IN THE INCOME TAX APPELLATE TRIBUNAL), 'D' BENCH MUMBAI

BEFORE SHRI RAJESH KUMAR, AM

&

SHRI PAVAN KUMAR GADALE, JM

ITA No.3967/Mum/2019
(**Assessment Year :2016-17**)

Dy. Commissioner of Income Tax, Central Circle 8 (1) Mumbai	Vs.	Shri Mahendra B Mittal A-403, Meghdoot Apartment Raheja Township, Malad(E) Mumbai – 400 097
PAN/GIR No. AEBPM1654H		
(Appellant)	..	**(Respondent**)

Revenue by	Shri Sajit V. Nair
Assessee by	Shri Madhur Agrawal
Date of Hearing	**20/01/2021**
Date of Pronouncement	**08/03/2021**

आदेश / O R D E R

PER RAJESH KUMAR, ACCOUNTANT MEMBER:

The aforesaid appeal has been filed by the revenue against the impugned order dated 28/03/2019, passed by the CIT(A)- 50, Mumbai, for the assessment year 2016-17.

2. The grounds raised by the revenue is as under:-

> *1."Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition of Rs.1.56 crore without appreciating the fact that the name of the assessee, nature of the transaction, period of the transaction and quantum involved are duly established from the snapshot found in the i-phone which was seized during the course of search action u/s.132 at the residence of the assessee"*

3. The only issue raised by the Revenue is against the deletion of Rs.1.56 crores by ld. CIT(A) which has been added by the AO on the basis of snapshot found in the i-phone of the assessee during the course of search u/s.132 of the Act at the residence of the assessee.

4. The facts in brief are that a search u/s.132 of the Act was conducted on 03/12/2015 on the assessee. The assessee filed the return of income on 05/08/2016 declaring total income of Rs.68,27,800/-. Thereafter, statutory notice was duly issued and served on the assessee. The AO on the basis of snapshot taken by the assessee during the course of search action u/s.132 of the Act on assessee observed that on page No.6 of the snap shot, assessee has shown net worth of Rs.1.56 Crores referring 23,00,000/- as "C", Rs.20,00,000/- as "P" and Rs.65,50,000/- as "I" and also mentioned the entry of Rs.47.50 lakhs. The said snap shot is reproduced by the AO in page No.2 of the assessment order in para No.5 and on the bottom of the page the amount of Rs.156 is mentioned. Accordingly, the explanation was called from the assessee vide letter dated 22/01/2016 which was replied by the assessee by submitting that these snapshots of i-phone represented old disputed matters pertaining prior to the year 2008. The assessee submitted that he was doing a small activity of finance brokerage and used to assist the people in lending money and these snap shots at page Nos. 1 to 65 mostly related to disputes in respect of finance activity against which he was entitled to get

a small commission. The assessee submitted that because of disputes and bad debts, the said activity was closed long ago in the year 2008 but the dispute continued, so the assessee took snap shot of the papers and retained in the i-phone. The assessee also submitted that the income earned by way of commission from the finance activity during the year 2007 till date which has also become bad. Accordingly, AO during the course of assessment proceedings, asked the assessee to provide the nature and source of said income and explain how it has been reflected in the books of accounts with supporting bills, vouchers and evidences and also to show-cause as to why the same should not be treated as unaccounted unexplained income of the assessee. The assessee replied vide letter dated 21/11/2017 and reiterated his stand as made before the search party. The AO was not convinced with the submissions of the assessee and came to the conclusion that page No.6 shows worth at Rs.1.56 Crores on 06/07/2015 for F.Y.2015-16 which AO concluded that 'C' pertains to 'Cash', P pertains to 'Profit' and I pertains to 'Interest' and thus, came to the conclusion that the amount mentioned in the said sheet of Rs.1.56 Crores is an unaccounted and unexplained income and added the same to the income of the assessee by framing assessment u/s.143(3) of the Act vide order dated 26/12/2017.

5. In the appellate proceedings, the ld. CIT(A) allowed the appeal of the assessee after taking into consideration the various contentions and submissions of the assessee by observing and holding as under:-

> *"I have considered the facts of the case, submissions of the appellant, the observations of the AO contained in the assessment order and the other materials on record on this issue.*
>
> *9.1 The Ground Nos. 1 & 2 raised by the Appellant relates to an addition of Rs. 1.56 crores made by the AO on the basis of snapshots found in the i-Phone of the Appellant, by holding it to be unaccounted and unexplained income.*

9.2 The facts are that during the course of search operation conducted on the Appellant, backup was taken of the i-Phone seized from the Appellant from his residence A-403, Meghdoot Apartment, Raheja Township, Malad (East), Mumbai-400097. The AO had noted that on Page No. 6 of the snapshot, the Appellant had shown its net worth of Rs. 1.56 cores mentioning "C" as 23 Lakhs, "T as 20 Lakhs and "I" as 65.50 Lakhs and Rs. 47.50 Lakhs. The AO had concluded in the assessment order that "C" represents cash "P" represents profit and "I" as general interest.

9.3. The Appellant had during the course of the assessment proceedings stated that these are rough and very old disputed matter in respect of finance activity carried on by the Appellant prior to the year 2008. He has further stated that he was doing small activity of finance brokerage prior to 2008. It was also categorically stated by him that the snapshots seized as pages number 1 to 65 mostly relates to disputes related to finance activity, which was carried on by him. It was also contended that he was entitled to get small commission/brokerage subject to the settlement of such finance disputes. It was also emphasized by the Appellant that most of the parties to whom finance was provided became bad debts and disappeared. To corroborate this statement, the Appellant had relied on seized page 2, 4, 5, 14, 26, 27, 38, 46, 50 & 60. It was also stated that because of the bed debts and disputes this finance activity was closed long back in the year 2008 but disputes regarding the same continued even after that.

9.4 After going through the observations of the AO, contentions of the Appellant and the seized material placed on record, I have noted that at the top of the seized page, which is dated 06.07.2015 the word "lost" is written at the top. According to the Appellant, the word "lost" as appearing in the seized page means the figures written below actually represents the amount lost by the Appellant. According to the Appellant, the entries on the said seized page represent the net worth that is lost in relation to the various parties. The Appellant had categorically stated that as such the amounts noted in the seized page had not been received by the Appellant at all and hence, represents the amount lost in the finance business, which had closed way back.

9.5 Also, at the top of the said seized page in the middle the phrase "net worth" is written. I have noted that on the said seized page a general amount of Rs. 1.56 crores is written. According to the Appellant, even if it is presumed that the same represented the net worth of the Appellant, then also no addition can be made, as the actual net worth of the Appellant, as reflected in the books of accounts is far greater. It is a material fact on record that the net worth of the Appellant is Rs. 28.71 crores, as on 31.03.2015 and Rs. 27.33 crores, as on 31.03.2016, which is far greater than that mentioned in the impugned seized.

9.6 I am also in agreement with the contention of the Appellant that the entries of the seized page are just rough noting, which had not been corroborated by the AO by any document, transaction, income, asset, investment or cash. Thus, the seized document had not been corroborated with any material evidence on record. Thus, no adverse conclusion can be drawn on the basis of rough noting made on the seized paper. I have noted that the AO had added the amounts mentioned on the seized page as undisclosed income, solely on the basis of presumption and surmises without bringing on record any corroborative material or documentary evidence.

9.7 The Appellant had vehemently contended that the seized paper is in the nature of a dumb document, which have no evidentiary value and the same cannot be taken as sole basis for the determination of undisclosed income of the appellant. Reliance has been placed by the Appellant on the judgment of the Hon'ble Mumbai Tribunal in case of ITO vs. Kranti Impex Pvt. Ltd. (ITA No. 1229/Mum/2013). Reliance was also placed on the judgment of Prarthana Construction Pvt. Ltd. vs. DCIT (2001) 70 ITJ (Ahd.) 122 in which it was held that addition on the basis of loose papers without any corroborating evidence cannot be the basis for making addition.

9.8 The Appellant had also contended that the amount cannot be added u/s 68 of the Act as unexplained cash credits, since the amounts noted in the seized page are not found to be credited in the books of accounts of the appellant maintained for the previous year under consideration. Further, the seized page also doesn't reflect that any amount had been received by the Appellant in cash from any third party. Thus, the dumb document cannot be considered as books of account of the Appellant and hence, no addition can be made u/s 68 of the Act.

9.9 I have noted that mere suspicion, however strong or probable it may be, is no effective substitute for the legal proof required to substantiate a charge, which the learned AO has failed to furnish. There is a long mental distance between 'may be true' and 'must be true' and this basic and golden rule helps maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of a dispassionate judicial enquiry based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of evidence brought on record. Reliance is placed on Ashish Batham v. State of MP, AIR 2002 SC 3206.

9.10 In this context, further reference is made to judgment of Hon'ble Special Bench of Mumbai Tribunal in the case of GTC Industries Ltd. v. ACIT [164 ITD I (Mum)(SB)]t wherein the Hon'ble Tribunal observed as under:-

> *"Ultimately the entire case of revenue hinges upon the presumption that assessee is bound to have some large share in so called secret money in the form of premium and its circulation. However, this presumption or suspicion how strong it may appear to be true but needs to be corroborated by some evidence to establish a link that GTC actually had some kind of share in such secret money. It is quite trite suspicion howsoever strong may be but cannot be the basis of addition except for some material evidence on record. The theory of preponderance of probability is applied to weigh the evidence of either side and draw a conclusion in favour of party which has more favourable factors in his side. The conclusion have to be drawn on the basis of certain admitted facts and material and not on the basis of presumption of facts that might go against the assessee. Once nothing has been proved against the assessee with the aid of any direct material especially when various round of investigation have been carried out, then nothing can be implicated against the assessee".*

9.11 Reliance is also placed on the decision of Hon'ble Calcutta High Court in the case of M/s Classic Growers Ltd. vs. CIT [ITA No. 129 of 2012(Cal)J. In this case, the Assessing Officer found that the evidences produced by the Appellant to support huge losses claimed in the transactions of purchase and sale of shares were stage managed. The Hon'ble High Court held that the opinion of the Assessing Officer that the

Assessee generated a sizeable amount of loss out of prearranged transactions, so as to reduce the quantum of income liable for tax might have been the view expressed by the Assessing Officer but he miserably failed to substantiate the same. The High Court held that the transactions were at the prevailing price and therefore the suspicion of the Assessing Officer was misplaced and unsubstantiated.

9.12 It is a trite law that the suspicion howsoever strong cannot partake the character of legal evidence. Reference in this regard is made to the decision of Hon'ble Supreme Court in the case of Lalchand Bhagat Ambica Ram vs. CIT [37 ITR 288 (SC)]. Raising of presumption itself, does not amount to proof. Presumption however strong, cannot take the place of evidence. Reliance is placed on the decisions of Pooja Bhatt 66 TTJ (Mum) 817& D. M. Kamani (HUF) 65 TTJ (Pat) 504. It is well settled by the Hon'ble Supreme Court in more than one decision that courts have to be watchful and avoid the danger of suspicion to take place of legal proof for sometime, unconsciously it may happen to be a short step between moral certainty and legal proof. In this regard, reference may be made to the judgment in the case of Narendra Singh v. State of MP, 2004 SCC 1 893.

9.13 It is well settled proposition of law that the court should safeguard itself against the danger of basing its conclusions on suspicions, howsoever strong they may be. It is equally well settled that the Courts decision must rest not upon suspicion but upon legal grounds established by legal testimony. Mere suspicion, however strong, cannot take the place of proof. Reliance is placed upon State v. Gulzari Lal Tandon AIR 1979 S.C. 1382 and J.A. Naidu v. State of Maharashtra AIR 1979 S.C. 1537.

9.14 The principles of the Indian Evidence Act are equally applicable and have been applied with full force in Income-tax proceedings. The Hon'ble Supreme Court in Chuharmal v. CIT [1988] 1 72-ITR-250 stated:-
was meant by saying that the Evidence Act did not apply to proceedings under the Income-tax Act, 1961, was that the rigour of the rules of evidence contained in the evidence Act was not applicable; but that did not mean that when the taxing authorities were desirous of invoking the principles of the Evidence Act in proceedings before them, they were prevented from doing so.

9.15 It is settled law that suspicion, howsoever, strong cannot take the place of legal proof, as has been held by the Hon'ble Supreme Court in the case of
Umacharan Shaw and Bros. v. CIT (1959) 37-ITR-271. Further reliance is placed Upon:

- ***Krishnand v. State of Madhya Pradesh: AIR 1977 SC 796***
- ***Jayadayal Poddar v. Mst. Bibi Hazra: AIR 1974 SC 171***
- ***CIT v. K Mahim Udmaf20001158 CTR (Ker.) 100:12000] 242 ITR133(Ker.)***
- ***Dhakeshwari Cotton Mitts Ltd. v. CIT(1954 26ITR 775 (SC)***
- ***Omar Salay Mohamed Sait v. CIT(1959)37 ITR 151 (SC)***
- ***Asstt. CIT v. Jindal Saw Pipes Ltd. [20081118TTJ 228 :12008] 11 DTR (Delhi X Trib.) 281.***
- ***DhirajLalGirdhanLalVs.CJT26ITR736***
- ***Lalehand Bhagat Ambika Ram Vs. CIT 37ITR288***

9.16 The Hon'ble Supreme Court in ***Dhakeshwari Cotton Mitts v. CIT*** *[1954J 26 ITR 775 at 782 observed;*

"As regards the second contention, we are in entire agreement with the learned Solicitor-General when he says that the Income Tax Officer is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law, but there the agreement ends; because it is equally clear that in making the assessment under sub-section (3) of Section 23 of the Act, the Income Tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all There must be something more than bare suspicion to support the assessment under Section 23(3). The rule of law on this subject has, in our opinion, been fairly and rightly stated by the Lahore High Court in the case ***ofSeth Gurmukh Singh v. Commissioner of Income-tax, Punjab."***

9.17 The Punjab & Haryana High Court in ***CJT v. Anupam Kapoor*** *120081 299 ITR 179 did not believe on the allegation:*

"A cheque had been taken by the beneficiary i.e. by paying cash equivalent to the cheque amount and the premium thereon". The Hon'ble Court at page 182 observed: There was no material before the Assessing Officer, which could have led to a conclusion that the transaction was, simplicitera device to camouflage activities, to defraud the Revenue. No such presumption could be drawn by the Assessing Officer, merely on surmises and conjectures".

9.18 The Hon'ble Supreme Court in Parimisetti Seetharamamma v. CIT f 19651 57-ITR-532 at 536-537 observed:-

> *'By sections 3 and 4, the Indian Income-tax Act, 1922, imposes a general liability to tax upon all income. But the Act does not provide that whatever is received by a person must be regarded as income liable to tax. In all cases, in which a receipt is sought to be taxed as income, the burden lies upon the department to prove that it is within the taxing provision. Where however a receipt is of the nature of income, the burden of proving that it is not taxable, because it falls within an exemption provided by the Act, lies upon the assessed.*

9.19 In this regard, it is important to refer to the judgment of Hon'ble Delhi High Court in the case of CIT vs. Antt Bhalla (2010) 38 DTK 0113: (2010) 322 ITR 0191, wherein the Hon'ble Delhi High Court has upheld, the following observations of the CIT(A):-

> *"4.2 I have considered in detail the material on record. From the notings on p. 47 of Annex. A2, it cannot be said that any actual expenditure is represented by such notings which is not recorded in the books of account. To support the addition on account of unexplained expenditure on the basis of jottings on a loose sheet of paper, it is necessary to establish that the notings represent unaccounted transaction, with the help of independent corroborative evidence. In this case apart from the notings on the said paper, no other independent material or evidence has been brought on record. Moreover, the explanation submitted by the appellant is supported by relevant entries in the books of account of VTPL. Accordingly, the allegation of unexplained expenditure outside the books of account has not been established in the assessment order. The addition of Rs. 35 lacs is, therefore, deleted."*

9.20 I have noted that all the ingredients/components for levy of tax are not decipherable from the seized documents either on standalone basis or in association with other documents. The components which enter into the concept of taxation are first, the transaction/events which attract the levy, second, the person on whom the levy is imposed and who is obliged to pay the tax, third, the assessment year in which charge of income-tax is levied, fourth, whether any taxable income arises from the transaction recorded in the document and fifth, the rate or rates at which tax is to be imposed.

9.21 The rates are prescribed in the annual Finance Act and, therefore, this component has no value in determining the total income arising from a seized document. Thus, the other four elements are relevant and in the present case and the same are not discernible from the seized documents. Thus, for affixing the tax liability on the basis of seized documents, the following four ingredients are required to be established on a reasonable basis:-

(i) Name of the assessee,
(ii) Nature of transaction, ;
(iii) Quantum involved
(iv) Period of transaction.

9.22 If any of the abovementioned ingredients is missing and cannot be reasonably inferred from the seized document then only a seized document would be called a dumb document. In this regard, reliance is placed on the judgment of the Hon'ble ITAT, Jabalpur dated 27 February, 2007 in the case of ACIT v. Satyapal Wassan (2007) 295ITR (A.T.) 352 (Jbl), wherein it was held, as under:-

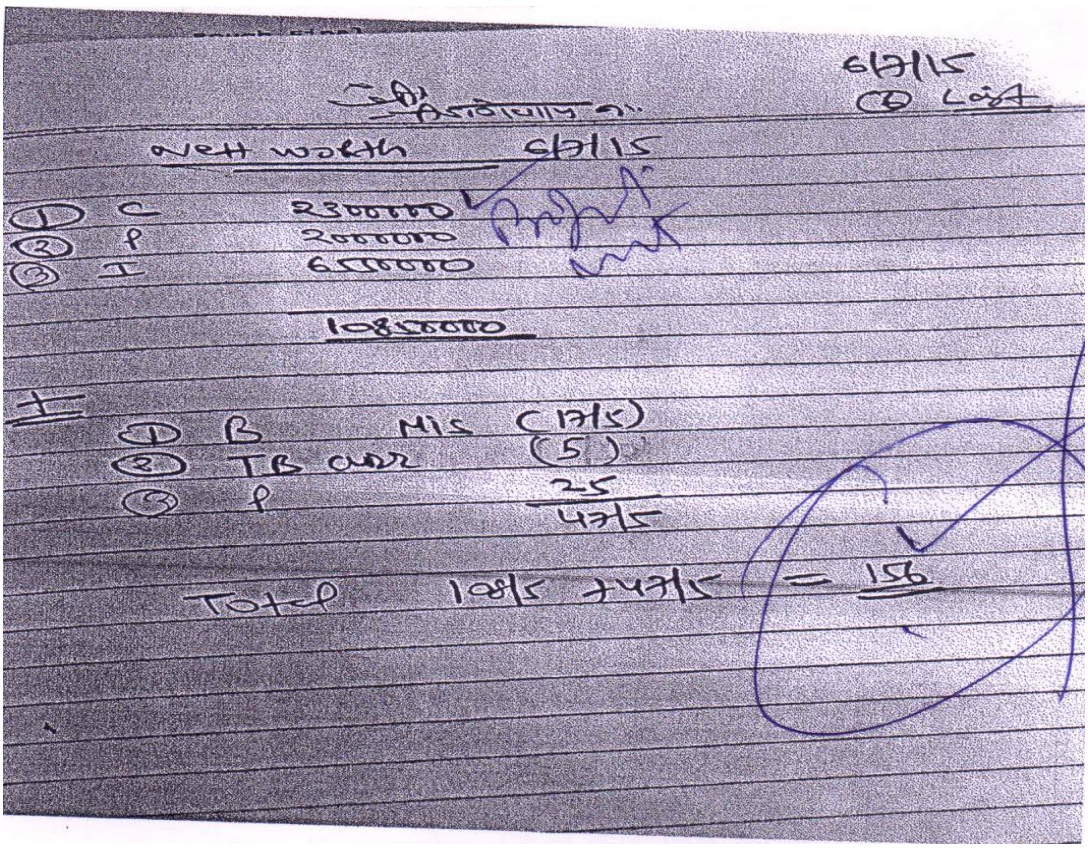
> *"....The component which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed and he fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislation scheme defining any of those components of the levy will be fatal to its validity..."*

The appellant had also contended that the onus is on the revenue to prove that the entries contained in the seized record represents his undisclosed income for the year under consideration and such burden has not been discharged by the AO. In order to bring certain sum to tax, the onus is on the Revenue to prove that the said sum has the character of income chargeable to tax in India. Reliance placed on Janki Ram Bahadur Ram Vs. CIT, (1965) 57 ITR 21 (SC)

9.24 I have noted that no enquiry had been done by the AO in relation to the plethora of seized material found during the course of the search operation, regarding the closed down finance business of the Appellant. It had been held by the Hon'ble Delhi High Court in the case of CIT ***vs.*** *Gangeshwari Metal Pvt. Ltd. (201^&G^)TR (Del) 299 that in case of lack of enquiry on the part of the tere assessee has furnished all the details, no addition can be made.*

9.25 In view of the above detailed factual and legal matrix, the addition made by the AO amounting to Rs. 1.56 Crores on the basis of i-phone messages is hereby deleted and accordingly, the Ground Nos. 1 & 2 of the present appeal are allowed.

6. We have heard the rival submissions and perused the material on record. The undisputed facts are that during the course of search proceedings, certain snapshots taken in the i-phone of the assessee were examined and on page 6 of the snapshot on the i-phone there were some entries which were claimed by the assessee as pertaining to the litigation which was going on in respect of fianance activities closed in the year 2008. The assessee contended before us that he was facilitator only charging small commission for getting borrowers for intending lenders. The AO extracted the page 6 of the snapshot in para 5 of page No.2 of the assessment order. The AO interpreted the entries 2300000 C as cash, 2000000 P as profit and 6550000 I as interest and total of Rs.156 was treated as 1.56 Crores. The said snapshot is reproduced as under:-



7. The ld. AO disbelieved the submissions and contentions of the assessee and added the entire amount to the income of the assessee by rejecting the contentions of the assessee that the said entries represented the old entries qua the financing business which assessee had been doing on brokerage basis till the year 2007 and which was closed in the year 2008. It is only because of the dispute continued and these information were stored on the i-phone by taking snapshots. The ld. CIT(A) deleted the addition by observing that the AO has failed to bring on record any substantive evidence to the effect that assessee has undisclosed/ unaccounted income of Rs.1.56 Crores. We have also perused the para 9.5 of the appellate order wherein it has been mentioned that net worth of the payment was Rs.28.71 Crores as on 31/03/2015 and Rs.27.33 Crores as on 31/03/2016 and thus, the calculation of the AO that Rs.1.56 Crores represented the net worth of Rs.1.56 Crores on 06.07.2015 is wrong and rightly deleted by the ld. CIT(A). We also note that the ld. AO has completely failed to bring any substantive evidence on record to prove that these entries represented the amounts in lakhs and hence , we do not find any infirmity in the order of ld. CIT(A). The ld. CIT(A) while allowing the appeal of the assessee also relied on series of decisions as discussed in para 9.7 to 9.9 considering all the facts and circumstances of the case. In our considered opinion the order passed by the ld. AO is based on presumption of surmises without any underlying substantive evidences and therefore, was rightly deleted by the AO. We are therefore, inclined to upheld the order of CIT(A) and appeal of the revenue is dismissed.

8. In the result, appeal of the revenue is dismissed.

Order pronounced on 08/03/2021 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(PAVAN KUMAR GADALE)	**(RAJESH KUMAR)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 08/03/2021
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai