

IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Before Shri Shamim Yahya, Accountant Member

I.T.A. No. 7076/Mum/2019
(Assessment Year 2008-09)

Anil Gopinath Nair 104, Oshiwara Bus Depot Link Road, Andheri(W) Mumbai-400 069 PAN : ABQPN6880Q (Appellant)	Vs.	ITO-24(1)(2) Piramal Chambers Mumbai-400 012 (Respondent)
---	-----	--

Assessee by	None
Department by	Ms.Smita Verma
Date of Hearing	13.10.2021
Date of Pronouncement	20.12.2021

O R D E R

Per Shri Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of learned Commissioner of Income Tax (Appeals)-36 dated 29.08.2019 and pertains to assessment year 2008-09.

2. Grounds of appeal read as under:-

1. On the facts and circumstances of the case, and in Law, the CIT (Appeals) erred in adding Rs. 20,00,000/-, being the amount paid to Fazulbhoy Construction Company (prop. Mr. Amirali Fazulbhoy) towards purchase of property to the income of the assessee as unexplained cash u/s 68.
2. On the facts and circumstances of the case and in law the CIT(A) failed to appreciate that
 - a) The assessee has purchased the property out of the sale proceeds of the Jewellery inherited from parents.
 - b) The assessee has discharged his onus by submitting supporting documents such as sales bill of the jewellery sold.

- c) The assessee cannot be held responsible for the purchaser not showing the said sales in its purchase.
 - d) The assessee could not produce the Purchaser and other proofs due to the demise of the said person.
3. The appellant, therefore, prays that the amount of Rs. 20,00,000/- should not be added to the income of the assessee.

3. Brief facts in this case leading to the addition in this case as emanating from the order of the AO as under:-

During the course of scrutiny proceedings for AY 2012-13, it is seen that the assessee has paid Rs. 20,00,000/- in cash to Fazulbhoys Construction Company proprietor Mr. Amirali Fazulbhoys during the FY 2007-08 for purchase of the property which has been registered in FY 2011-12. When asked for the source of the same, the assessee has submitted that the same has been paid out of sale proceeds of jewellery of parents, which was inherited from parents. The assessee furnished sales bills of the same. The assessee has furnished the sale proceeds has been received in cash of Rs. 20,29,925/-. The purchaser of Jewellery, M/s Kothari and Sons Jewellery has been issued notice u/s 131 to furnish the confirmation of the same. However, no one attended. This fact is also brought to the notice of the assessee. However, no confirmation from the purchase parties has been received. Hence, the case of the assessee is reopened by issuing notice u/s 148 on 26.03.2015 which was duly served.

The assessee has not filed any return in response to the notice u/s 148 of the 1 T Act, 1961. During the assessment proceedings notices u/s 142(1) were issued, but assessee has not complied, A show cause for levying penalty u/s 211 (1)(b) was also issued. In response to this also assessee did not comply.

During the course of assessment proceedings for the AY 2012-13 an information was sent to the ITO - 24(2)(2), Mumbai regarding M/s Kothari and Sons Jewelers Prop Jayantilal Kothari to whom the assessee have claimed to have sold the jewellery and received cash of Rs.20,29,925/-. The case of M/s Kothari and Sons Jewelers Prop. Jayantilal Kothari was reopened by the jurisdictional AO viz. ITO 24(2) (2), Mumbai. Further an information is received from ITO 24(2) (2), Mumbai vide Idler dt .22.01.2016 in which the copy of the submission of M/s Kothari and Sons Jewelers Prop. Jayantilal Kothari is also given. Vide letter dt 22.01.2016 the ITO has informed that "...Details of party wise have been submitted which does not include name of Shri Anil Nair. Concluding the issue it has been submitted that all bills are forged and not executed by Shri Jayantilal."

On perusal of the same it is noticed that M/s Kothari and Sons Jewelers Prop. Jayantilal Kothari has denied of having any purchases made from the assessee. It is mentioned in the submission that the bills were not issued by Late Shri Jayantilal B Kothari. However, stationery used for this URD purchase bills are similar as issued by the firm and may have been misused by any of the salesman.

Accordingly a show cause was issued on 15.02.2016 which is reproduced as under;

" Vide notice u/s 148 dated 26.03.2015 you have been asked to file a return for A Y 2008-09, however no return has been filed so far. Further, notice u/s 142(1) dt 16.11.2015 issued, however no details has been furnished by you till date. Further, a show cause notice u/s 271(1)(b) is also issued fixing date of hearing on 11.01.2016. It is also mentioned that why ex parte order u/s 144 should not be passed on the basis of material available on record. However so far no reply has been filed by you.

As the matter is getting time barred on 31.3.2016, this office has no option but to finish the proceedings in a time bound manner. Therefore, you are hereby given a show cause viz. as under:

During the course of assessment proceedings for AY 201 2-1 3 you have furnished (hat you have sold certain jewellery to M/s Kothari & Sons(Prop Sh. Jayantilal Kothari) % 20,29,925/- and received sale proceeds in cash . But M/s Kothari & Sons Jewellers has denied the said transaction in his assessment proceedings for AY 2008-09 and submitted that the bills submitted by you are forged and noi executed by Shri Jayantilal Kothari, prop M/s Kolhari& Sons Jewelers. Hence the assessee was asked to show cause as to why the sum of Rs. 20. 29.92S/- should not be considered as unexplained casii in his hand and added to his income.

In response to the show cause the assessee submitted his reply vide letter dl 22.02.2016 in which he has submitted that the cash investment in Apr. 2007 was made from sale proceeds of his mother's ancestral gold ornaments. It is found that in the reply filed by the assessee, the assessee has not tried to counter the denial of M/s Kothari & Sons Jewellers that the bills were not issued by Late Shri Jayantilal B Kothari. Therefore, it is considered that he has no explanation to offer. Earlier during the assessment proceedings of the AY 2012-1 3 the assessee has submitted the bills from M/s Kolhari and Sons Jewellers to explain the source of cash of Rs.20,00,000/- As M/s Kothari and Sons Jewelers is denying the fact of issuing any such bills, it means that the assessee has no such jewellery in his possession and was having cash from undisclosed sources. Therefore to make the source explainable the assessee has produced forged documents.

Therefore , the assessee's contention that Rs 20,00,000/- paid to Fazulbhoy Construction Company in cash during FY 2007-08 are out of sale proceeds of the jewellery received from M/s Kothari and Sons Jewelers Prop. Jayantilal Kothari is not acceptable as the assessee failed to substantiate the actual source of the case. Hence Rs. 20.00,000/-- is added to the income of the assessee u/s 68.

4. Before the Ld.CIT(A) assessee reiterated the submissions claiming that assessee has submitted all the necessary evidences and that assessee cannot be held responsible

for the lack of appearance of assessee's name in the list of persons from whom purchase have been made by M/s. Kothari and Sons Jewelers.

5. However, Ld.CIT(A) was not satisfied, he confirmed the AO's action by holding as under:-

The Ground of appeal nos. 1 to 7 relate to the addition of Rs. 20,00, 000/- u/s 68 of the IT Act by the AO. After going through the facts of the case, the views taken by the Assessing Officer, along with the submissions made by the appellant, I am of the considered opinion that the AO has taken a correct stand for the following reasons:

1. The source for the cash payment made to M/s Fazulbhoj Construction Company was highly Doubtful and in fact was without any concrete supporting evidence. The Sale receipt for Jewellery from M/s Kothari & Sons wherein cash of Rs 20,29,925/- was received was not verifiable on many levels.
2. The notice u/s 131 summoning the Jewellers mentioned above for questioning remained un complied prior to issue of notice u/s 148.
3. None of the notices issued to the assessee during the assessment proceedings remained complied with such that the assessment had to be completed u/s 144 of the Act.
4. Vital information was received from the ITO 24(2) (2). Mumbai vide letter dt 22.01.2016 during the scrutiny assessment proceedings for the AY 2012-13, in which the copy of the submission of M/s Kothari and Sons Jewelers Prop. Jayantilal Kothari was also given. Vide letter dt 22.01.2016 the ITO informed that *"...Details of party wise have been submitted which does not include name of Shri Anil Nair. Concluding the issue it has been submitted that all bills are forged and not executed by Shri Jayantilal. Copies of the documents submitted during reassessment are enclosed for your reference. "*
5. Show cause letter dated 15.02.2016 issued by the AO on the findings of the ITO 24(2)(2) remained unanswered and the assessee did not counter the comments of the Jeweller Sh. Jayantilal B. Kothari indicating that he had no explanation to offer.
6. The submission of the appellant that he had sold jewellery at the counter of the premises and it was not necessary for him to verify who the owner or salesman was, as the person in the counter had given a bonafide bill against the sale was not supported by evidentiary confirmation either in the Books of Accounts or in the form of statements of the proprietor.

The observations above reveal that the alleged transaction was a doubtful one which remained unverifiable in the face of specific damning confession made by the owner of the Jewelry showroom Sh. Jayantilal B. Kothari that no purchases were ever made from the assessee by M/s Kothari & Sons. This confession indicated beyond doubt that the Sales Bills produced by the assessee were indeed bogus as the same did not find mention in the books of M/s Kothari & Sons and the appellant also had no

other supporting evidence to rely on. Bills on their own stand on very weak legs if they are not supported by the Books of accounts and even more when the proprietor vehemently denies any purchases being made from the assessee. In view of this, the findings of the AO do not warrant any interference as the conclusions drawn were logical and as per the requirements of the provisions of section 68. Therefore, the addition of Rs 20,00,000/- made by the AO is upheld.

6. Against the above order, assessee is in appeal before the ITAT.

7. I have heard the Ld. DR and perused the record.

8. I note that as regards, the source of the sum of Rs. 20 Lacs the assessee's submission of sale of jewellery has not been accepted, on the ground that the proprietor of the jeweler firm has given a statement that no such transaction has been done. It has not been disputed that assessee has submitted the bill from the same jewellery. In such case mere statement of the seller ipso-facto cannot be a reason to make the impugned addition. It is not the case that AO has examined the books of the jeweler and he is satisfied that no such transaction has taken place. It is also not the case that when the statement of the third party is sole basis for addition, whether the assessee has been given a chance to cross-examine the same. This is fatal on the touchstone of decision of the Hon'ble Supreme in the case of Andaman Timber Industries v. C.C.E. (2015) 281 CTR 241 (SC). Moreover, it is noted that Ld.CIT(A) is using the word late in the name of the proprietor of the jewellery company, which means that the said person is no more. In these circumstances, on the facts and circumstances of the case, I note that assessee has discharged its onus and the addition u/s. 68 is not sustainable. Hence, I set aside the orders of the authorities below and decide the issue in favor of the assessee.

9. In the result, this appeal by the assessee is allowed.

Pronounced in the open court on 20.12.2021

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 20 /12/2021

Thirumalesh, Sr.PS

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai