

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE SMC BENCH, INDORE

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No.224/Ind/2019
Assessment Year: 2012-13

Shri Sameer Maheshwari J-29, MIG Colony Indore (Appellant)	<u>बनाम/</u> Vs.	ITO-3(3) Indore (Revenue)
P.A. No.ALYPM9116E		
Appellant by	Shri Ashish Goyal & Shri N.D. Patwa, Advs	
Revenue by	Shri R.P. Mourya, Sr. DR	
Date of Hearing:	22.07.2020	
Date of Pronouncement:	27.07.2020	

आदेश / O R D E R

This appeal by the assessee is directed against order of the Commissioner of Income Tax Appeals [CIT(A)]-I, Indore dated 22.01.2019 pertaining to the assessment year 2012-

13. The assessee has raised following grounds of appeal:

On the facts and the circumstances of the case:-

1. The reassessment order is invalid, barred by limitation, illegal, bad in law, void-ab-initio and therefore liable to be quashed.

2. The Ld. CIT(A) erred in sustaining the reassessment order

which is invalid, barred by limitation, illegal bad in law, void ab initio and therefore liable to be quashed.

3. The ld. CIT(A) erred in confirming addition of Rs.17,28,000/- to the total income of the appellant, treating the same as unexplained investment.

2. At the outset of hearing, Ld. counsel for the assessee submitted that he does not wish to press ground no.1 & 2. Ground no.1 & 2 of this appeal are therefore, dismissed.

3. Ground No.3 is against the confirming addition of Rs.17,28,000/- as unexplained investment.

4. The facts giving rise to the present appeal are that the assessee had filed his return of income on 23.03.2013 declaring total income Rs.4,01,470/-. It is observed by the assessing officer that on verification of details submitted with the Income Tax Department during the year under appeal. It was noticed that the assessee had made investment of Rs.48,00,000/- in the project namely Gold Link/Gold Green while purchasing a plot on 21.10.2011. As per the said agreement of sale of that plot the amount

disclosed is Rs.30,72,000/- and assessing officer was of the view that remaining amount was paid by the assessee as on money. Further the assessing officer was of the view that the investment made by the assessee was not commensurate to the income offered for taxation from A.Ys.2009-10 to 2012-13. Therefore, the case of the assessee was reopened by issuing notice u/s 148 of the Act. In response to the notice Authorised Representative of the assessee appeared and filed the requisite details. The assessing officer framed assessment u/s 143(3) r.w.s 147 of the Income Tax Act 1961 (hereinafter referred as the Act) vide order dated 27.11.2017, hereby, the Assessing Officer made addition of Rs.17,28,000/- being unexplained investment purchase of plot.

5. Aggrieved against this the assessee preferred an appeal before Ld. CIT(A), who after considering the submissions confirmed the addition. Now the assessee is in appeal

before this Tribunal. Ld. counsel for the assessee submitted that under the identical facts the division bench of this Tribunal has ruled that in the light of judgment of Hon'ble Gujarat High Court and Coordinate Bench of the Tribunal simply relying upon the declaration made before the Settlement Commission no addition can be made. He took me through the decision of The Tribunal in the case of Anantnadh Construction and Farms (P.) Ltd. vs. DCIT (2017) 83 taxmann.com 164 (Mumbai). He further reiterated the submissions made in the synopsis. The submissions of the assessee are reproduced as under:

Being aggrieved and dis-satisfied by the addition, the appellant submits as under:

*1. **No evidence for on-money:** - During search, no incriminating document, loose paper, any handwritten or printed document was found showing on-money payment by assessee. It was only after search, the Garha Group applied before the Settlement Commission, and in the spirit of settlement, they made a disclosure in an EXCEL SHEET regarding on-money payment.*

2. The disposition of making "on-money" payment is merely a bald allegation which is not corroborated by any evidence. The Excel sheet filed by them before Settlement Commission, which

is not corroborated by any evidence, has no evidentiary value.

2. Evidence before Settlement Commission cannot be used against assessee: Further, a disclosure before Settlement Commission is confidential information, and cannot be used against the assessee itself; what to talk about third party. Thus, the declaration made by Garha group, which was not backed by any evidence, which is a confidential information, and just "in the spirit of settlement" cannot be used against the assessee.

It was held in *Anantnadh Constructions and Farms* {2017} 83 taxmann.com 164 (Mum. Trib.), at para 13 as under:

"We find that assessee has made declaration and filed some information

before Settlement Commission admitted under section 2450 of the Act and it can be used only for limited purpose for settlement of tax dispute and passing an order under section 2450{4} of the Income Tax Act and not for other purpose

We find that any confidential information disclosed in annexure

to the settlement application before Income Tax Settlement Commission can never be the basis to make the addition."

