

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA

आयकर अपीलीय अधिकरण, कोलकाता पीठ ‘ए’, कोलकाता

[Before Shri Sanjay Garg, Judicial Member & Shri Rajesh Kumar, Accountant Member]

श्री संजय गर्ग न्यायिक सदस्य एवं श्री राजेश कुमार, लेखा सदस्य के समक्ष

I.T.A. No. 1447/Kol/2018

आयकर अपील संख्या-1447/कोल/2018

Assessment Year : 2010-11

निर्धारण वर्ष: 2010-11

Binit Agarwal (PAN: ACYPA 5174 F)	Vs.	DCIT, CC-VI, Kolkata
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	08.06.2022
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	30.08.2022
For the Appellant/ निर्धारिती की ओर से	Shri K.M. Roy, CA
For the Respondent/ राजस्व की ओर से	Md. Ghyas Uddin, CITDR

ORDER / आदेश

Per Shri Rajesh Kumar, AM:

This is the appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals), Central-I, Kolkata (hereinafter referred to as the Ld. CIT(A)”) dated 01.11.2013 for the AY 2010-11.

2. The grounds raised by the assessee are extracted below for the sake of convenience:

1. For that on the facts of the case the order passed by the Ld. CIT(A), Central-I, Kolkata on 01.11.2013 is completely arbitrary, unjustified and bad in law.

2. For that on the facts of the case, the Ld. CIT(A), Central-I, Kolkata was wrong in confirming the addition made by the Ld. AO to the tune of Rs. 89,13,710/- as undisclosed income of the assessee based on ad hoc disclosure made under coercion, threat and undue pressure by the search team in the course of search conducted u/s 132 of the Act. The Disclosure was neither voluntarily made nor based in any incriminating material relating to the assessee found in the search. As such, the confirmation of addition by the Ld. CIT(A), Central-I, Kolkata is arbitrary, unjustified and bad in law and need to be deleted.

3. For that the appellant reserved the right to adduce any further ground or grounds, if necessary, at or before the hearing of the appeal.

3. The only effective issue raised in ground nos. 1 and 2 is against the confirmation of addition of Rs. 89,13,710/- by Ld. CIT(A), Central-I, Kolkata as made by the AO on account of undisclosed income surrendered by the assessee at the time of search.

4. Facts in brief are that the search action u/s 132 of the Act was conducted on 16.09.2009 at the residential and business premises of the assessee and group. The assessee filed return of income declaring total income of Rs. 6,30,150/-. The assessment u/s 143(3) of the Act was framed vide order dated 31.12.2011 assessing total income of Rs. 1,06,30,150/- by making an addition of Rs. 1.00crore was made on account of undisclosed income. The facts underlining the above addition of Rs. 1.00crore was that during the course of search some documents were seized which were marked BSA/1. Thereafter Shri Sambhunath Agrawal, the key person of the group filed disclosure petition dated 14.11.2009 before the DDIT(Inv), Kolkata admitting therein an undisclosed income of Rs. 7.50crores in the names of family members which included surrender of Rs. 1.00crore in the hands of the assessee for the instant year comprising commission income of Rs. 89,02,110/- and miscellaneous and other income of Rs. 10,97,890/-. The assessee did not disclose the said income in the return of income filed on the ground that the document BSA/1 did not relate to

him at all despite the fact the disclosure annexure-05 of the disclosure petition was signed by the assessee also.

5. Aggrieved the assessee filed an appeal before the Ld. CIT(A) challenging the said addition of Rs. 1.00 crore and the appeal of the assessee was partly allowed by Ld. CIT(A) sustaining the addition to the tune of Rs. 89,02,110/- whereas the addition of Rs. 10,97,890/- was deleted. The assessee has challenged the said confirmation of addition of Rs. 89,02,110/- before us. The operative part of the Ld. CIT(A) is reproduced as under:

“9. I have perused the assessment order. I have also considered the submissions of the assessee and the judicial decisions relied upon. I find that the facts are not disputed in this case. It is admitted that Shri Sambhunath Agarwal in his disclosure petition dated 14.11.2009 made total disclosure of Rs. 7.5 crores in the name of the family members which included disclosure of Rs. 1 crore on behalf of the assessee. It is also admitted that the assessee signed the schedule-5 containing admission of undisclosed income of Rs. 1 crore for the assessment year 2010-11 comprising ‘commission income’ of Rs. 89,02,110/- and Misc. & others’ of Rs. 10,97,890/-. However, the assessee did not include the disclosure in his return on the ground that no incriminating material representing undisclosed income in his case was found in the search; and, that the disclosure was not supported or corroborated by independence evidence. I find from the assessment order that documents marked BSA/1 was seized from the residential premise of the assessee. It was claimed at the assessment stage that the seized documents did not belong to the assessee; instead, they were related to the other persons. However, I agree with the AO that the assessee has brought no material on record to substantiate his claim. As the seized documents were recovered from the residence of the assessee, the onus was on him to establish that such documents did not belong to him or that they pertained to the other persons. And, as the assessee has failed to discharge his onus, the presumption of Section 292C shall certainly operate against him. The AO was justified in holding that the seized documents BSA/1 belong to the assessee and that the content recorded therein was true and correct; and consequently, the commission income of Rs. 89,02,110/- recorded therein was assessable in the hands of the assessee. I am therefore not impressed with the argument that no incriminating material was found in the search insofar as the addition of Rs. 89,02,110/- is concerned. The addition of Rs. 89,02,110/- made on the basis of the seized documents BSA/1 is confirmed.”

6. The Ld. Counsel for the assessee submitted before us at the time of hearing that the addition on the basis of mere disclosure made in the post search enquiry on 14.11.2009 when the search was conducted on 16.09.2009 is arbitrary, wrong and bad in law. It is settled law that no addition could be made on the basis of mere admission that not by the assessee but by the third party. The Ld. Counsel for the assessee submitted that the key person of the group Shri Sambhunath Agarwal cannot make

any disclosure of income on behalf of the assessee and therefore the same cannot be sustained. The Ld. Counsel for the assessee referring to the documents seized during the course of search BSA/1 argued that the said document in fact pertained to customer for his business concern M/s Utsav Rice Mills Pvt. Ltd. and his counterpart in Bangladesh and in fact did not pertain to the assessee. Further, the Ld. Counsel for the assessee also submitted that on the direction of the Bench on 23.12.2021, he visited the office of Ld. D.R. on 28.12.2021 at 12 O'clock for inspection of file which was duly allowed by the Ld. D.R. however the said document was not found in the assessment folder which was also admitted by the Ld. D.R. at the time of hearing of the case. The Ld. Counsel for the assessee submitted that the addition on the basis of document which was not even available with the department and department has expressed his inability to place the same before the Bench is wrong and against the provisions of the Act. The Ld. Counsel of the assessee submitted the search team has not found any money or assets or undisclosed expenditure justifying the said addition during the course of search proceedings and mere fact that the document was found in the post search proceedings would not suffice to make the addition in the hands of the assessee as such documents represented the dumb document and therefore the presumption drawn by the authorities below u/s 292C of the Act that the document belonged to the assessee is not correct and the assessee has duly rebutted the said document as not belonging to him. Ld. Counsel, therefore, submitted that to sustain the addition is wrong and it has to be deleted. In defense of its arguments the Ld. Counsel for the assessee relied on the decision of Co-ordinate Bench of ITAT, Rajkot Bench in the case of Shri Lalji Khimjibhai Patel vs. ACIT in ITA Nos. 712 to 715 /RJT/2010 for AYs 2001-02, 2005-06 to 2007-08 dated 21.10.2019 wherein the Co-ordinate Bench has held that no addition could be made on the basis of notings on piece of paper. The Ld. Counsel for the assessee therefore submitted that the appeal of the assessee may kindly be allowed following the said decision of the Co-ordinate Bench.

