

IN THE INCOME TAX APPELLATE TRIBUNAL
“D” Bench, Mumbai
Before Shri G. Manjunatha, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA No. 3427/Mum/2016
(Assessment Year: 2011-12)

Rutuja VinayKumar Diwekar
Flat No. 402/403, Krishna Chembur,
Linking Road, Khar (West),
Mumbai – 400052

DCIT CC-7(4)
Mumbai
Vs.

PAN – AEQPD3960C

(Appellant)

(Respondent)

Appellant by: Shri Mani Jain, A.R
Respondent by: Shri H.N. Singh, D.R
Date of Hearing: 12.12.2019
Date of Pronouncement: 25.02.2020

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-49, Mumbai, dated 11.03.2016, which in turn arises from the order passed by the A.O under Sec. 143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 01.03.2013, for A.Y. 2011-12. The assessee has assailed the impugned order on the following grounds of appeal before us:

- “1. On the facts and circumstances of the case and in law the Ld Commissioner of Income Tax (Appeals) erred confirming the disallowance of Rs.1,00,839/- out of the disallowance of Rs 2,01,678/- made by the Ld. A.O on account of lodging and boarding expenses as per the grounds stated in the impugned order or otherwise.
2. On the facts and circumstances of the case and in law the Ld Commissioner of Income Tax (Appeals) erred confirming the disallowance of Rs.93,000/- out of the disallowance of Rs 1,00,000/- made by the Ld. A.O on account of travelling expenses as per the grounds stated in the impugned order or otherwise.
3. On the facts and circumstances of the Appellant's case and in law the Ld Commissioner of Income Tax (Appeals) erred in confirming the action of Ld. AO in making an addition of Rs.16,25,969/- without appreciating the fact that assessee has

duly incorporated the cash payment in the cash book as per statement given u/s 132(4) of the income tax Act.

4. The Appellant craves leaves to add, to amend, alter, modify and / or withdraw any or all of the above grounds of appeal, each of which are without prejudice to one another.

The appellant prays this Hon'ble Tribunal to delete the addition/disallowances made by the Ld. Assessing Officer, which is confirmed by the Ld. Commissioner of Income Tax (Appeals)."

2. Briefly stated, the assessee is a practising dietician in Mumbai. Search and seizure proceedings were conducted at her premises under Sec.132(1) of the Act on 09.12.2010. Return of income for A.Y. 2011-12 was filed by the assessee on 30.09.2011, declaring her total income at Rs.2,41,26,225/-. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. During the course of the assessment proceedings it was observed by the AO that the assessee was a proprietor of URJA Unlimited, a concern which was engaged in the business of running a gymnasium. Along with the professional and gymnasium fees of Rs.1,87,11,970/-, the assessee during the year had also received a royalty of Rs. 23,54,941/- for writing a book. It was noticed by the A.O that the assessee during the course of the search proceedings had made a disclosure of Rs.70 lacs viz. (i) an amount of Rs.47 lac was disclosed in respect of the cash payment which was made by her towards purchase of a Flat at Khar (West) as additional income over and above her normal income; and (ii) a sum of Rs.23 lac was disclosed as additional income over and above the normal income in order to cover up any possible discrepancy. On a perusal of the return of income of the assessee, it was observed by the A.O that she had in her return of income duly offered the aforesaid undisclosed income of Rs.70 lacs that was declared by her in the statement recorded under Sec. 132(4) of the Act.

4. On a perusal of the documents which were found and seized in the course of the search proceedings, it was observed by the A.O that the assessee was an enthusiastic trekker and had participated in various trekking expeditions. As per the details discernible from the seized records, it was noticed by the A.O that the assessee had debited an amount of Rs.2,01,678/- towards lodging and boarding expenses in respect of M/s Windamere Hotel, Darjeeling. In the backdrop of the aforesaid facts, the A.O called upon the assessee to explain as to on what basis the aforesaid lodging and boarding expenses were claimed as an expense incurred in the course of her business activities. In reply, it was submitted by the assessee that as she was

writing a book, therefore, she had undertaken the aforesaid journey to Darjeeling. As such, it was the claim of the assessee that the expenses on lodging and boarding were incurred in the course of her aforesaid business activity. However, the A.O was not persuaded to accept the aforesaid claim of the assessee. Observing, that the assessee had neither furnished the details of the books written by her during the year nor the details of the submissions of the same to the publisher, therefore, the entire expenses of Rs.2,01,678/- which were claimed by the assessee as a business expenditure was liable to be disallowed. On a similar footing, the A.O was of the view that as the travelling expenses of Rs.1,00,000/- (out of Rs.1,85,998/-) which were claimed by the assessee to have been incurred in the course of her business actually pertained to the trips of trekking etc. which were undertaken by her during the year, therefore, he disallowed the same as being in the nature of personal expenditure.

5. Also, it was observed by the A.O that in the course of the search proceedings at the residence of the assessee a MOU dated 07.07.2010 and an 'agreement for purchase' of a Flat at Khar (West), dated 27.08.2010, was found and seized. As per the MOU, the cost of the flat was Rs.2.75 crores, whereas as per the 'agreement' it was Rs.1.85 crores. As stated by the assessee in her statement recorded under Sec.132(4) of the Act, the aforesaid difference of Rs. 90 lacs was the 'on money' that was paid by her out of the cash that was generated from her business. On a perusal of the details, it was observed by the A.O that the assessee in her statement recorded in the course of the search proceedings had claimed that up to November, 2010 she had cash receipts of Rs.57 lacs. Out of the aforesaid amount, it was stated by the assessee that she had paid an amount of Rs.43 lacs towards purchase of the aforesaid Flat at Khar (West). Apart from that, it was stated by the assessee that she was in receipt of an amount of Rs.47 lacs which however was not recorded in the summary of receipts which were prepared by her and inventorised as Annexure A2 in the course of the search proceedings. As such, it was the claim of the assessee that the 'on money' of Rs.90 lac paid by her was sourced from viz. (i) an amount of Rs.43 lac (out of cash receipt of Rs. 57 lacs) as was recorded in the receipts prepared by her and inventorized as Annexure A2 in the course of the search proceedings; and (ii) an amount of Rs.47 lacs was out of the undisclosed cash receipts which were not recorded in the summary of receipts which were prepared by her. Also, the assessee in her statement recorded under Sec. 132(4) had made a further disclosure of an amount of Rs.23 lac as additional income for A.Y. 2011-12, which was offered as income over and above

her normal income to cover up any possible discrepancy. Further, it was observed by the A.O that cash amounting to Rs.10 lac was also found from the bank locker of the assessee in the course of the search proceedings. As per the records, the assessee had operated her bank locker on the last occasion on 09.09.2010. In the backdrop of the aforesaid facts, the A.O was of the view that the assessee was required to explain the source of the cash out go aggregating to Rs.1 crores viz. (i) payment of on money of Rs.90 lac towards purchase of Flat at Khar (West); and (ii) cash of Rs.10 lac that was found lying in her bank locker. On a perusal of the records, it was noticed by the A.O that the 'agreement to purchase' for the aforesaid property at Khar (West) was got registered by the assessee on 27.08.2010. Observing, that the assessee would had paid the 'on money' of Rs.90 lac prior to the date of registration of the aforesaid 'agreement for purchase' viz. 27.08.2010, the A.O found that the assessee as on the said date was in possession of cash in hand of Rs.36,59,103/-. Apart from that, it was noticed by the A.O that the assessee was having cash in hand of Rs.36,74,031/- on 09.09.2010 i.e the date on which the bank locker was last operated by her. The AO taking cognizance of the amount of cash in hand available with the assessee on 09.09.2010 i.e Rs.36,74,031/-, and also the disclosure of additional income of Rs. 47 lac that was made in her statement recorded under Sec. 132(4) towards purchase of flat at Khar (W), observed, that as against the cash out-go of Rs.1 crore [90 lac (+) Rs.10 lac], the source of the same could be explained only in respect of the aforesaid amount of Rs.83,74,031/- [Rs.47 lac (+) Rs.36,74,031/-] . Accordingly, on the basis of his aforesaid observations, the A.O was of the view that the differential amount of Rs.16,25,969/- [Rs.1 crore (-) Rs.83,74,031/-] remained to be explained. Rebutting the aforesaid observation of the A.O, it was the claim of the assessee that she had made the payment of the 'on money' for purchase of the flat at Khar (West) out of her total recorded cash receipts up to November, 2010. As such, it was the claim of the assessee that the balance amount of 'on money' of Rs.43 lacs (out of Rs.90 lacs) was duly sourced from the recorded cash receipts of Rs.57 lacs that was received by her up to November, 2010. However, the A.O being of the view that the assessee would had paid the entire amount of 'on money' prior to the date of registration of the 'agreement to purchase' i. e on 27.08.2010, therein declined to accept the aforesaid claim of the assessee. Alternatively, it was submitted by the assessee that as she had made an additional disclosure of an amount of Rs.23 lacs as income over and above her normal income to cover up any possible discrepancy, therefore, the source of the aforesaid

amount of deficit of Rs.16,25,969/- stood duly explained. Observing, that the assessee had duly accounted for her aforesaid additional disclosure of Rs.23 lac in the form of various assets like loans and advances, therefore, the A.O was of the view that no 'set off' of the aforesaid amount of Rs.16,25,969/- could be given against the disclosure of the additional income of Rs.23 lacs made by the assessee. Accordingly, on the basis of his aforesaid deliberations the AO assessed the income of the assessee at Rs.2,60,53,870/-.

6. Aggrieved, the assessee carried the matter in appeal before the CIT(A). As regards the disallowance of the entire amount of boarding and lodging expenses of Rs.2,01,678/-, the CIT(A) being of the view that the aforesaid expenses were partly in the nature of the personal expenses of the assessee, and partly in the nature of expenses which were incurred by her in the course of writing the book "Women and the weight loss tamasha", therein restricted the disallowance to 50% of the total expenses of Rs.2,01,678/-. Resultantly, the A.O restricted the disallowance of the total boarding and lodging expenses to Rs.100,839/-. On the similar reasoning, the AO restricted the disallowance of travelling expenses aggregating to Rs.1,87,998/- to 50% and upheld the same to the extent of Rs.93,000/-. As regards the addition of Rs.16,25,969/- that was made by the A.O on account of alleged cash that was paid by the assessee for purchase of flat, the CIT(A) did not find any favour with the contentions advanced by the assessee and upheld the same.

7. The assessee being aggrieved, with the order passed by the CIT(A) has carried the matter in appeal before us. We have heard the authorized representatives for both the parties perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. Admittedly, the assessee is a practising dietician in Mumbai engaged in the business of running a gymnasium and had also professionally authored certain books on diet and health. On a perusal of the seized documents, it was gathered by the A.O that the assessee who is an enthusiastic trekker and had participated in various trekking expeditions, had claimed boarding and lodging expenses as regards her stay at Windamere Hotel, Darjeeling. It was the claim of the assessee that as she was writing a book for which she required peace of mind, and also time from her regular work, therefore she had pursuant to her said professional assignment gone to Darjeeling and had stayed at the aforesaid hotel. As such, it was the claim of the assessee before the lower authorities, as well

as before us, that the aforesaid expenses having been incurred in the course of her profession of a writer, therefore, no part of the same was liable to be disallowed. As observed by us hereinabove, the AO rejected the aforesaid claim of the assessee and disallowed the entire amount of boarding and lodging expenses of Rs.2,01,678/-. On appeal, the CIT(A) partly finding favour with the claim of the assessee that for writing the book viz. "Women and the weight loss tamasha", she had incurred the aforesaid expenses, therein attributed part of the expenses to her personal holiday and trekking pursuits etc, and restricted the aforesaid disallowance to 50% i.e to Rs.1,00,839/-. On a similar footing, the disallowance of the travelling expenses of Rs.1,87,998/- made by the A.O was also restricted by the CIT(A) to 50% i.e to Rs.93,000/-.

8. We have given a thoughtful consideration to the facts pertaining to the disallowance of boarding and lodging expenses, and also the travelling expenses as had been sustained by the CIT(A). Admittedly, the fact as regards the incurring of the aforesaid expenses is not in doubt. Only dispute herein involved hinges around the aspect as to whether the aforesaid expenses were incurred by the assessee in the course of her professional pursuit as that of a writer, or were in the nature of expenses incurred for her personal holiday and trekking. As observed by us hereinabove, the CIT(A) had partly agreed with the claim of the assessee that part of the aforesaid expenses were incurred in the course of her professional pursuit of writing the book "Women and the weight loss tamasha". Accordingly, the CIT(A) had scaled down the disallowance to 50% of the total amount of the aforesaid expenses viz. boarding and lodging expenses and travelling expenses. In our considered view, there is substantial force in the claim of the assessee that for writing a book an author would need peace of mind, and also travelling to such place which would take her away from the regular chaos, and provide a convenient scenario for writing the book. At the same time, we also cannot remain oblivious of the fact that a part of the expenses could safely be attributed as the personal expenses of the assessee who is also an enthusiastic trekker. However, in the totality of the facts of the case and the purpose for which the assessee was staying at Windamere Hotel, Darjeeling i.e writing of a book, expenses to the extent of 75% in our considered view can safely be related on an estimate basis as having been incurred by the assessee in the course of her aforesaid professional venture. Accordingly, we restrict the disallowance as regards the boarding and lodging expenses (Rs.2,01,678/-) and travelling expenses (Rs.1,87,998/-) to 25% of the

aggregate of the aforesaid expenses. As such, the order passed by the CIT(A) is modified in terms of our aforesaid observations. The **Grounds of appeal No. 1 & 2** are partly allowed.

9. We shall now advert to the sustaining of the addition of Rs.16,25,969/- which was made by the AO in respect of the deficit source of investment made by the assessee towards purchase of Flat at Khar (West), and also the cash that was found lying in her bank locker during the course of the search proceedings. As observed by us hereinabove, it was claimed by the assessee in her statement recorded under Sec.132(4) of the Act that she had paid 'on money' of Rs.90 lac for purchase of a Flat at Khar (West). At the same time, the assessee explaining the source of the investment made towards the purchase of the aforesaid property, had submitted, that the same was sourced from viz. (i) unrecorded business receipts of Rs.47 lacs (which formed part of the disclosure of additional income of Rs.70 lacs by her) ; and (ii) an amount of Rs. 43 lacs was paid out of the duly recorded cash receipts of Rs.57 lac that were received by her up to November, 2010. Insofar the claim of the assessee that she had received duly recorded cash receipts of Rs.57 lac up to November, 2010 is concerned, we find, that the said fact has not been controverted by the revenue. However, the A.O observing that as the assessee had got the 'agreement to purchase' registered on 27.08.2010, therefore, held a conviction that she must have paid the entire amount of 'on money' prior to the said date. Accordingly, the A.O declined to accept the claim of the assessee that the amount of Rs.43 lacs of 'on money' was paid by her out of the total cash receipts up to November, 2010. As observed by us hereinabove, the A.O taking cognizance of the 'on money' paid by the assessee, and also the unaccounted cash that was found from her locker, had therein worked out the deficit as regards the source of the aforesaid investments at Rs.16,25,969/-. We have given a thoughtful consideration to the issue before us. We find substantial force in the observation of the lower authorities that now when the assessee had got the 'agreement to purchase' registered on 27.08.2010, therefore she would have parted with the entire amount of 'on money' by the said date. In fact, the aforesaid observations of the lower authorities find support from the principle of preponderance of human probability, as per which no seller of a property would part with the same unless the entire amount of the sale consideration is received by him. But then, we also cannot remain oblivious of the fact that the assessee in her statement recorded under Sec. 132(4) of the Act, had categorically stated that an amount of Rs.43 lacs was paid by her out of her cash receipts of Rs.57 lacs up to November, 2010. In this regard, it would be relevant to

