IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH (SMC), JODHPUR

BEFORE SHRI R.C.SHARMA, ACCOUNTANT MRMBER

ITA No. 484/Jodh/2018
(ASSESSMENT YEAR-2009-10)

Shri Jiterndra Ojha S/o Sh. Mangi Lal Ojha , Chhoti Brahmpuri, Sirohi.	Vs	The ITO, Sirohi.
(Appellant)		**(Respondent)**
PAN: AADPO9124C		

Assessee By	Shri N.R. Mertia (FCA)
Revenue By	Shri Abhimabnu Singh Yadav (JCIT-DR)
Date of hearing	16/03/2020
Date of Pronouncement	19/03/2020

ORDER

PER R.C. SHARMA, A.M.

This is an appeal filed by the assessee against the order dated 28.08.2018 of Ld. CIT(A)-I, Jodhpur for the assessment year 2009-10 in the matter of order passed U/s 143(3)/147 of the Income Tax Act, 1961 (in short, the Act), wherein the assessee has taken following grounds:-

"1. *That, the ld. Commissioner of Income tax (A)-1st, Jodh. ld. CIT(A), was unjustified and has erred in law and in facts in maintaining the assessment order and the jurisdiction acquired u/s 147/148 and the by the ld. Income-tax Officer, Sirohi, (ld. AO). Hence, both the orders deserve to be quashed and cancelled.*

2. *That, without prejudice to the generality and comprehensiveness of the ground No. 1 above, the ld. CIT(A) was not justified and had erred in law and in facts in view of the material available on record and the written and oral submissions made with the support of the applicable judicial pronouncement during the course of the appellate and assessment order and thereby dismissing the appeal on these legal issues, which are:-*

   i. The copy of reason did not contain date.

   ii. The notice u/s 148 was served on 03.04.2016 i.e. after the stipulated date.

   iii. Reasons were recorded on the basis of vague, non-specified and irrelevant material.

   iv. The AO completing the assessment had no jurisdiction over assessee's case.

   The Hon'ble Tribunal may very kindly allow the appeal by deciding these issues correctly and as per law.

3. *That, the ld. CIT(A) erred in law and in fact in not deciding the above issue No. ii relating to service of notice after prescribed time limit u/s 148(1) of the Act. Hence the impugned order under appeal is erroneous and bad in law. (2015) 53 taxmann.com 108 (Mad.)- Gitsons Engineering Co. Vs. CIT.*

4. *The without prejudice to the generality of the ground No. 1 & 2above. It is alternatively urged that in the facts and circumstances of the case, the impugned reopening of the asset invoking Sec. 147 to 151 was without jurisdiction and contrary to the legal provisions contained in Sec. 153C read with sec. 153A & 153B because the material used were emanated from a search carried out u/s 132 of the Act and such material allegedly had been sent to the ld. A.O., then in that case the Ld. AO ought to have proceeded only u/s 153C of the Act, read with other section like Sec.*

153A,153B &153D. In not doing so the ld. AO had incorrectly and unlawfully acquired jurisdiction u/s 147 of the Act by overlooking the mandatory provision of Sec. 153 which starts with non-obstante clause i.e.:-

" Notwithstanding anything contained in section 139, section 147, section 148, section 149, section, where the Assessing Officer is satisfied that " ....

Since the ld. AO had not proceeded as per the mandatory provision of law, hence the ld. CIT(A) erred in maintaining the impugned asst. order. The same may kindly be cancelled and quashed. Such action and decision ought to have been sue-moto taken by the ld. CIT(A)in the facts and circumstances of the case and ought to have allowed the appeal of the appellant in the interest of justice, even if the appellant could not raise a ground for the same. The Hon'ble ITAT may kindly allow this legal ground.

5. *That without prejudice to the legal grounds taken above it is further urged that in the facts and in circumstances of the case ld. CIT(A)erred in law and facts in maintaining the addition made u/s 69 of the Act by the AO in the returned income of the appellant which amongst other, was also sustainable as during the course of asst. proceeding the ld. AO cause notice issued to the appellant containing only some portion of statement of the alleged seller which itself was not reflecting the name of the appellant hence the addition made is unsustainable on facts and in the eye of law. Thus, it deserved to be cancelled. The Hon'ble Bench may kindly delete the same.*

6. *That the impugned asst. order was unsustainable in the eye of law and on fact when the ld. AO did not provide any opportunity to cross examine the seller whose statement was used and relied upon by ld. AO against the appellant. This cross examination, amongst other, ought to have been provided by the ld. AO, particularly when the appellant had vehemently denied the allegation and had made assertions that the statement*

of the seller of Sh. Madan Mohan Gupta was false as the appellant did not give any additional money to seller as was alleged against the appellant. For this appellant had referred judicial supports in his written submissions to the AO which were in relation to providing of cross-examination of the witness. hence the Hon'ble Tribunal very kindly deleted the addition.

7. *That the ld. CIT(A) erred in law and facts in rejection the appellant's ground of appeal in relating to levy of interest by relying on the decision of the Hon'ble Supreme Court in the case of CIT vs. Anjum M.H.Ghaswala and others (2001) 252 ITR 1 (SC) and other decision, by holding that the levy of interest was automatic whereas the ground of the appeal of the appellant was totally different and the appellant was denying his liability of interest u/s 234B because no interest was leviable u/s 234B91), consequentially Sec. 234B(3) was also in applicable.*

8. *The appellant craves leave to add, alter, substitute withdraw, modify or amend any of the ground of appeal here in above taken on or before the hearing.*

9. *The appellant prays that his appeal may kindly be allowed, cancelling the impugned sustained action of ld. AO by CIT(A)."*

2. Rival contentions have been heard and record perused. Facts in brief are that the assessee is a salaried employee and also derived income from other sources. The A.O. received information which indicated that the during the year under consideration, the assessee had purchased a plot admeasuring 200 sq. yards in the residential project “Revenue Residency" (Nizi Khatedar Residential Scheme) at village Bharatsingh, Jaisingpura-Muhana Road, Bhankrota, Teh. Sanganer, Jaipur. This residential scheme was developed and sold

by Sh. Madan Mohan Gupta in F.Y. 2008-09 relevant to AY 2009-10 in whose case search and seizure operation were carried out on 23-05-2013. During the course of search and seizure, statement of Sh. Madan Mohan Gupta were recorded wherein he had accepted and honoured on-money receipt on sale of plots in Revenue Residency scheme which was Rs. 2000/- per sq. yards as per the seized papers. The name of the assessee was also appearing in the list of such purchasers for aforesaid plots, who alleged had given Rs. 2000/- per sq. yards as on money i.e. Rs. 4,00,000/- (200 sq. yards x Rs. 2000/-) to Sh. Madan Mohan Gupta for purchase of the alleged plot. The assessee claimed before the AO that he only invested Rs. 2,46,000/- towards purchase of plot. However, the AO did not find any substance in assessee's claim and added Rs. 4.00 lacs in assessee's income. By the impugned order, the ld. CIT(A) has confirmed the action of the A.O., against which the assessee is in further appeal before the ITAT.

3. 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 Dhirendra 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 ld. 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.*
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> *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:-*
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> *"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-Sanganeer, 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.*
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> *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 ld. CIT(A), hence, the Assessing Officer is directed to delete the same."

5. As the facts and circumstances of the case are exactly same for the case stated above, therefore, 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 ld. 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 19th March, 2020.

Sd/-
[R.C. SHARMA]
Accountant Member

Dated : 19/03/2020
*Ranjan

Copy to :
1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR
6. Guard File (ITA No. 484/Jodh/2018)

Assistant Registrar
Jodhpur Bench