3. Third party evidence not binding unless corroborated: - Further, it is a settled law that entries in books of third person/ statement of third person is not binding on the assessee. Here, in the present case, there were no entries in the books of third person, or statement of third person, it was only an EXCEL SHEET, where they made certain disclosure. Such disclosure was "IN THE SPIRIT OF SETTLEMENT", as stated by Id Assessing Officer himself.

In *Chiranjilal Steel Rolling Mills Vs. CIT* (1972) 84 ITR 222 {P&H}, considering section 27 of the Evidence Act, it was held that statement of co-accused cannot be read in evidence against another co-accused unless and until it is corroborated with independent material.

Further reliance is placed on *M.K. Brothers* 163 ITR 249 (Raj.), where it was held that Statement recorded u/s. 132{4} or 131 of the third parties are binding upon them in their own case only

and same cannot be foisted upon the other parties in the absence of sufficient corroboratory material.

Further reliance is placed on following cases:

ACT vs Prabhat Oil Mills 52 TTI 533 (Ahd);

Chironjilal Steel Rolling Mills vs CIT 84 ITR 222 (P&H). CBI vs v.c. Shukla 1998 SCC 410;

Sheth Akshya Pushpavandan 130 TT) 42 (Ahd.); Common Cause (SC)~ following v.c. Shukla (supra)

4. Not confronted: - *The EXCEL SHEET itself was never provided to the assessee.*

It was only at this stage, they provided a copy of same. Although the excel sheet is inconsequential, still the respondents relied on same, without providing a copy of the same. It is prayed that, once the department relied on certain document, it was incumbent upon them to provide a copy of the same before making assessment, and if the same had not been provided, no addition can be made based on same.

Kishinchand Chellaram 125 ITR 713 (SC)

Thus, it is submitted that no on-money was paid by the assessee. The addition which is without any basis, may kindly be deleted.

6. Per contra Ld. DR opposed the submissions and supported the orders of the authorities below.

7. I have heard the rival submissions, perused the materials available on record. It is not disputed that the assessment was reopened on the ground that the 3rd party had made an application before the Settlement Commission. The Garha Group of Indore had offered/

estimated the receipt of on money for such units was also sold. The Revenue has no other material except the statement made before Settlement Commission, I find force into the contention of the assessee that the issue is covered by the decision of the Coordinate Bench of this Tribunal rendered in the case of *Anantnadh Construction and Farms (P.) Ltd. vs. DCIT* wherein the Tribunal has held as under:

“13. We find that assessee has made declaration and filed some information before Settlement Commission admitted under section 245D of the Act and it can be used only for limited purpose for settlement of tax dispute and passing an order under section 245D(4) of the Income Tax Act and not for other purpose. The assessee has made a disclosure and such disclosure ultimately ended in settlement order under section 245D(4) of the Act. The disclosure came to the possession of AO. The fact that the disclosure made under section 245D(1) of the Act even if constructed as if no order under section 245D(4) has been passed it will not give a license to the AO to use the confidential information disclosed in an annexure to the application of the Settlement Commission. If the application is treated as not admitted under 245D(1) of the Act, then the provisions are clear that confidential information can never be passed on to the AO nor can it be used in evidence against the assessee. Section 245D(4) has clearly held that admission of assessee's application under section 245(1) was incorrect. We find that any confidential information disclosed in annexure to the settlement application before Income Tax Settlement Commission can never be the basis to make the addition. We find that in the instant case, the AO has reopened the assessment under section 147. Thereafter, AO has not brought any evidence or made any inquiry that assessee has earned additional income of Rs.5 lakhs as brokerage income.

In the instant case, after reopening the assessment order, the AO had not made any inquiry and not examined the material which was before him that how this income was declared by the assessee and addition has been made simply relying upon the declaration made in the application before the Settlement Commission under section 245D. The AO was in possession of the paper relating to the income but in absence of any material no addition can be made. The Hon'ble Gujarat High Court in the case of Maruti Fabrics (supra) has held that whatever material is produced along with application by the assessee before Settlement Commission or result of inquiry held or evidence recorded by the Settlement Commission in course of proceedings before it can be used by the adjudicating authority as if same had been produced before such Central Excise Officer. Once application or proceedings before Settlement Commission fails, Central Excise Officer is required to adjudicate entire proceedings and show cause notice and Hon'ble Gujarat High Court has held as under:

