

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER**

**ITA Nos.4114, 4115 & 4116/M/2015
Assessment Years: 2008-09, 2009-10 & 2010-11**

ACIT-33(1), 308, C-11, Bandra-Kurla Complex, Bandra (East), Mumbai - 400051	Vs.	Mr. Abhishek R. Vyas, No.202/203, Off. M.G. Road, Dhanukarwadi, Kandivali (W), Mumbai – 400 067 PAN: ABYPV0770D
(Appellant)		(Respondent)

Present for:

Assessee by : None
Revenue by : Shri Manoj Sinha, D.R.

Date of Hearing : 04 . 08 . 2022
Date of Pronouncement : 25 . 08 . 2022

O R D E R

Per : Kuldip Singh, Judicial Member:

Aforesaid appeals were filed way back on 5th of January 2017. Since then despite issuance of numerous notices none appeared on behalf of the assessee till 12.12.2019. On 28.01.2020 & 17.03.2020 one Mr. Rajesh Modi appeared on behalf of the assessee but thereafter again none appeared on behalf of the assessee. So the Bench decided to dispose of the present appeals on the basis of record with the assistance of the Ld. D.R. for the Revenue.

2. For the sake of brevity aforesaid appeals bearing common question of law and facts are being disposed of by way of composite order.

3. The appellant ACIT-33(1), Mumbai (hereinafter referred to as 'the Revenue') by filing the present appeals, sought to set aside the impugned even orders dated 31.03.2015 passed by Commissioner of Income Tax (Appeals), [hereinafter referred to as the CIT(A)] qua the assessment years 2008-09, 2009-10 & 2010-11 on identically worded grounds inter alia that:-

“i) Whether, the Ld. CIT(A) can accept books of accounts prepared by the assessee after assessment proceedings, incorporating entries found in incriminating documents impounded in a survey proceedings u/s 133(A) of the Act.

ii) Whether the Ld. CIT(A) can accept the books prepared by the assessee to produce before the Ld. CIT(A) to explain cash received and cash paid without necessary inquiry about the genuineness of cash.

iii) Whether the Ld. CIT(A) was justified in holding that in the interest of natural justice and considering that the accounts have been prepared on the basis of material that was available and impounded on the day of survey, a fair assessment is possible on the basis of the accounts.

iv) Whether the Ld.CIT(A) was justified in holding that for the purpose of assessment or arriving at the correct total income merely not taking into cognizance the accounts that the assessee prepared for the CIT(A) would not provide fair justice to the assessee.

v) Whether the Ld.CIT(A) was justified in deciding appeal against assessment order passed u/s 144 of Income Tax Act, 1961 on the basis of books of A/c that were not produced .before AO and prepared for producing before the CIT(A) after including entries of unaccounted cash received and paid as per impounded material found during survey in case of assessee.

vi) The appellant prays that the order of the Ld. CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.

vii) The appellant craves leave to amend or alter any ground or add a new ground”.

4. Briefly stated facts necessary for adjudication of the controversy at hand are : during the survey action initiated under section 133A of the Income Tax Act, 1961 (for short 'the Act') in case of assessee on 17.02.2012 various documents were found indicating that the assessee has earned income of more than Rs.1,00,00,000/- in A.Y. 200809 then assessment was reopened by way of issuance of notice under section 148 of the Act which was served upon the assessee on 17.02.2012 and in response thereto assessee filed a letter dated 15.03.2012 that he needed time of about a month to file the return which was allowed till 26.03.2012. Thereafter, assessee did not turn up to file the reply or to file the return of his income. Notice under section 142(1) of the Act was issued along with questionnaire. However, despite numerous opportunities given to the assessee none appeared on behalf of him and the Assessing Officer (AO) proceeded to frame the assessment under section 144 of the Act. AO on the basis of material found during the action under section 133A of the Act, on the basis of statement of assessee recorded during survey proceedings, particularly impounded document with identification mark A-1 AO proceeded to hold that the assessee has received cash amount of Rs.1,67,89,000/- during the year under assessment from different persons and treated the same as income of the assessee which is detailed as under:

	Rs.	Rs.
As discussed -		
i. Inpara13(i)	20,00,000	
ii. In para 13(ii)	15,00,000	
iii. In para 13(iii)	21,00,000	

iv. In para 13(iv)	20,00,000	
v. in para 13.2	26,89,000	
vi. In para 13.4	27,00,000	
vii. In para 13,5	38,00,000	1,67,89,000

5. Assessee has also disclosed an amount of Rs.1,00,00,000/- as income for A.Y. 2008-09. As per AIR/ITS data the assessee had entered into transaction in immovable property aggregating to Rs.7,88,07,000/- qua which he has not furnished any detail or document during assessment proceedings and consequently AO made addition of Rs.78,80,700/- being profit @ 10% of Rs.7,88,07,000/- and proceeded to frame the assessment at the total income of Rs.2,59,19,330/-, Rs.4,72,93,556/- and Rs.21,09,91,114/- for A.Y. 2008-09, 2009-10 & 2010-11 respectively.

6. Assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has deleted the addition by partly allowing the appeal. Feeling aggrieved the Revenue has come up before the Tribunal by way of filing present appeals.

7. We have heard the Ld. Departmental Representative for the Revenue, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and case law relied upon.