point out that the assessee in the very same statement had made a disclosure of an aggregate amount of Rs.70 lacs viz. (i) disclosure as regards the 'on money' paid for purchase of Flat at Khar (West) : Rs.47 lacs; and (ii) disclosure of additional income over and above the normal income to cover up any possible discrepancy : Rs. 23 lac. In our considered view, in case the aforesaid claim of the assessee was without any basis, then she could have easily raised the amount of her disclosure towards payment of 'on money' for purchase of Flat at Khar (West), with a corresponding reducing of the balance disclosure of Rs. 23 lacs, which at the said point of time was only in context of covering up of any possible discrepancy. In sum and substance, the veracity of the aforesaid claim of the assessee that she had made the payment of 'on money' out of her cash receipts till November, 2010 could not have been summarily rejected. As a matter of fact, the conduct of the assessee at the time of making the disclosure in her statement recorded under Sec.132(4), therein inspires confidence as regards the veracity of her aforesaid claim. However, we find that the lower authorities without placing on record any 'material' which could justify dislodging of the said claim of the assessee, had summarily rejected the same. Apart from that, the assessee had also not been called upon to substantiate her aforesaid claim on the basis of any irrefutable documentary evidence. In the backdrop of the aforesaid facts, we are of the considered view that the matter requires to be restored to the file of the A.O for fresh adjudication. Needless to say, the A.O shall in the course of the 'set aside' proceedings afford sufficient opportunity of being heard to the assessee, who shall remain at a liberty to substantiate her claim on the basis of fresh documentary evidence.

10. We shall now advert to the alternative claim of the assessee that as she had disclosed an amount of Rs.23 lacs as additional income over and above her normal income to cover up any possible discrepancy, therefore, she would be eligible for 'set off' of an amount of Rs.12,66,626/- for which she had not claimed any deduction till date and had shown the said amount in her 'balance sheet'. On a perusal of the orders of the lower authorities, we find, that the aforesaid claim had not been accepted by them, for the reason, that now when the assessee had duly accounted for her aforesaid disclosure of Rs. 23 lac in the form of various assets like loans and advances, therefore, it was not permissible on her part to claim benefit of the same for explaining the source of the 'on money' that was paid towards purchase of the aforesaid property under consideration. In our considered view, the lower authorities had adopted a half hearted approach for adjudicating the aforesaid claim of the assessee. As the

aforesaid disclosure to the said extent Rs. 23 lacs was made by the assessee for the purpose of meeting out any possible discrepancy, it was thus in the backdrop of the said fact that the aforesaid claim of the assessee was required to be looked into. Be that as it may, as we have restored the matter to the file of the A.O for fresh adjudication, therefore, the assessee would remain at a liberty to substantiate her claim also in context of her aforesaid plea. As such, we are of the considered view that in all fairness the aforesaid matter requires to be restored to the file of the A.O. Needless to say, the A.O in the course of the 'set aside' proceedings shall afford a reasonable opportunity of being heard to the assessee, who shall remain at a liberty to substantiate her claim on the basis of supporting documentary evidence. The **Ground of appeal No. 3** is allowed for statistical purposes.

11. The appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 25.02.2020

Sd/-

(G. Manjunatha)
ACCOUNTANT MEMBER

Mumbai;

Dated: 25/02/2020

Rohit, P.S.

Sd/-

(Ravish Sood)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai