IN THE INCOME TAX APPELLATE TRIBUNAL
"A'' BENCH: BANGALORE

BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

ITA Nos.276 to 281/Bang/2018
Assessment Years : 2009-10 to 2014-15

ACIT Central Circle-2(3) Bangalore	**Vs.**	Sri M.J. Mohan No.16, 1st Main Road Vasanthnagar Bengaluru 560 052 **PAN NO : ACJPM3642H**
APPELLANT		**RESPONDENT**

ITA No.2713/Bang/2017
Assessment Year : 2014-15

Sri M.J. Mohan No.16, 1st Main Road Vasanthnagar Bengaluru 560 052	**Vs.**	Deputy Commissioner of Income-tax Central Circle-2(3) Bangalore
APPELLANT		**RESPONDENT**

Revenue by	**:**	Shri Sumer Singh Meena, D.R.
Assessee by	**:**	Shri Vijay Mehta, A.R.

Date of Hearing	**:**	03.02.2022
Date of Pronouncement	**:**	30.03.2022

O R D E R

PER BENCH:

The revenue has filed appeals for Assessment years 2009-10 to 2014-15. The assessee has filed appeal for AY 2014-15. All these

appeals are directed against the orders passed by Ld CIT(A)-11 Bangalore for these years.

2. The revenue is challenging the decision of Ld CIT(A) in deleting the protective addition made in the hands of the assessee in all these years. The assessee is challenging the decision of Ld CIT(A) in confirming addition of Rs.25 crores made by the AO on the basis of statement/letter given by the assessee.

3. The facts relating to the above said issues are stated in brief. The assessee herein is Secretary of M/s Venkatesha Education Society, Bengaluru. The above said Society runs a medical college, a hospital, a nursing college and other educational institutions in Bengaluru. The assessee is also chairman of the medical college run by the Society under the name MVJ Medical College. The revenue carried out search and seizure operations in the hands of Venkatesha Education Society and also in the hands of the assessee on 19-09-2013. Based on certain documents found during the course of search, the AO came to the conclusion that above said Society was collecting capitation fees for admission of students into MBBS and PG Courses. Even though the documents were related to a particular year, yet the AO concluded that the above said society would have been collecting capitation fee from all the students in all the years under consideration. Accordingly, on the basis of those documents, the AO estimated the capitation fee collected and extrapolated the same to all students in all the years.

4. The facts relating to the first addition are that, during the course of search, a document no. A/MJM/02, Pg. 2,3,4,5,6 was found from the residence of the assessee herein. It contained the name and address of students seeking admission into various PG Courses for the academic year 2013-14. The AO has scanned copy of the same in the assessment order. Against each of the student, some numbers were found noted in pen. For example, one number “20” is written

against a student. Adjacent to this number 20, it is written as 10C and 10 A/c. The amount so mentioned against each of the students ranged from 10 to 1.50 Cr. The source of this document was also traced to the iMac Desktop computer seized from the office of medical college. The AO interpreted "C" as cash and "A/c" as cheque payments. The AO, accordingly, took the view that amounts mentioned therein as "C" represent capitation fees. The AO estimated average amount of capitation fee collected from PG students at Rs.45.00 lakhs per student and accordingly applied the same to all the students in all the years under consideration. The workings made by the A.O. for PG students are extracted below:-

From PG Students:-

A.Y.	*No. of students (through KRLMPCA & NRI quota)*	*Average amount of capitation per student (Ref. A/MJM/02, Pg.2,3,4,5,6)(About Rs.45,00,000/-)*	*Total capitation collected*
08-09	*Nil*	--	---
09-10	*25*	*Rs.45,00,000/-*	*Rs.11,25,00,000/-*
10-11	*35*	*Rs.45,00,000/-*	*Rs.15,75,00,000/-*
11-12	*36*	*Rs.45,00,000/-*	*Rs.16,20,00,000/-*
12-13	*40*	*Rs.45,00,000/-*	*Rs.18,00,00,000/-*
13-14	*38*	*Rs.45,00,000/-*	*Rs.17,10,00,000/-*
14-15	*46*	*Rs.45,00,000/-*	*Rs.20,70,00,000/-*

The AO added the above amounts on substantive basis in the hands of the Venkatesha Education Society. Since the document with noting in pen was found from the residence of the assessee, the AO added the above said amounts in the hands of the assessee herein also on protective basis in respective assessment years from AY 2009-10 to 2014-15.

5. The facts relating to the second issue are that, a statement u/s 132(4) of the Act was recorded from the assessee herein on 21.10.2013. He was asked about the document no. A/MJM/02, Pg.