"Considering sub-section (2) of section 32L of the Act, in a case where an order is passed by the Settlement Commission under sub-section (1) of section 32L and thereafter adjudicating authority is required to adjudicate the case, the Central Excise Officer shall be entitled to use all the materials and other information produced by the assessee before the Settlement Commission or the result of inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it as if such materials, information, inquiry and evidence have been produced before such Central Excise Officer or held or recorded by him in the course of the proceedings before him on fair reading of sub-section (2) of Section 32L of the Act whatever is admitted by the assessee while submitting the application before the Settlement Commission submitted under Section 32E(1) of the Act straightway cannot be said to be admission on behalf of the assessing accepting the liability. Whatever the material is produced alongwith the application and/or any material and/or other information produced by the

assessee before the Settlement Commission or the result of the inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it can be used by the adjudicating authority as if such materials, information, inquiry and evidence has been produced before such Central Excise Officer, while adjudicating the show cause notice and the proceedings. If the contention on behalf of the appellant is accepted, in that case, there is no question of further adjudication by the Central Excise Officer with respect to the amount admitted by the assessee while submitting the application before the Settlement Commission submitted under Section 32E(1) of the Act. Once the application or proceedings before the Settlement Commission fails, the Central Excise Officer is required to adjudicate the entire proceedings and show cause notice. Under the circumstances, so far as proposed question of law No.1 is concerned, the present Tax Appeals deserve to be dismissed and are, accordingly, dismissed by answering the proposed question of law No.1 against the Revenue."

14. Respectfully following the same, we hold that Hon'ble Gujarat High Court's judgment in the case of Maruti Fabrics (supra) pertains to Central Excise but if we compare central excise under [section 32E of the Central Excise Act this section](#) is parallel to [section 245C of the Income Tax Act](#). One primary condition mentioned in section 32E for filing central excise settlement petition is "a show cause notice for recovery of duty issued by Central Excise Officer has been received". In [Income Tax Act section 245C](#) requires some pendency of proceedings. The Central Excise application is allowed or rejected vide order under section 32F(1). This section is parallel to section 245D(1). Section 32L gives the powers and procedure of Central Excise Settlement Commission. This section is similar to [section 245F of the Income Tax Act](#). [Section 32L](#) gives the powers of the Settlement Commission to send the case back to the Central Excise Officer. Section 32L reads as under:

"32L(1) The Settlement Commission may, if it is of opinion that any person who made an application for settlement under

section 32E has not co-operated with the Settlement Commission in the proceedings before it, send the case back to the Central Excise Officer having jurisdiction who shall thereupon dispose of the case in accordance with provisions of the Act as if no application under section 32E had been made.

32L(2) For the purpose of sub-section (1), the Central Excise Officer shall be entitled to use all the materials and other information produced by the assessee before the Settlement Commission in the course of the proceedings before it as if such materials, information, inquiry and evidence had been produced before such Central Excise Officer or held or recorded by him in the course of the proceedings before him."

15. We find that section 245HA(1) of the income Tax Act lists several circumstances in which the case before the Settlement Commission would abate; whereas in section 32L(1) non - cooperation of the petitioner is the only ground. The Central Excise Officer derives its power its power to assess such abated proceeding vide section 32L(2) of the Central Excise Act. This is identical to powers vested with an AO under section 245HA(2) and 245HA(3) under the Income Tax Act. It is therefore very clear that the provisions of Central Excise Settlement Commission and that for Income Tax settlement Commission are identical. Therefore, the judgment of Hon'ble Gujarat High Court in the case of Maruti Fabrics although pertaining to Central Excise should be applied to cases abated under section 245HA of the Income Tax Act also.

16. Therefore, we are of the view that the judgment of Hon'ble Gujarat High Court is applicable to the facts of the assessee's case. We find that Hon'ble Gujarat High Court has held that if the petition filed before the Settlement Commission wherein assessee has made declaration but proves that assessee has neither earned such income nor any incriminating material was found during the search relating to undisclosed income then no addition can be made.

17. We have also gone through the judgment of ITAT, Mumbai in the case of Dolat Investments Ltd. (supra) wherein the ITAT has specifically held in para 22 which reads as under:

"22. The first issue is whether the case of the assessee for assessment year 2005-06 was admitted by the Settlement Commission under section 245D(1) of the Act?"

On this issue, we have already seen that in the order dated 30-11-2007 under section 245D(4) of the Act, the Settlement Commission has clearly held that the assessee for assessment year 2005-06 does not satisfy the criteria of offering income on which at least an income-tax payable should exceed Rs. 1 lakh. The Settlement Commission has further held that when admitting the petition of the assessee for assessment year 2005-06, this aspect was overlooked and that they are rectifying the apparent error by excluding assessment year 2005-06 of the assessee from the process of settlement. Thus, the case of the assessee for assessment year 2005-06 cannot be considered to have been admitted for the process of settlement under section 245D(1) of the Act. Consequently, the confidential information disclosed in the Annexure to the Settlement application could not have been used by the Assessing Officer against the assessee to make the impugned addition. Therefore, the addition to the income made by the Assessing Officer in assessment year 2005-06 which is based only on the disclosure made in the Annexure to the Settlement Commission is not valid in law. Consequently, the imposition of penalty on the basis of such invalid addition cannot be sustained. In view of the above conclusion, we do not wish to go into the other alternate argument of the learned counsel for the assessee regarding abatement of proceedings before Settlement Commission and use of confidential information disclosed by the assessee in such proceedings by the Assessing Officer in making assessment."

18. From the above decision of the Tribunal where they have discussed the section 245C(1) and section 245D(i) and 245HA by following observation:

'20. The [Finance Act, 2007](#) made changes to the provisions for settlement of cases contained in Chapter XIX-A of the [Income-tax Act, 1961](#). One change involves introduction of a new concept of abatement of proceedings before the Settlement Commission for which provisions has been made in the newly inserted section 245HA relevant portion whereof reads thus :—

"245HA. Abatement of proceeding before Settlement Commission.— (1) where....

- (i) an application made under section 245C on or after the 1st day of June, 2007 has been rejected under sub-section (1) of section 245D;
- (ii) an application made under section 245C has not been allowed to be proceeded with under sub-section (2A) or further proceeded with under sub-section (2D) of section 245D;
- (iii) an application made under section 245C has been declared as invalid under sub-section (2C) of section 245D;
- (iv) in respect of any other application made under section 245C, an order under sub-section (4) of section 245D has not been passed within the time or period specified under sub-section (4A) of section 245D, the proceedings before the Settlement Commission shall abate on the specified date.
- Specified date would be (i) in respect of an application referred to in sub-section (2A) or sub-section (2D), on or before the 31st day of March, 2008; (ii) in respect of an application made on or after 1st day of June, 2007 within nine months from the end of the month in which the application was made.
- (2) Where a proceeding before the Settlement Commission abates, the Assessing Officer or as the case may be any other income-tax authority before whom the proceeding at the time of making the application was pending, shall dispose of the case in accordance with the provisions of this Act as if no application under section 245C had been made.
- (3) For the purposes of sub-section (2), the Assessing Officer or as the case may be, other income-tax authority, shall be entitled to use all the material and other information produced by the assessee before the Settlement Commission or the results of the inquiry held or evidence recorded by the Settlement

Commission in the course of the proceedings before it, as if such material, information inquiry and evidence had been produced before the Assessing Officer or other income-tax authority or held or recorded by him in the course of the proceedings before him."

21. Thus, when a proceedings before the Settlement Commission abates, it reverts to the income-tax authority before whom it was pending at the time of making the application for settlement and the income-tax authority has to dispose of the case in accordance with the provisions of the Act as if no application for settlement had been made and for that purpose, it is entitled to use all the material and other information produced by the assessee before the Settlement Commission or the results of the inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it.'

19. We find from the above proposition of law by Hon'ble Gujarat High Court and Tribunal that simply relying upon the declaration made before the Settlement Commission no addition can be made. In this group case, the search was conducted in the business premises of Lodha Group and subsequent to search action assessee company along with other companies of Lodha Group filed a petition under section 245C(1) of the Act before Settlement Commission. The assessee has offered additional income of Rs.5 lakhs towards the land brokerage income. This offer was made for maintainability of petition before Settlement Commission as stated in clause (i) and clause (ia) of section 245C(1) of the Act. We are of the view that after reopening of the assessment order no addition can be made on the basis of income offered by the assessee before Settlement Commission. We find that no incriminating material was found during the course of search action substantiating that assessee has actually earned undisclosed income. Therefore, just because assessee has offered additional income before Settlement Commission, no addition can be made without basis. Hence, the addition made by the AO and Ld. CIT (A) is deleted.

8. Therefore, respectfully, following the decision of the division bench of this Tribunal, I hereby direct the assessing officer to delete this addition.

9. In the result, the appeal of the assessee is allowed.

Order was pronounced in the open court on 27.07.2020.

Sd/-

**(KUL BHARAT)
JUDICIAL MEMBER**

Indore; दिनांक Dated : 27/07/2020

Patel/PS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order
Assistant Registrar, Indore