8. Undisputedly, survey proceedings were initiated against the assessee on 17.02.2012 under section 133A of the Act and various

documents were found indicating that the assessee earned income of more than Rs.1,00,00,000/-, Rs.3,00,00,000/- & Rs.3,00,00,000/- for A.Y. 2008-09, 2009-10 & 2010-11 respectively and on the basis of which assessment was reopened. It is also not in dispute that despite putting initial appearance before the AO assessee has not preferred to contest the assessment proceedings and consequently assessment order was framed ex-parte under section 144 read with section 147 of the Act. It is also not in dispute that during the appellate proceedings the assessee had filed a fresh set of documents to substantiate the profit & loss account and balance sheet including tax audit report which was admitted as additional evidence under rule 46A of the Act. It is also not in dispute that the remand report was called from the AO which is dated 24.09.2014 and is available on record. It is also not in dispute that subsequent to the notices issued under section 148 of the Act for A.Y. 2008-09, 2009-10 & 2010-11, no return of income was filed by the assessee despite availing numerous opportunities. It is also not in dispute that till the proceedings before the Ld. CIT(A), assessee has paid Rs.30,00,000/- against the huge demand for A.Y. 2008-09, 2009-10 & 2010-11.

9. In the backdrop of the aforesaid facts and circumstances the Ld. D.R. for the Revenue challenged the impugned orders passed by the Ld. CIT(A) by contending inter alia that the Ld. CIT(A) has accepted the books of accounts prepared by the assessee produced first time before him to explain the cash receipts and cash paid without any necessary enquiry about the genuineness of the cash; that no opportunity of examining and verifying the documents first time produced before the Ld. CIT(A) was provided to the AO.

10. When we examine the argument addressed by the Ld. D.R. in the light of the findings returned by Ld. CIT(A) and in the light of the fact that the assessee has surrendered Rs.11,00,00,000/- during all the three assessment years; that AO had issued a detailed questionnaire to the assessee to conduct a thorough enquiry but Assessee has not preferred to avail of any opportunity. The Ld. CIT(A) proceeded to grant the relief merely on the ground that audited accounts including balance sheet prepared by the assessee on the basis of material that was in any case available and impounded on the day of survey is sufficient to make a fair assessment in these cases on the basis of actual income, expenses and investment shown in the account. In the remand report AO specifically raised the objection that accounts needed to have been audited before the specified date but Ld. CIT(A) overruled this objection by observing that there is no complexity of the accounts objected to by the AO needing a special audit.

11. We have also examined the remand report dated 24.09.2014 available on record wherein it is categorically mentioned that “the assessee has furnished audit accounts along with 3CD report dated 25.04.2014 under section 44AB of the Act, but the assessee was required to get his account audited before the specified date and furnished the report of such audit by 30.09.2008”. It is also mentioned by the AO in remand report on the basis of certificate that no cash book was maintained but in annexure-1 to 3CD report dated 25.04.2014 filed before the Ld. CIT(A) it is mentioned by the auditor that cash book has been maintained and examined which shows that the cash book which was not maintained on the date of survey was prepared subsequently after a gap of long period. It is

also mentioned in the remand report that in the notes of account there is no “remark of auditor in respect of revenue recognition, valuation of closing stock and whether discloser made during survey has been taken into consideration in the account”. It is also duly recorded in the remand report by the AO that in the cash book and other ledger accounts there are entries of receipt/payment of huge amount of cash. AO also mentioned in the remand report that perusal of the profit & loss account as on 31.03.2009 duly signed by auditor filed before the Ld. CIT(A), the net profit has been shown at Rs.35,46,701/- but none of the figure of profit & loss account duly signed by Tanksali, C.A and Suresh Shah are matching which shows that the assessee has audited two sets of accounts. AO accordingly suggested not to entertain any additional evidence brought on record by the assessee.

12. When we further examine the impugned order passed by the Ld. CIT(A) in the light of the observation made by the AO during the remand proceedings and conduct of the assessee in not filing any reply to the detailed questionnaire issued during the assessment proceedings and not filing any return of income after initiation of reopening goes to prove that detail enquiry has not been made and document submitted during appellate proceedings have not been examined with due verification from the AO. In para 5.5 of the impugned order for A.Y. 2008-09 it is categorically recorded by Ld. CIT(A) that “the assessee has been prevented from filing the revised computation as it was submitted that the illegible impounded documents were not provided in time for doing such exercise”. However, during appellate proceedings on the basis of same illegible impounded documents assessee filed the revised

computation which was again taken on record without calling specific comments of the AO. So the provisions contained under section 46A to entertain the additional evidence remained uncomplished with.

13. Hon'ble High Court of Delhi in case of CIT vs. Manish Buildwell (P.) Ltd. (2012) 204 Taxman 106/(2011) 16 taxmann.com 27 (Delhi) while dealing with the identical issue held that "it is true that the powers of CIT(A) as First Appellate Authority are co-terminus with that of the AO but to impart the justice the CIT(A) can also do and can direct the AO to do what he has failed to do."

14. The Ld. D.R. for the Revenue drew our attention towards the decision rendered by Hon'ble Supreme Court in case of Keshav Mills Co. Ltd. vs. CIT (1965) 56 ITR 365 (SC) wherein it has been held that "proceedings taken for the recovery of tax under the provisions of the Act are naturally intended to be over without unnecessary delay, and so, it is the duty of the parties, both the department and the assessee, to lead all their evidence at the stage when the matter is in charge of the Income-tax Officer."

15. So in the totality of circumstances, we are of the considered view that the issue in this case is required to be re-examined threadbare by the Ld. CIT(A) by conducting complete enquiry by calling a specific report from the AO. So the aforesaid appeals are remanded back to the Ld. CIT(A) to decide afresh after providing opportunity of being heard to the assessee.

16. Aforesaid appeals filed by the Revenue are allowed for statistical purposes.

Order pronounced in the open court on 25.08.2022.

**Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 25.08.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.