2,3,4,5,6 containing the list of PG students (referred above). The assessee disowned the same and also expressed his ignorance about the noting made therein. At the time of conclusion of taking of sworn statement, last question was posed to the assessee, which was general in nature viz., "Do you have anything else to say?" In reply thereto, the assessee agreed to offer additional income of Rs.20.00 crores with the request that he may be exonerated from penal and prosecution proceedings. Subsequently, vide letter dated 20-11-2013 written to DDIT (Inv), the assessee agreed to disclose additional amount of Rs.5 crores over and above the amount of Rs.20 crores, referred above. However, the assessee did not offer above said amount of Rs.25 crores separately in the return of income filed subsequently for AY 2014-15. When questioned, the assessee submitted that he has offered capital gains arising on sale of a property located at Sholingur, Chennai, which was sold for a consideration of Rs.20 crores, i.e., it was submitted that the offer made by him in the sworn statement was related to the capital gains arising on sale of above said property. The AO, however, did not accept the explanations of the assessee. He expressed the view that the additional income of Rs.25 crores surrendered by the assessee should mean income which was not already accounted for. He also expressed the view that the assessee has agreed to offer the above said amount in view of the incriminating document related to collection of capitation fee not accounted for. Accordingly, the AO assessed the above said sun of Rs.25 crores in the hands of the assessee in AY 2014-15.

6. The assessee challenged the protective additions made in AY 2009-10 to 2014-15 and also the addition of Rs.25 crores made in AY 2014-15 by filing appeals before Ld CIT(A). The first appellate authority noticed that M/s Venkatesha Education Society has also filed appeals challenging the addition of capitation fee made on substantive basis in its hands. The Ld CIT(A) noticed that he has

disposed of the said appeals and, in the orders passed in the hands of Venkatesha Education Society, he had deleted the addition made on substantive basis holding that the seized documents do no prove collection of capitation fees. Accordingly, in the absence of incriminating documents evidencing collection of capitation fee, the Ld.CIT(A) held that the protective additions made in the hands of the assessee will not survive. Accordingly, he directed deletion of the same in AY 2009-10 to 2014-15. The observations made by Ld CIT(A) in AY 2014-15 are extracted below:-

> *"PARA 24. I have considered the submissions of the Ars independently in the present proceedings in order to confirm or otherwise the assessment order on the said addition made protectively and as I have taken a view on the quality of the seized material/loose sheets which are the basis for the addition even substantively made in the hands of the Society as not reliable based on the another seized material without insertion by pen in the office of the Society coupled with the answers given by the Appellant at the time of search and during the course of assessment proceedings. On the combined reading of the all the facts relevant for the consideration of confirming the addition under consideration substantively in view of the deletion of such addition in the substantive assessment in the hands of the Society, I am convinced that there is no such legal requirement to convert the protective addition into substantive addition in the light of the cumulative consideration of the material available on record. On a close reading of the order passed in the hands of the Society for the Assessment Year 2014-15, the said addition was deleted on the ground of the non reliability of the loose sheets/seized material for making the estimated addition in view of the answers given by the Appellant at the time of search on those loose sheets and the results of post search enquiry. For the detailed reasons given therein, the protective addition of Rs.20,70,00,000/- is hereby deleted."*

7. With regard to the addition of Rs.25.00 crores relating to income surrendered by the assessee in the sworn statement, the Ld CIT(A) agreed with the view taken by the AO. Accordingly, he confirmed the addition made in AY 2014-15 with the following observations:-

> *"PARA 31. I have considered the stand of the Appellant in the present appeal on the said issue and the approach of the Assessing Officer while I am convinced on the stand taken by the AO in the assessment order in making the separate addition for the offer made by the Appellant at the time of search in delinking such offer relating to a property transaction. It is seen that the*

return came to be filed later but the offer of additional income was immediately after the search, i.e., on 20-12-2013. This offer looks as having been consciously made by the appellant. In this view of the matter, the addition on account of voluntary offer of Additional income of Rs.25 crores – offered in terms of sec. 132(4) statement is deemed as separate and distinguishable from the Income from Capital gains. The offer of additional income is retained as such and the grounds raised by the Appellant in challenging the assessment order on this point are hereby rejected. The addition made by the Assessing officer at Rs.25,00,00,000/- is hereby confirmed."

Aggrieved by the orders passed by Ld CIT(A), both the parties have filed appeals before us challenging the decision of Ld CIT(A) rendered against each of them.

8. We shall first take up the appeals filed by the revenue for AY 2009-10 to 2014-15, wherein it has challenged the decision of Ld CIT(A) in deleting the protective additions made by the AO in the above said years.

9. We heard the parties on this issue and perused the record. We noticed earlier that the basis for estimation of capitation fee alleged to have been collected for admission of students into PG Course is the document no. A/MJM/02, Pg. 2,3,4,5,6. We also earlier noticed that the AO has made addition on substantive basis in the hands of the Venkatesha Education Society in AY 2009-10 to 2014-15 and on protective basis in the hands of the assessee for the above said years in respect of capitation fee collected from PG students.