7. The Ld. D.R. on the other hand, strongly objected the arguments as put forward by the Ld. A.R. by submitting that the annexure-05 of the disclosure signed by the assessee though the disclosure was made by Shri Sombhunath Agarwal on behalf of

the assessee and other individuals/entities in the group. The Ld. D.R submitted that it is immaterial whether the disclosure was made after approximately two months from the date of search in post search proceedings. The Ld. D.R. submitted while defending the assessment order and appellate order that the addition was based upon the BSA/1 which contained the particular of said income and it was admitted that it is being a commission income of the assessee on supply of onion to Bangladesh. The Id DR argued that nevertheless admittedly, the said document could not be traced in the assessment folder at the time of joint inspection of assessment records on 28.12.2021 which was carried out on the direction of the Bench, the adverse inference cannot be drawn against the assessee. The Ld. D.R, therefore, submitted that the assessee should not be allowed the benefit of non-production of said document by the revenue. The Id DR also argued that there was no retraction on the part of the assessee before filing the return of income. Finally the Id DR prayed that the appeal of the assessee may kindly be dismissed.

8. After hearing the rival parties and perusing the material on record, the undisputed facts that the search action u/s 132 of the Act of the assessee's group on 16.09.2009 at the residential and business premises of the assessee was conducted. During the course of search, a document marked as BSA/1 was found and seized which contained the same information as to commission receipt which was admitted by the assessee in the disclosure petition made by Shri Sombhunath Agarwal who is the key person of the group who disclosed Rs. 7.5 crores in the name of various family members including Rs. 1 crore in the hands of the assessee in the instant assessment year comprising of Rs. 89,02,110/- as commission income and miscellaneous and other income of Rs. 10,97,890/-. We also note that though it figured in the disclosure petition however the assessee did not disclose the said income in the income tax return filed in the instant assessment year and AO added the same to the income of the assessee on the ground that the disclosure was made which was also signed by the assessee on the basis of BSA/1 the seized document at the time of search. The Ld. CIT(A) confirmed the petition stating the same as rightly made by the AO on the basis of document BSA/1 on the presumption of Section 292C as the assessee has failed to

discharge its onus qua the said document and the same belonged to the assessee only. Now the issue before us is whether the addition could be made on the basis of statement made by the key person of the group Shri Sombhunath Agarwal after approximately two months from the date of search on 14.11.2009. We also note that the Bench has directed on 23.12.2021 for joint inspection of record by the assessee's counsel as well as by the Id DR as the said documents was never shown to the assessee in the assessment proceedings or thereafter. Accordingly a joint inspection was carried out on 28.12.2021 but the said document could not be found in the assessment folder and this was duly admitted by the D.R. during the course of hearing before us. So we are unable to comment on the contents of BSA/1 the document which was seized during the course of search and was stated to the belonging to the assessee but the undisputed position is that no addition can be made on the basis of ad hoc disclosure made during the course of search or post search when there is no corroborating evidence. In the present case only BSA/1 was seized during the search which was denied by the assessee in the assessment proceedings. Under these circumstances, we are of the considered view the assessee cannot be slapped with tax liability based upon the information contained in the document which could not be produced before the Bench despite the specific direction. We note that the search team has not found any cash, money and not other assets corroborating the said addition in the hands of the assessee. Therefore presumption of section 292CA of the Act cannot be applied in this case. So far as the another plea of the income tax authorities is concerned that the retraction was made only in the return of income, we are not satisfied with the said plea as the assessee has retracted the disclosure in the return of income itself and the case is supported by the decision of Co-ordinate Bench in the case of Shri Lalji Khimjibhai Patel (supra) the operative part is extracted below:

“13. We have duly considered rival contentions and gone through the record carefully. No doubt, the disclosure or admission made under section 132(4) of the Act during the course of search proceedings is an admissible evidence but not conclusive one. This presumption of admissibility of evidence is a rebuttable one, and if an assessee is able to demonstrate with the help of some material that such admission was either mistaken, untrue or based on misconception of facts, then solely on the basis of such admission no addition is required to be made. It is true that admission being declaration against an interest are good evidence, but they are not conclusive, and a party is always at liberty to withdraw the admission by demonstrating that they are either mistaken or untrue. In law, the retracted confession even

may form the legal basis of admission, if the AO is satisfied that it was true and was voluntarily made. But the basing the addition on a retracted declaration solely would not be safe. It is not a strict rule of law, but only rule of prudence. As a general rule, it is unsafe to rely upon a retracted confession without corroborative evidence. Due to this grey situation, CBDT has issued Circular No.286/2/2003 prohibiting the departmental officials from taking confession in the search. The CBDT is of the view that often the officials used to obtain confessions from the assessee and stop further recovery of the material. Such confessions have been retracted and then the addition could not withstand the scrutiny of the higher appellate authority, because no material was found supporting such addition.

14. In the light of the above, let us examine the facts. The stand of the assessee before the AO was that no incriminating material was found. His accountant was forced to write certain notings on a piece of paper and it was treated as expenditure out of books. This stand of the assessee has been rejected by both the Revenue authorities on the ground that (a) the assessee is being regularly assessed to tax, and well conversant with the income-tax proceedings, (b) he is seasoned businessman and could not come under the pressure of income-tax authorities during the course of search and agreeing for noting certain details on a piece of paper, and then admitting them, (c) the assessee has filed affidavit after 25 months of search, and not brought it to the notice of higher authorities. To our mind, reasoning given by the ld. Revenue authorities are not sufficient for making addition of Rs.80,69,186/- in the hands of the assessee. The finding of the ld.CIT(A) is that the alleged affidavit is being filed after 25 months i.e. before the AO and not before the officer who have recorded his statement or senior officers. It is pertinent to observe that after search nothing remained pending for adjudication before the investigating authorities. Their role is to investigate the assessee and collect material and pass on to the AO concerned. They did not pass any order which can be executed for effecting the recovery of taxes. Thus, the executable order for making any assessee liable to pay tax is the assessment order. The role of the AO is of a quasi-judicial officer who prosecute as well as adjudicate. Therefore, the right forum before whom an objection can be made is the AO. If some proceedings remained open before the investigation wing, and their adjudication give rises to refund of tax or collection of tax, probably, the Revenue authorities would be justified in making such observation. Passage of time before passing of the assessment order would not legalise any illegality. If something has been inherently gone wrong, at the time of search, then during the assessment proceedings, that facts should have been ascertained by the AO. It was for the AO to call for independent witness as well as accountant of the assessee in support of the report of the investigation wing. Onus is not upon the assessee. It is the AO who has to first establish that some undisclosed expenditure was incurred by the assessee and details recorded to that were found. On the basis of simple declaration even under section 132(4) addition cannot be made. Revenue authorities have failed to carry out this inquiry, and therefore, after relying upon the decision of Hon'ble jurisdictional High Court in the case of CIT Vs. Maulikkumar K. Shah, and K.P.M. Nair Vs. ACIT, we do not have any hesitation that addition is not sustainable. We allow third ground of appeal and delete addition of Rs.80,69,186/-."

In view of this facts and circumstances and the decision of Co-ordinate Bench, we set aside the order of Ld. CIT(A) and direct the AO to delete the addition.

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

Order is pronounced in the open court on 30th August, 2022

Sd/-
(Sanjay Garg /संजय गर्ग)
Judicial Member/न्यायिक सदस्य

Sd/-
(Rajesh Kumar/राजेश कुमार)
Accountant Member/लेखा सदस्य)

Dated: 30th August, 2022

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- Binit Agarwal, 33, Bankim Sarani, 5th Floor, Kolkata-700053
2. Respondent – DCIT, CC-VI, Kolkata
3. Ld. CIT(A) - , Kolkata
4. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata