

**IN THE INCOME TAX APPELLATE TRIBUNAL
DEHRADUN BENCH, DEHRADUN**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI V.P. RAO, JUDICIAL MEMBER**

**ITA No. 186 & 187/DDN/2019
Assessment Year: 2012-13**

DCIT, Central Circle, vs. Swarnganga Construction P. Ltd.,
Dehradun. Sharda House, Old RTO Road,
Bhilwara (Rajasthan),
PAN : AAPCS5792P

(Appellant)

(Respondent)

Appellant by : Sh. N.S. Jangpangi, CIT/DR
Respondent by : Sh. Kapil Goel, Advocate

Date of hearing: 24.11.2021
Date of order : 14.12.2021

ORDER

PER V.P. RAO, J.M.

These two appeals by the Revenue are directed against two separate orders of CIT(A) dated 27.09.2019 and 30.09.2019 arising from the assessment order passed u/s. 153C read with section 144 and penalty order u/s. 271(1)(c) of the Act respectively for the assessment year 2012-13.

2. In the quantum appeal, the assessee raised following grounds
:

“1. On facts and circumstances of the case and in law, the Ld. CIT(A) erred in condoning the delay of more than 2 years merely on ground that the erstwhile directors did not handover the notices to the existing directors, without appreciating that during the assessment proceedings the assessee did not file any response to notice issued on all the addresses including the latest one as well as email of the assessee company during the asstt proceedings, which is same as the address provided during the appellate proceedings also, which led to passing exparte order u/s 144 by the AO.

2. That the Ld. CIT(A) failed to bring any material on record to suggest that there was change in directors in the middle of the asstt proceedings or, that all notices were issued only during the period when previous directors were in the assessee company or, that the contention that no notices were received by present directors was a genuine and bonafide one.

3. That the Ld. CIT(A) failed to allude to the relevant facts and failed to record any ‘satisfaction’ as required u/s 249(3) on the sufficiency of reasons for condonation of delay because CIT(A) being an authority under the I T Act only, does not have unfettered powers to condone without assigning any reasons.

4. On facts and circumstances of the case and in law, the Ld. CIT(A) erred in admitting additional on his own, even before calling the remand/enquiry report u/s 250(4) from the AO on addl. evidence furnished, without passing any separate order u/r 46A(2) to show that the conditions for filing addl. evidence u/r 46A(1) are satisfied, thereby violating the principles of

admissions of addl. evidence as explained in Ranjit Kumar Choudhary 288 ITR 179 (Guj). That the powers of CIT(A) to admit or reject is not absolute but only subject to satisfaction of conditions under rule 46A(1) to be specifically recorded in writing in the appellate order.

5. On facts & circumstances of the case and in law, the CIT(A) erred in calling the enquiry (remand) report from the AO without first passing any order u/r 46A(2) to show that the conditions for filing addl. evidence u/r 46A(1) are satisfied.

6. On facts & circumstances of the case and in law, the CIT(A) erred in not considering the objection raised by AO during the remand proceedings that sufficient opportunity was already provided and also failed to record any specific findings with reference to the circumstances under which the assessee was prevented from producing the evidence before the AO or on the genuineness and correctness of the claims raised by assessee nor has controverted this assertion of the AO in remand report, while admitting the addl. Evidence.

7. On facts & circumstances of the case and in law, the CIT(A) erred in admitting the additional evidence at appellate stage without appreciating that the purpose of rule 46A is to ensure that evidence is primarily led before the Income-tax Officer as held in Rajkumar Srimall02 ITR 525 (Cal), Ganpatrai & Sons Ltd. 24 ITR 362 (Bom)

8. On facts and circumstances of the case and in law, the Ld. CIT(A) in law while deleting the addition of 75,00,000 made in the assessment order on the grounds that there was no incriminating material, without appreciating that the pg no 32 to 43 of LP-20, which was a sale deed which recorded sale consideration of only 75,00,000 as against the stamp value of

3,74,22,000/- in respect of land purchased by assessee, did prima facie constitute the incriminating material because the excess of FMV over the actual consideration represented prima facie the undisclosed investment in cash by the assessee and no reasons have been furnished by assessee before the CIT(A) also for acquiring the land at 1/5 cost of its stamp value.*

9. On facts and circumstances of the case and in law, the Ld. CIT(A) in law while deleting the addition of 75,00,000 made in the assessment order on the grounds that there was no incriminating material once the entries were recorded in regular books of accounts, without appreciating that even if some entries are recorded in books of accounts yet they may still represent undisclosed income having bearing on the assessment of income if they are partly recorded (at 1/5th value of stamp value as in this case), or camouflaged or shown to be from a source which is not the real source and thus recording of entry in books alone may not take such entry out from being incriminating, if there are prima facie reasons to doubt its correctness.

*10. Without prejudice to above grounds, on facts and circumstances of the case and in law the Ld. CIT(A), erred in applying the ratio of decision in case of *Sinhgad Technical Education society* without appreciating that the said decision was rendered with reference to provisions of 153C as they stood prior to 1.4.2005 where the nature of documents which could trigger issue of notice u/s 153C was not at all specified, whereas after amendment w.e.f. 01.04.2005, specific condition has now been prescribed for issue of notice u/s 153C stating that the material belonging/relating to assessee should have a 'bearing on the assessment of income' of other person. Hence the test of presence of incriminating material is not at all a pre-requisite after 1.4.2005 u/s 153C.*

11. That the Ld. CIT(A) failed to appreciate that the expression 'bearing on the assessment of income' has very wide connotation and it envisages that seized material need not by itself indicate the undisclosed or escaped income at the time of recording satisfaction u/s 153C but it should only be in the nature of prima facie material having live nexus to the belief of it having bearing on assessment of income and not in the nature of absolute evidence which by itself could suggest/divulge the undisclosed income without any further act of investigation/examination. The detailed examination of such material of having undisclosed material or not, is the step envisaged only after the issue of notice u/s 153C.

12. On facts and circumstances of the case and in law, the Ld. CIT(A) in law while deleting the addition of Rs. 73,00,000/- and Rs. 40,95,000/- without appreciating that in view of the amended provisions, the burden u/s 68 could not have been said to be discharged by assessee just by filing confirmations/financial statement for the first time at appellate stage in view of the ratio of decision in case of NR Portfolio Pvt. Ltd. 264 CTR 258(Delhi), Nova promoters & finance Pvt Ltd 252 CTR 187(Delhi), Seema Jain 406 ITR 411 (Delhi).

13. That the CIT(A) failed to appreciate that no evidence was given during asstt proceedings and that during remand proceedings also the confirmations by itself would not discharge the burden u/s 68 unless the genuineness and creditworthiness of the creditors were also proved to the satisfaction of AO and that no such evidence was given before AO nor CIT(A) has recorded any specific finding on the fulfilment of these conditions.

14. On the facts and circumstances of the case and in law, the CIT(A) failed to allude to the relevant facts & circumstances and

misread the legal provisions and ignored relevant observations of AO in the remand report to arrive at the conclusion.

15. That the above grounds are without prejudice to each other and appellant craves leave to add or amend any other more ground of appeal as state above as and when needs for doing so may arise."

3. Ground No. 1 to 3 are relating to condonation of delay of more than two years in filing the appeal before the CIT(A).

4. We have heard the Id. DR as well as the Id. AR and considered the relevant material on record. There is no dispute that the assessee filed the appeal before the CIT(A) on 28.02.2019 against the assessment order dated 26.10.2016. Therefore, there was delay of more than two years in filing the appeal before the CIT(A). The CIT(A) has condoned the delay in para 5 of the impugned order as under :

"5. It is seen from the record that the appeal under consideration has been filed on 28.02.2019. This appeal has been filed late by more than 2 years and appellant has submitted application for condonation of delay. The reasons submitted by the Ld. A.R. were discussed and undersigned finds that the appellant has sufficient cause for not presenting its appeal within stipulated time. Thus, delay is condoned and appeal is allowed for admission."

5. As it is apparent from the above order of the CIT(A) that neither the reasons for delay has been discussed nor the facts leading to the cause of delay has been analysed by the CIT(A). Therefore, the impugned order of the CIT(A) qua condonation of

delay for more than two years is non-speaking order. Accordingly, in the facts and circumstances of the case and in the interest of justice, without expressing any view on the merits of this issue, we set aside this issue to the record of Id. CIT(A) for deciding the condonation of delay afresh by speaking order.

6. Ground No. 4 to 14 are relating to admission of additional evidence by the Id. CIT(A) and deletion of additions made by the Assessing Officer on account of unexplained investment in land, unexplained cash credits and unexplained investment on account of loans and advances.

7. There was a search and seizure operation conducted in the case of Shreevaas Group of cases on 21.11.2013. During the course of search and seizure action, certain material and documents belonging to the assessee were found. Assessing Officer of searched person forwarded those information and documents to the Assessing Officer of the assessee. Consequently, the Assessing Officer after recording his satisfaction issued notice u/s. 153C of the Act on 12.01.2016. Since nobody has appeared in response to the notice issued by the Assessing Officer nor any reply or details or requisite material/documents were filed, therefore, the Assessing Officer passed the assessment u/s. 153C read with section 144 of the Income Tax Act. Assessing Officer has made various additions based on the material found and seized during the search and seizure action and received from the Assessing Officer of the

searched person. The Assessing Officer has made the addition on various accounts in para 3 to 6 as under :

“3. Vide referred above show cause dated 12.08.2016 and 14.10.2016 the assessee was asked to furnish the evidence of source of investment in purchase of property of Rs. 75,00,000/- (Market Value Rs. 3,74,22,000/-) executed on 03.05.2011. The Assessee has failed to do so. Therefore, an amount of Rs. 75,00,000/- is added to the income of the assessee due to unexplained investment made in purchase of property.

(Addition of Rs. 75,00,000/-)

The assessee has furnished inaccurate particulars of income and has concealed particulars of income, hence the assessee is liable for penalty u/s 271(l)(c) of IT Act 1961.

4. Vide referred show cause dated 12.08.2016 and 14.10.2016 the assessee was asked to explain the transactions of Rs. 73,00,000/- which have been carried by the assessee from 04.05.2011 to 09.03.2012. The Assessee has failed to furnish the same. Hence an amount of Rs. 73,00,000/- is added to the total income of the assessee.

(Addition of Rs. 73,00,000/-)

The assessee has furnished inaccurate particulars of income and has concealed particulars of income, hence the assessee is liable for penalty u/s 271(l)(c) of IT Act 1961.

5. Vide referred show cause dated 12.08.2016 and 14.10.2016 the assessee was asked to prove the genuineness of advance of Rs. 50,00,000/- which was given to M/s KaniyaRealinvestPvt. Ltd. The Assessee has failed to do so. Therefore, an amount of Rs. 50,00,000/- is added to the total income of the assessee.

(Addition of Rs. 50,00,000/-)

The assessee has furnished inaccurate particulars of income and has concealed particulars of income, hence the assessee is liable for penalty u/s 271(1)(c) of IT Act 1961.

6. Vide referred show cause dated 12.08.2016 and 14.10.2016 the assessee was asked to prove the advance of Rs. 40,95,000/- given to SabhyaInfrabuilPvt. Ltd and Rs. 50 lac given to Sabhya Real investment and Rs. 50 lac given to Megh Real investment. However the Assessee has failed to do so. Hence addition of Rs.1,40,95,000/- is added to the total income of the assessee.

(Addition of Rs. 1,40,95,000/-)

The assessee has furnished inaccurate particulars of income and has concealed particulars of income, hence the assessee is liable for penalty u/s 271(1)(c) of IT Act 1961.”

8. The Assessing Officer has computed the total income of the assessee at Rs.3,38,95,000/- which was challenged by the assessee before the CIT(A) by filing a belated appeal. Before the CIT(A), assessee has also filed additional evidence to explain the source of various transaction of investment/purchase of land as well as loans and advances. The CIT(A) forwarded the additional evidence to the Assessing Officer for his comments. The Assessing Officer in his remand report objected to the admission of additional evidence. The CIT(A) while passing the impugned order has rejected the remand report of the Assessing Officer and admitted the additional evidence and consequently, the addition made by the Assessing Officer was deleted.

9. At the time of hearing, Id. DR submitted that the CIT(A) has admitted additional evidence in complete violation of Rule 46A of the Income-tax Rules. Assessing Officer in his remand report has raised serious objections against additional evidence to be admitted. He has further submitted that even otherwise, the additional evidence admitted by the CIT(A) remained unverified, as the Assessing Officer was not given any opportunity to examine and verify the correctness of the additional evidence filed by the assessee. Thus, Id. DR has submitted that the impugned order of the CIT(A) be set aside and the order of the Assessing Officer be restored.

10. On the other hand, Id. AR of the assessee has submitted that all the transactions which are mentioned in the documents found during the search and seizure action, are recorded in the books of accounts. Therefore, nothing incriminating was found during the course of search and seizure carried out in this case. He has further submitted that the authenticity of additional evidence filed by the assessee cannot be doubted by the department. Consequently, CIT(A) is justified in deleting the additions made by the Assessing Officer by considering the additional evidence filed by the assessee. He has supported the order of the Id. CIT(A).

11. We have considered the rival submissions as well as relevant material on record. Undisputedly, the assessee did not appear before the Assessing Officer in the assessment proceedings and

therefore, the assessment was passed ex-parte. The assessee filed additional evidences before the CIT(A) under Rule 46A of the IT Rules, which was forwarded to the Assessing Officer for his comments. The Assessing Officer objected to the admission of additional evidence in his remand report which is reproduced in the impugned order by the Id. CIT(A). Therefore, it is clear that the comments called by the CIT(A) from the Assessing Officer were in respect of the admission of additional evidence and there was no direction to the Assessing Officer to verify the additional evidence. When the Assessing Officer has objected to the admission of additional evidences, the CIT(A) ought to have first take a decision on the admissibility and once the additional evidence is admitted by the CIT(A), then the same ought to have been referred to the Assessing Officer for verification and examination. Instead of following the procedure of getting the additional evidence examined and verified from the Assessing Officer, the CIT(A) proceeded to decide the issues of additions on merits on the basis of the additional evidences. The relevant finding of the Id. CIT(A) in para 7.1 to 7.3 is as under :

“7.1. Ground no. 1 to 5 pertain to various additions made by the AO on the basis of seized documents. In this regard, Ld. AR of the appellant filed written submission as well as additional evidence u/r 46A which have been admitted by the undersigned as discussed here-in-above. It was the contention of the Ld. AR that all the entries mentioned in the seized documents are duly reflected in the books of account for the relevant assessment year and the entries which are not reflected in the books of account are related to the other assessment years. In this regard, a meticulous examination of seized documents with the

explanation and supporting documents filed by the appellant was made by the undersigned and LP wise observation of the undersigned are as under;

(A) Page No. 32 to 38 & 39 to 43 of LP-20 which containing purchase of land for Rs. 75,00,000/- (Market value Rs. 3.74.22.000/-) by the appellant company.

This paper consist of sale deed of land which shows sale value of Rs, 75,00,000/-, The appellant has duly capitalized the land in its the Books of account. A perusal of Balance Sheet of appellant company shows that the said land is a part of Balance Sheet where inventories is disclosed at Rs. 97,46,000/- [Rs. 75,00,000/- land + Rs. 22,46,000/- stamp duty] which clearly indicates that this LP-20 is properly reflected in Books of account of the appellant.

(B) Page No. 16 of LP-2 containing the details of transactions of Rs. 73.00.000/- by the appellant company.

This document pertains to the loan of Rs. 73,00,000/- to Shri Harshit Malik. In support of its contention, appellant has filed confirmation and other details from party, as additional evidence during the appellate proceedings which has been admitted by the undersigned and from the details filed in support of appellants claim. It is found that said entry is also recorded in the Books of Account and stands explained. Appellant has discharged the initial burden u/s 68 of the act by submitting cogent documentary evidences. Hence, addition on this count is unwarranted.

(C) Page No. 71 to 76 containing the transaction of Rs. 50,00,000/- by the appellant company being loan given to M/s. KamyarealinvestPvt.Ltd.

This page pertain to loan of Rs. 50,00,000/- advanced to M/s. KamyarealinvestPvt. Ltd.. The confirmation from loanee has been furnished as additional evidence and it was also observed that this amount does not belong to this relevant assessment year but relates to assessment year 2013-14. For this reason, addition does not deserves to be sustained.

(D) Page No. 29 to 31 of LP-1, Page No. 1 to 20 A 1-33 & 1-39 found and seized from Vonobapuri office and Page No. 33 of LP-8 found from Rishkesh Office, containing transaction of unsecured loans of Rs.

65,00,000/- taken M/s. Esspal International Ltd, and of Rs. 73,00,000/- from Shri Harshit Malik.

These papers contain several high value transaction by appellant company. The said loose papers are registries of property and also the details of loans covered in point 2 & 3 for which confirmation and explanation have been already filed. It is seen that all the entries have been recorded in the books of account and there is no incriminating material as such.

(E) Further, with regard to Rs. 1,40,95,000/-, the loan received from 'M/s. ShreevasInfrabuild Pvt, Ltd. is reflected in Balance sheet and loans to M/s. MeghRealinvestPvt. Ltd., and M/s. SabhyaRealinvestPvt. Ltd. pertain to assessment year 2013-14 only. During the appeal proceedings the contention of the appellant were verified vis-a-vis financial statements like Balance sheet and Profit and Loss account and it was observed that contention of the Ld. AR is substantiated with cogent documentary evidences and financial statements/ books of account maintained by the appellant.

7 2. It is a settled law that addition cannot be made on mere allegations or guess work or conjuncture unless supported by the direct or circumstantial evidence. Hon'ble Supreme Court in the case of Dhakeshawan Cotton Mills Vs. CIT 26 ITR 775 has observed and held ***“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 of Seth Gurmukh Singh v. Commissioner of Income-tax, Punjab.”***

Further, jurisdictional Hon'ble Allahabad High Court in the case of CIT vs. Sweta Kalyan Samiti [2013] 39 taxmann.com 21 (Allahabad) has held that ***“When the A.O made addition on the basis of loose paper which has been incorporated in the books of account and no defect otherwise has been found that those loose paper entries were recorded incorrectly. Under the circumstances when those entries pertaining to***

the loose papers have been incorporated in books of account and that was found in order and that amounts to a satisfactory explanation about the loose papers found, under that circumstances, we are of the considered view that no addition is warranted."

Also, in the following judicial pronouncements it was held that addition on the basis of loose sheet noting found during the course of departmental action without having corroborative evidence is unjustified.

- a) CIT vs. Anil Bhatla [2010]322UR 191 (Delhi),
- b) Hon'ble Punjab & Haryana High Court in the case of CU vs. AtamValves(P.)Ltd.[2009] 184 Taxman 6 (Punjab & Haryana),
- c) A CIT vs. Sharad Chaudhary [2014] 165 TTJ 145 (Delhi - Trib.),
- d) Hon'ble Hyderabad Tribunal in the case of Gyankumar Agarwal(Ind.)[2012]146 TTJ334,
- e) CIT v. Maulikkumar K. Shah [2008] 307 ITR 137

7.3 In view of the above detailed discussions and considering the judicial pronouncements cited here-in-above, all the additions made by the AO are hereby deleted and grounds of appeal of the appellant are allowed."

12. Once the assessee sought to file the additional evidence then the proper procedure is to first admit the additional evidences and then seek remand report from the Assessing Officer on the correctness of the additional evidence. This exercise is necessary to verify the correctness of the additional evidence first time filed by the assessee at appellate stage as well as granting the opportunity to the Assessing Officer to consider such evidences. The CIT(A) has proceeded on its own without giving the opportunity to the Assessing Officer to verify and examine the additional evidence and further to respond and make comments on merits of the issue.

Hence, when the additional evidence was not subjected to examination and verification by the Assessing Officer and the order of the CIT(A) is also non-speaking order so far as deletion of additions are concerned, therefore, in the facts and circumstances of the case we set aside the impugned order and remand the issue to the record of CIT(A) to decide the appeal afresh by passing a speaking order after getting the additional evidences to be verified from the Assessing Officer. Needless to say, assessee be given an opportunity of hearing before passing fresh order.

13. Though the assessee has supported the order of CIT(A) under Rule 27 of IT rules on the issue of validity of initiation of proceeding under section 153C of the Act which has been decided by CIT(A) against the assessee however, as we have remanded the matter to the record of the CIT(A) for fresh adjudication including the maintainability of the belated appeal therefore, this issue is kept open to be raised as per the outcome of the fresh order of CIT(A).

14. The appeal arising from the penalty order passed u/s. 271(1)(c) is consequential and the same is also set aside to the record of CIT(A) for re-adjudication after the outcome of the quantum appeal.

14. In the result, both the appeals of the revenue are allowed for statistical purposes.

Order pronounced in the open court on 14th day of December, 2021.

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 14/12/2021

'aks'

Sd/-

(V.P. RAO)
JUDICIAL MEMBER