10. M/s Venkatesha Education Society had also challenged the addition made on substantive basis in these years by filing appeals before Ld CIT(A), who deleted the addition in all the above said years holding that the documents and the explanations given by the assessee do not show collection of capitation fee. The Revenue came in appeal before the Tribunal challenging the decision so rendered by Ld CIT(A) in the hands of Venkatesha Education Society. The Tribunal has, by a separate common order, passed in the hands of the above said society has confirmed the decision of by Ld CIT(A) in

deleting the addition of capitation fee alleged to have been collected from PG students. The relevant observations made by the Tribunal are extracted below for the sake of convenience:-

"19. The next issue relates to the addition of capitation fee collected from PG Students. The assessing officer has relied on Document No. A/MJM/02 – Pages 2 to 6 in order to come to the conclusion that the assessee has collected capitation fee from all the students in all the years under consideration. The AO has scanned this document at pages 6 to 10 of the assessment order. This document contains name and address of the students and the course to which they are admitted for the academic year 2013-14 in PG courses. This is a printed document found from the residence of the Secretary Shri M J Mohan. Against each of the student, some numbers were found noted in pen. For example, one number"20" is written against a student. Adjacent to this number 20, it is written as 10C and 10 A/c. The amount so mentioned against each of the students ranged from 10 to 1.50 Cr. The source of this document was traced to the iMac Desktop computer seized from the office of Medical College. We noticed earlier that the AO has interpreted "C" as cash and "A/c" as cheque payments. The AO took the view that amounts mentioned therein in "C" represent capitation fees. The AO estimated average amount of capitation fee collected at Rs.45.00 lakhs per student and accordingly applied the same to all the students in all the years under consideration.

19.1 We noticed earlier that the Secretary has stated that the noting made in pen are not either in his hand writing or in the handwriting of any of employees. We notice that the Ld CIT(A) has extracted following question and answers from the Sworn statement given by the Secretary:-

> ***(I)** Answer to Question No.8 of the sworn statement dated 21.10.2013:-*
> *"These are not my handwriting and I have not received any money. There is no mention of money being paid."*
> *Q.No.9 :- Why is the same is found in your premise?*
> *Ans.: I do not remember*
> *Q.No.10 : Why this reply should not be treated as evasive in nature of refusal to answer the question and hence making you liable for prosecution as per 11th provision of the Act?*
> *Ans:- I did not refuse to answer. I made my statement clear with regard to the questions asked.*
> ***(II)** Statement recorded during search assessment proceedings on 14.10.2015:*
> *Answer to Question No.6:*
> *"subsequent to search during recording of my statement this document was shown to me by the Investigating officer stating that in the absence of me during the search these documents were found and I replied that I have no idea where these pieces of paper come from and I once again reiterate these documents does not belong to me and my institution and these are not in my hand writing and my employees and as such we have not collected any capitation from any student in list."*

The Ld CIT(A) further observed as under:-

> *"It is also incidentally submitted by the ARs that the very same pages were seized from the college premises marked as MVJMCRH/08 pg. 77 to 81, where the hand writing/pen noting insertions are not available/visible while demonstrating/fortifying the doubt raised by the Secretary/Chairman of the Institution on the correctness of the very same pages seized from his residence.*

19.2 Thus, we notice that the Ld CIT(A) has also appreciated the doubt raised by the Secretary of the institution about the noting made in pen. We notice that there are not corroborative material available to fortify the inference drawn by the tax authorities with regard to the noting found in the document seized from the residence. The corroborative material was necessary in view of the fact that

> *(i) the source document found in the computer did not have such kind of noting and*
> *(ii) The Ld A.R submitted that none of the cheque amounts (amounts stated as "A/c" in the seized document) tally with the amount actually received by the assessee from the students as per the bank statements and books of accounts.*
> *(iii) The ignorance of the noting expressed by the Secretary and also his statement that the same was not his handwriting or any of the staffs' handwriting.*

The AO could have made this addition on the basis of presumption prescribed u/s 132(4A) and sec.292C with regard to the noting found in the seized document. In our view, the presumption prescribed in the above provisions of the Act by legal fiction has been effectively rebutted by the assessee on the basis of actual amount received from the students and also entries made in the books of account. The entries may be presumed to be correct, if the cheque amounts mentioned in the seized document tallied with the actual receipts. It is not the case here, which the assessing officer is also aware of. Accordingly, we are of the view that the noting made in the above said list lacks credence.

19.3 We may derive support for our view from one more fact submitted before us, i.e., it was submitted that the investigation wing had issued summons to some or all the students in the list and also recorded the statements from them. However, the result of the said enquiry was not conveyed to the assessee in spite of specific request made by the assessee in this regard. The AO has also not discussed anything in the assessment order about the enquiry conducted and the results thereof. Accordingly, there is merit in the contentions of Ld A.R that the very fact that the tax authorities are reluctant to reveal the result of their enquiry conducted with the concerned students would lead to reach to the natural conclusion that nothing adverse against the assessee could be stumbled upon by the tax authorities on the basis of those enquiries. Under these set of facts, we are of the view that no credence could be given to this piece of document and accordingly, the AO was not justified in placing reliance on this paper in order to estimate the capitation fee alleged to have been collected from all the PG students in all the years under consideration. Accordingly,

we confirm the orders passed by Ld CIT(A) in deleting the addition relating to Capitation fee for PG students in all the years under consideration."

11. The Tribunal, while upholding the view taken by Ld CIT(A) in deleting the addition relating to capitation fee for PG Students, has also observed that the AO was not justified in placing reliance on the above said seized documents, i.e., it is the view of the Tribunal that the seized documents do not show the collection of capitation fee from the PG students. Another important point noticed by the Tribunal is that the investigation wing had issued summons to some or all the students in the list and also recorded the statements from them. However, the result of the said enquiry was not conveyed to the assessee in spite of specific request made in this regard. The AO has also not discussed anything in the assessment order about the enquiry conducted and the results thereof. Accordingly, the Tribunal has also expressed the view that the said investigations might not have brought out anything against the assessee. Accordingly, the Tribunal has held that the impugned seized documents lack credence and could not be relied upon. Since the allegation of collection of capitation fee from PG students itself could not be proved, the addition made on substantive basis in the hands of Venkatesha Education Society were deleted. Accordingly, the above said conclusions reached by the Tribunal would equally apply to the case of the assessee herein also. Hence the protective addition made in the hands of assessee would automatically fall to the ground. Accordingly, we do not find any reason to interfere with the decision taken by Ld CIT(A) on this issue in AY 2009-10 to 2014-15.

12. We shall now take up the appeal filed by the assessee for AY 2014-15, wherein the assessee is assailing the decision of Ld CIT(A) in confirming the addition of Rs.25.00 crores.

13. The Ld A.R submitted that the assessee had made disclosure of Rs.20.00 crores initially in the sworn statement given on 21-10-

2013. Subsequently, it was increased to Rs.25.00 crores, vide letter dated 20-11-2013. He submitted that the assessing officer has wrongly understood that the above said disclosure was related to capitation fee collected by the assessee. He submitted that the assessee has, nowhere, stated that the above said disclosure was on account of collection of capitation fee. In fact, the assessee has denied collection of capitation fee and further he has expressed ignorance about the noting made in Pen on the sheet. However, it is the AO who has considered the noting as related to collection of capitation fee. Accordingly, he submitted that there is no correlation of the disclosure made in the sworn statement and the alleged collection of capitation fee. The Ld A.R further submitted that the assessee was constrained or might have been compelled to make disclosure in view of various difficulties created during the course of search including attachment of bank accounts, which made day to day running of medical college difficult. He submitted that the assessee has later clarified that he was under confusion on the income so surrendered, as there is no evidence whatsoever to support the above said huge disclosure. He submitted that the assessee has later explained the reason for making the surrender of income, i.e., he had sold a land and the tax liability arising thereon was kept in mind while making the surrender, since he was not sure of the year in which capital gain is required to be offered. He submitted that the assessee has also duly offered the capital gain in his return of income. Accordingly, the Ld A.R submitted that the tax authorities are not justified in infering that the disclosure of additional income was related to Capitation fee. He submitted that the tax authorities could not have made addition on the basis of disclosure disregarding the explanations given by the assessee. Further, the search action did not bring any material or throw light on any undisclosed income belonging to the assessee. He submitted that the CBDT has also clarified that disclosure of income, if any, made without any basis

and which has been subsequently retracted do not serve any purpose. Accordingly, the CBDT has advised the officials not to coerce assesses to disclose undisclosed income during search/surveys. The Ld A.R submitted that the surrender of income of Rs.25.00 crores was related to capital gains only. It is not backed by any other material showing undisclosed income of the assessee. Accordingly he submitted that the tax authorities are not justified in presuming that the said disclosure is additional income of the assessee over and above the income disclosed in his return of income. Accordingly, he contended that the Ld CIT(A) was not justified in confirming the addition of Rs.25.00 crores without appreciating the factual aspects submitted by him.

14. The Ld D.R, on the contrary, strongly supported the order passed by Ld CIT(A). He submitted that the assessee has offered the additional income of Rs.20.00 crores in the statement taken on 21-10-2013 during the course of search, while the search action began on 19-09-2013, which means, the assessee had enough time to apply his mind. Further, vide his letter dated 20-11-2013, the assessee has also enhanced the additional income to Rs.25.00 crores, which could not have been done without proper application of mind. Accordingly, the Ld D.R submitted that the assessee has consciously admitted additional income after the appraisal of all facts surrounding his case. Since the assessee had offered additional income, the revenue did not carry out further investigation. The Ld D.R placed his reliance on the following case laws in support of his contentions:-

(a) T.Lakhamshi Ladha & Co vs. CIT (2016)(386 ITR 245)(Bom)

(b) Raj Hans Towers (P) Ltd vs. CIT (2015)(373 ITR 9)(Delhi)

(c) Pr. CIT vs. Avinash Kumar Setia (2017)(395 ITR 235)(Delhi)

Accordingly he submitted that the Ld CIT(A) was justified in confirming the addition of Rs.25 crores made by the AO.

15. The Ld A.R, in the rejoinder, submitted that the impugned addition of Rs.25.00 crores is not based on any material and further, it was not shown that the same is represented by any undisclosed income, if any, found during the course of search in the form of any asset or otherwise. He submitted that it is well settled proposition of law that the tax can be levied only on real income, meaning thereby, an assessee cannot be subjected to tax for an amount, which has not been earned at all, except in the circumstances when the statute so provides for taxation under legal fiction. He submitted that the tax authorities have placed reliance on the income surrendered in the sworn statement, which the assessee has clarified as related to capital gains income. Further, the said capital gains have also been duly offered to tax. Hence the question of preventing the revenue in probing the matter further, as contended by Ld D.R, does not arise in the facts of the present case. With regard to the case laws relied upon by Ld D.R, the Ld Representative for the assessee submitted that they have been rendered on the basis of facts prevailing in those cases and hence those decisions do not have application to the facts of the present case.

16. We heard rival contentions on this issue and perused the record. We notice that the basis for making this addition is the surrender of income made by the assessee in the sworn statement taken u/s 132(4) of the Act on 21.10.2013 in the answer given to the final question posed to the assessee. The question no.19 posed to the assessee and the answer given by him is relevant here. The same reads as under:-

> *"Q No.19 Do you have anything else to say?*
>
> *Ans.:-I hereby disclose Rs. 20 crores as additional income either in my hands or in the hands of any other person(s) on the appraisal of factual possession*

(sick 'position') existing on this day based on the issues discussed till date and I further pray for exoneration from penal and prosecution proceedings under the Act. The year wise, assessee wise and head wise break up which shall be submitted on a subsequent date, be treated as part of the statement."

Subsequently, the assessee has filed another letter dated 20-11-2013 before the DDI and the same reads as under:-

"Further to my disclosure letter dated 21/10/2013, I state that the apportionment of disclosure of additional income will be appropriately dealt with, in the returns of income to be filed in response to notices u/s 153A/143(2) of the Act for various assessment years. Such apportionment of additional income would depend on reconciliation of various material facts & books of account regularly maintained for the relevant assessment year. Accordingly I offer an additional income of Rs. 5 crores (Rupees five crores) in addition to my original offer of additional income of Rs.20 crores (Rupees Twenty crores) totalling to Rs.25 crores (Rupees Twenty five crores) to complete post search enquiries and without prejudice shall act in accordance with the provisions of law."

A careful perusal of the both the replies referred above would show that the replies given by the assessee are couched with many caveats. We shall dissect the Reply given on 21-10-2013 to question no.19. It contains following sentences.

(a) I hereby disclose Rs.20 crores as additional income

(b) either *in my hands or in the hands of any other person(s)*

(c) *on the appraisal of factual position existing on this day*

(d) *based on the issues discussed till date.*

A perusal of various other questions posed to the assessee in the sworn statement would show that they are related to jewellery, family settlement, document containing list of PG students, report given to MCI, loan given to Smt. Dharini Mohan. None of the questions was related to any undisclosed income, if any, earned by the assessee. During the course of arguments, the Ld A.R submitted that the disclosure was made in order to come out of certain difficulties created during the course of search like freezing of bank accounts.

In fact, question no.16 and reply given to it support the above said submission. They are extracted below:-

> *"**Q No.16** : A letter has been received from you wherein you have stated that funds are needed for taking care of poor patients and salaries and hence you have requested for release bank accounts. However it is noted that you have siphoned funds for personal property acquisition by close acquaintances like Ms Dharani Mohan without any interest. Please state whether the funds meant for poor patients and salaries can be appropriated for such kind of personal investments.*
>
> ***Ans.:** It is a fact that funds are needed for taking care of poor patients and salaries. Since the accounts are frozen, the hospital is affected and the doctors are working without salary for the law two months. No funds were siphoned. Loans are given to all the employees as and when they make the request subject to availability."*

We shall examine the letter dated 20-11-2013 filed by the assessee. In this letter, the assessee makes it clear that

- Apportionment of additional income would depend upon reconciliation of various material facts & books of accounts regularly maintained.
- Additional income of Rs.5 crores is offered to complete post search enquiries
- Without prejudice, he shall act in accordance with the provisions of law.

17. We notice that the JDI has recorded a sworn statement from the assessee on 20-12-2013, wherein questions have been posed on sale of lands. The assessing officer has also recorded a sworn statement from the assessee on 14.10.2015, during the course of assessment proceedings. The AO has raised a specific query as to why the additional income of Rs.25 crores was not offered to tax. The assessee has given following reply:-

> *"During the recording of my statement subsequent to the search proceedings under the circumstances, to release the PO attached on all the bank accounts of the societies which will have catastrophic effect on the day to day*

functioning of all the institutions, including withholding the salary release of all the employees and to run the medical college hospital interrupted and also to buy the peace from the department, I agreed to declare a taxable income of Rs. 25 crores in my hand."

Before the AO, the assessee has filed a letter dated 27-02-2016, wherein he has referred to the Statement given on 21-10-2013, letter dated 20-11-2013 and the statement given on 20-12-2013. In this letter, referring to the statement given on 20.12.2013, the assessee has stated that the sale of property at Chennai was admitted at Rs.20 crores in the return of income filed for the AY 2014-15. At the end, the assessee has stated as under:-

"Right from the end of the search, I was under confusion with regard to disclosure of income. The change in the quantum of income was necessitated by facts obtained/emerged later. As on date my offer of additional income may please be taken as Rs.20 crores as originally offered."

18. On a combined reading of above said replies, we notice that the assessee has not identified any additional income, i.e., it does not appear to be surrender of income in a blanket manner, as presumed by the tax authorities. In our view, It appears that there was some kind of compulsion upon the assessee to make surrender of additional income. The confusion/uncertainty in the mind of the assessee in this regard is also discernible from the various replies given by the assessee. Hence the assessee appears to have stated that the surrender is on appraisal of factual position as well as in accordance with law. The confusion/uncertainty is further visible when the assessee states that the additional income will be declared either in his hands or in the hands of any other persons on the basis of factual position. The assessee has explained about this confusion in the letter dated 27-02-2016 and in that letter he has further stated that the additional income may be taken as Rs.20 crores, i.e., the capital gain arising on sale of lands.

19. Be that as it may, we notice that the questions posed to the assessee in the sworn statement do not refer to any material relating to any undisclosed income of the assessee. The only document referred was the list of students admitted in PG courses and the assessee has denied collection of capitation fee and further pleaded his ignorance about the noting found on the sheet. It is an admitted fact that the above said document was actually related to the Venkatesha Education Society and not to the assessee. In these factual aspects, the natural question that would arise is that – what was compelling reason for the assessee to make the disclosure of Rs.20 crores in the sworn statement. From the foregoing discussions, we are of the view that there was no reason for the assessee to make blanket surrender of additional income of Rs.20 crores at the time of taking sworn statement.

20. The Ld D.R contended that the assessee, by agreeing to surrender additional income has estopped the revenue from carrying out further investigation. We are unable to appreciate this contention. First of all, the revenue has not seized any material, which indicated any undisclosed income belonging to the assessee. Secondly, the surrender of Rs.20 crores was made while giving answer to the final question and there was no circumstance or material to show that the earlier questions posed to the assessee might have pushed him to the wall to surrender additional income. We noticed earlier that above mentioned surrender was made in October/November, 2013 by the assessee. The return of income was filed on 31.7.2014, wherein the assessee did not disclose the additional income. From the assessment order, it could be seen that the assessment proceedings were started from February, 2015 onwards. The assessment was completed on 29-02-2016, i.e., after about one year. It can be noticed that there was time span of more than one year available with the AO from the date of filing return and completion of assessment. The AO was well aware that the assessee

has not offered the additional income (as understood by the AO) in the return of income filed. In fact, the AO has also raised a specific query in this regard and the reply given by the assessee was extracted earlier. Subsequent enquiries made by the AO also did not bring out any undisclosed income, if any, belonging to the assessee. Under these set of facts, in our view, the question of estopping the revenue from carrying out further investigation does not arise in the present case.

21. In fact, the assessee has also explained the nature of surrender made by him before the assessing officer. If the AO was of the view that the additional income surrendered could not be related to 'capital gains', it was within the powers of the AO to probe the matter further. However, it is a fact that no incriminating material relating to alleged undisclosed income of the assessee was found during the course of search or nor did AO carry out any further enquiry during the course of assessment proceedings. Hence, it is very much clear that the AO has made the impugned addition of Rs.25 crores merely on the basis of his understanding that it was surrendered on adhoc basis as undisclosed income of the assessee.

22. The Ld A.R also relied on Circular issued by CBDT in Instruction F No.286/2/2003-IT (Inv. II) dated 10-03-2003 and Letter F No.286/98/2013-IT (Inv.II) dated 18-12-2014, wherein the CBDT has deprecated the practice of coercing the assesses to admit undisclosed income. We noticed earlier that there could be a possibility that the assessee might have been coerced to admit additional income and hence the above said additional income was offered, subject to various conditions. The Ld A.R also submitted that the assessee has offered additional income in order to overcome difficulties created by search officials like attaching bank accounts of medical college etc. We also noticed that, prior to recording statement u/s 132(4), the assessee has requested to lift the

attachment of bank accounts for smooth running of medical college and hospital. All these factors cumulatively show that the assessee has made surrender, subject to the conditions discussed above, to overcome the difficulties. We also noticed that the assessee has also later clarified that there was confusion in his mind, as he had earlier entered into certain land dealings and was not sure about the capital gains implications. In our view, the assessee seems to have justified his surrender as the capital gain. On the contrary, there was no material available with the revenue that could point out any undisclosed income belonging to the assessee, which would warrant making of the addition of Rs.25 crores. In the absence of any incriminating material, the question of assessing any non-existing undisclosed income shall not arise. Hence the tax authorities are not justified in assessing the amount of Rs.25 crores as income of the assessee holding the same as voluntarily surrendered additional income.

23. We have gone through the case laws relied upon by Ld D.R.

23.1 The first case relied upon by Ld D.R is T Lakshmi Ladha & Co (supra). In this case, a senior Partner "T" declared additional income of Rs.10 lakhs during the course of search towards inflated expenses and discrepancy in bills, which was also endorsed by another partner. Subsequently yet another partner sent a letter to the department seeking to withdraw/retract earlier statement in respect of surrender of Rs.10 lakhs. The senior partner "T" merely confirmed the same. The Hon'ble High Court noticed that the income was surrendered in the context of signed black vouchers and loose papers found during the search. These loose papers were explained as record of payments made outside the books of accounts. So far as blank signed vouchers are concerned, it was stated that the figures are filled in later so as to enable inflating the expenses actually incurred. Under these set of facts, it was held by Hon'ble Bombay

High Court that the retraction is an afterthought. It can be noticed that, in this case,

(i) the department has unearthed specific incriminating materials, which could not be disowned by the assessee. Hence the assessee had no other option, but to surrender additional income.

(ii) the income so surrendered by partner "T" was endorsed by another partner at the time of making statement.

(iii) the retraction was some other partner and it was merely confirmed by partner "T". Under these set of facts, subsequent retraction was rejected.

It can be noticed that the decision has been rendered in facts prevailing in the above said case, which is not applicable to the facts of the present case.

23.2 The next case law relied upon by Ld D.R is Raj Hans Towers (P) Ltd (supra). In this case, the assessee was engaged in real estate and construction activities. During the course of survey operation conducted u/s 133A of the Act, one of the directors of the assessee disclosed a sum of Rs.15,00,55,000/- as additional income earned outside regular books of accounts. Since the assessee did not declare the same in its return of income, the AO proposed to assess the above said amount. The assessee contended that the surrender was not voluntary and bona fide and the same was obtained in illegal and arbitrary manner. It was also contended that there was no evidence or material in relation to the surrender. The AO, however, rejected the above said contentions and assessed the surrendered amount. The Ld CIT(A) granted partial relief by taking into account the debit entries from the gross receipts. The assessee filed appeal before ITAT challenging the addition confirmed by the Ld CIT(A) and the same was rejected. The assessee carried the matter to the Hon'ble High

Court of Delhi. The following observations made by Hon'ble High Court are relevant here:-

> *"7.....In the present case, the extent of amounts which the AO took into consideration in adding back* ***on the basis of the receipts and rough jottings*** *was Rs.1,11,12,860/-. The assessee's Director stated this in the course of survey in the statement recorded by the Revenue. Though the assessee claims - in the reply to the questionnaire given to it on 27.11.2010 - that the statement was not voluntary and the surrender was not binding, we notice that the reply dated 21.12.2010 itself does not give the date when such retraction letter was given to the assessee."*
>
> .....
>
> *10. In the present case, the admitted facts are that during the survey, a Director of the assessee - who was duly authorized to make a statement* ***about the materials and the undisclosed income****, did so on 20.11.2007. The Company did not retract it immediately or any time before the show cause was issued to it. For the first time, in reply to the show cause notice it faintly urged that the statement was not voluntary and sought to retract it. The reply, a copy of which has been placed on record, undoubtedly makes reference to some previous letter retracting the statement. Learned counsel urged that that letter was written on 21.12.2007. However, the actual reply to the show cause notice is silent as to the date. This itself casts doubt as to whether the retraction was in fact made or was claimed as an afterthought.*
>
> *11. Furthermore, this Court is of the opinion that in the circumstances of the case both the CIT (A) and ITAT were correct in adding back the amount of Rs.63,33,260/- after adjusting the expenditure indicated. The explanation given by the assessee, in the course of the appellate proceedings, that the surrender was in respect of a certain portion of the receipt which had remained undisclosed or that some parts of it were supported by the books, is nowhere borne out as a matter of fact, in any of the contentions raised by it before the lower authorities. For these reasons, this Court is of the opinion that no substantial question of law arises. The appeal is accordingly dismissed."*

We notice that the Hon'ble High Court has taken into consideration that

> *(i) the claim of alleged retraction could not be proved by the assessee. (ii) certain incriminating materials were also found during the course of survey.*
>
> *(iii) the claim of the assessee that some portion of receipt was actually supported by books, were not borne out in any of the contentions raised before lower authorities.*

It can be noticed that the assessee, in the above said case, has surrendered income on the basis of incriminating materials found during the course of search. Despite presence of materials, the assessee has claimed to have retracted the statement, but the said claim could not be proved. Further, the assessee appears to have claimed before the High Court that some of the entries are supported by the books, but it was found by the High Court that such contentions were not raised before the lower authorities. Accordingly, the Hon'ble Delhi High Court rejected the appeal of the assessee. Thus, we notice that this decision has also been rendered on the basis of facts prevailing therein and this decision cannot be taken support by the revenue.

23.3 The last case relied upon by Ld D.R is Avinash Kumar Setia (supra). In this case, a survey took place upon the assessee on 20th October, 2008. *Nearly two months later*, the assessee furnished a letter on 18th December, 2008, wherein he declared a sum of Rs.1.20 crore as additional income. After expiry of about two years, the assessee retracted the above said disclosure through his letter dated 16.12.2010. The addition made by the AO was confirmed by Ld CIT(A), but the ITAT, following the decision rendered by Hon'ble Madras High Court in the case of Khader Khan Son (300 ITR 157) deleted the addition on the ground that the income disclosed in the statement taken during the course of survey operations conducted u/s 133A is not legally binding. The Hon'ble Delhi High Court noticed that

> *(i) the survey officials did not record statement during the course of survey carried out u/s 133A of the Act.*
>
> *(ii) It is the assessee who has voluntarily surrendered income after two months from the date of survey. In the letter, the assessee made it clear that the income is surrendered on the basis of impounded documents, which were impounded from computers etc.*

On these facts, the Hon'ble Delhi High Court held as under:-

> *"16. The Court finds that in the present case, the ITAT erred in relying upon the decision in Khader Khan Son (supra), which as noted hereinbefore, is distinguishable on facts. The Court is not satisfied that that the retraction made by the assessee two years after the declaration was not bonafied. There was no satisfactory explanation for not including the said amount in the return of income filed by the assessee on 26th September, 2009."*

In view of the above facts, the decision rendered by ITAT was reversed. From these discussions, it can be noticed that the Hon'ble Delhi High Court has rendered the decision on the basis of facts prevailing in that case.

24. The facts prevailing in the present case is totally different. The initial declaration of Rs.20 crores was obtained in the statement taken u/s 132(4) of the Act and we have found that the same is not supported by any incriminating material. Subsequently, the amount was increased to Rs.25 crores, again without any basis. We have also noticed that the surrender was not blanket surrender as presumed by the tax authorities. We also noticed that the surrender was couched with various caveats. In any case, the surrender of income without any basis is against the circular issued by CBDT (referred supra). We also noticed that the assessee has explained later before the AO that the capital gain was in his mind while making surrender. Hence the facts prevailing in the present case are totally different from the facts that prevailed in the above said cases relied upon by Ld D.R. Hence, we are of the view that these decisions cannot be taken support by the revenue.

25. In view of the foregoing discussions, we are of the view that the order passed by Ld CIT(A) on this issue cannot be sustained. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the addition of Rs.25 crores made in AY 2014-15.

25. In the result, all the appeals of the revenue are dismissed and the appeal of the assessee is allowed.

Order pronounced in the open court on 30th Mar, 2022

Sd/-	**Sd/-**
(George George K.)	**(B.R. Baskaran)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 30th Mar, 2022.
VG/SPS

Copy to:

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

By order

Asst. Registrar, ITAT, Bangalore.