

of land at Haryana is rejected and, addition made by the AO is hereby confirmed.

5.12 In the present case, the addition has been made in the hands of the appellant on protective basis. It is on record that during the entire survey proceedings and assessment proceedings, in the various statements recorded from the appellant, he has submitted that the cash amounting to Rs. 1,30,00,000/-, found at the premises of Sh. Rajeev Gulati belonged to him. He has not only admitted the cash belonged to him, but has even provided the manner in which such income was generated, being sale/purchase of agriculture land and also earned some income as property consultant/brokerage. He even stated the period in which such income was earned being F.Y. 2009-10. Not only his statement and admission alone, but specific incriminating documents Annexures A-1 to 25 were found during the course of survey and on being asked to explain these documents, the appellant stated that these were the hand written papers (Parchies), which show the transactions related to sale/purchase of properties from 01.04.2009 to 31.03.2010. He further stated that some of papers contain the details of his income as commission/brokerage received and some shows the transactions related to sale purchase of agriculture land. On the basis of these incriminating documents, appellant once again categorically clarified in his statement that he had earned some cash income from 01.04.2009 to 31.03.2010 which was not reflected in his regular books and as he was not in a position to explain the source of this income, he voluntarily offered to surrender Rs.1,40,00,000/-, which included Rs. 1.3 Crores cash found at the premises of Sh. Rajeev Gulati. However, the appellant, retracted from his promises made in the statement before survey authorities that he will submit a detailed working of the manner in which such income amounting to Rs. 1.3 Crores was earned in cash. Even after letter issued to him by AO, the appellant did not come forward to submit such details. As per the findings given in the order of CIT(A) in the case of Sh. Rajeev Gulati, which have been reproduced above, the fact that the appellant Sh. Tajinder Kakkar later on filed his return of income for assessment year 2010-11 u/s 139(1) on 16.07.2010 declaring income of just Rs.2,52,790/- only and issued 3 post dated cheques of Rs.14,00,000/- each, but later on failed to file any revised return of income disclosing undisclosed income of Rs.1,40,00,000/- and all the post dated cheques were also not honoured by his bank. This fact is already on record that Shri Taiender Kakkar alleged to have not maintained books of account in support of his alleged acceptance of ownership impugned sum Rs.1,30,00,00/- deposited with Sh. Rajeev Gulati for alleged purchase of plot of land at Haryana. The appellant has also not brought any material on record to show as to how the cash of Rs. 1,30,00,000/- alleged to have been received

from Shri Tajender Kakkar was carried/ delivered by/to him in Mumbai from Delhi.

5.12. In the present case, no doubt that additions made in the hands of Sh. Rajeev Gulati have already been upheld by CIT(A) on substantive basis. It is also on record that CIT(A) has given his findings that Sh. Tajinder Kakkar has not been able to substantiate ownership of cash amounting to Rs. 1,30,00,000/- found by DRI authorities at the residence of Sh. Rajeev Gulati in view of various observations made by CIT(A):

- (i) That Sh. Tajinder Kakkar is not maintaining books of account in support of his alleged acceptance of ownership impugned sum Rs.1,30,00,00/- deposited with Sh. Rajeev Gulati for alleged purchase of plot of land at Haryana.*
- (ii) That Shri Tajender Kakkar is a man of straw and his alleged statement of ownership impugned sum Rs.1,30,00,000/- is lack of genuineness and he creditworthiness and source of fund is not established.*
- (iii) That Sh. Rajeev Gulati has not brought any material on record to show as to how the cash of Rs. 1,30,00,000/- alleged to have been received from Shri Tajender Kakkar was carried/ delivered by/to him in Mumbai from Delhi.”*

5.1 In view of the facts, the issue before us is whether the same addition can be retained in the hands of two assesseees, in one on substantive and other on protective basis. In this regard, we find that CBDT in order dated 20-12-1971 has authorized the Departmental Authorities to cancel the protective assessment where the substantive assessment had attained finality. The relevant order of the CBDT is reproduced as under:

“BOARD’S F. NO. 246/25/71-A & PAC DT. 24TH DECEMBER, 1971

Order under s. 119(2)(b) of the IT Act, 1961—The Board’s authorisation for taking action under s. 154 beyond the time limit fixed under s. 154(7) in cases of protective assessments requiring to be cancelled.

24/12/1971

RECTIFICATION

SECTION 119(2)(b), SECTION 154

*Where the same income as assessed, as a **protective** measure in the hands of more than one assessee or as the income of more than one **assessment** year, and one or more of these **protective assessments** needs to be cancelled as a result of some of the relevant **assessments** having become final and conclusive it has been the practice of the IT Department to cancel the redundant **assessments** under s. 154 of the IT Act, 1961, treating these as involving mistakes apparent from the records. This is being done by the ITOs either suomotu or on applications made by assessee. Sometime, it is no possible to take action under s. 154 in such cases because of the operation of the time limit laid down sub-s. (7) of s. 154 of the IT Act, 1961. Since the operation of this time limit causes genuine hardships to the affected assessee, the CBDT in exercise of the powers vested in them under cl. (b) of sub-s. (2) of s. 119 of the IT Act, 1961, hereby authorises the ITOs to take action under s. 154 or to admit or dispose of on merits applications under s. 154 filed by assessee seeking relief, for cancelling such **protective assessments** as have become redundant, by waiving, is necessary, the time limit fixed under sub-s. (7) of s. 154 of the IT Act, 1961.*

2. *Every case of the relaxation of the time limit on the authority of this order shall be reported by the ITO to the IAC, in whose jurisdiction he is functioning, within one month of the passing of such order.*

5.2 The Departmental Authorities are bound by the Circulars issued by the CBDT, and should take action in the hands of the assessee after verifying the facts in respect of the status of the addition in the hands of Sh. Rajiv Gulati. The Ld. CIT(A) is not justified in sustaining the protective addition merely on the reason that the assessee has not provided the status of finality of addition in the hands of Sh. Rajiv Gulati. The ld. CIT(A) had access to the records of the department and could have ascertained the status of finality of addition. In our opinion, retaining the addition by the First Appellate Authority, in both substantive in the case of one assessee and protective in the hands of another assessee, is not justified.

5.3 In the facts and circumstances of the case, we feel it appropriate to set aside order of the ld. CIT(A) and restore the matter back to the ld. CIT(A) for deciding afresh in accordance

with law after verifying the records that Sh. Rajiv Gulati has finally accepted addition of Rs.1.3 Crore in his hand.

6. The appeal of the assessee is accordingly allowed for the statistical purposes.

Order is pronounced in the open court on 10th January, 2020.

**Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER**

**Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER**

Dated:10th January, 2020.

RK/-(D.T.D.)

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi