IN THE INCOME TAX APPELLATE TRIBUNAL
"H" BENCH, MUMBAI

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA Nos.1447 & 1448/Mum/2022

(A.Ys.2010-11 & 2011-12)

The Dy. Commissioner of Income Tax, Central Circle-5(3) Room No. 1906, 19th Floor, Air India Building, Nariman Point, Mumbai – 400021	Vs.	Kalpataru Limited Mumbai - 400055
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACK2108K		
Appellant	..	Respondent

Appellant by :	Vasanti Patel
Respondent by :	Tejinder Pal Singh Anand

Date of Hearing	03.10.2022
Date of Pronouncement	20.10.2022

आदेश / O R D E R

Per Amarjit Singh (AM):

Both the appeals filed by the revenue are directed against the order passed by the ld. CIT(A)-53, Mumbai, which in turn arises from the order passed by the A.O u/s 143(3) r.w.s 147 of the Act. Since similar facts and identical issue are involved, therefore, for the sake of convenience both appeals are adjudicated together. We shall take ITA No. 1448/Mum/2022 as a lead case and its finding will be applied as mutatis mutandis to other appeal. The revenue has raised the following grounds before us:

"1. Whether, on the facts and in the circumstances of the case and in law, the Ld CIT(A) is justified in deleting the addition made of Rs 5,32,50,000 as unaccounted cash loan and interest in the hands of the assessee, on the basis that the addition is not based on any material, ignoring the fact that statement of Shri Akshay J. Doshi recorded under oath u/s 131 of the Act on 28.12.2015 has significant evidentiary value?

2. Whether, on the facts and in the circumstances of the case and in law, the Ld CIT(A) is justified in deleting the addition made of Rs.5,32,50,000/- as unaccounted cash loan and interest in the hands of the assessee, on the basis that the addition is not based on any material ignoring the fact that statement of Shri Akshay J Doshi recorded under oath u/s 131 of the Act on 28.12.2015 has significant evidentiary value and the statement is based on incriminating digital evidence, and has not been retracted?

3. The appellant craves to leave, to add, to amend and/or to alter any of the ground of appeal, if need be."

2. The fact in brief is that return of income declaring nil income was filed on 11.10.2010. The assessment u/s 143(3) was completed on 10.05.2012 assessing the income at Rs.nil. Thereafter the case was reopened on 12.03.2017 on the basis of information received from the assessing officer of M/s Bhoomi Group vide letter dated 20.03.2017 stating that a search and survey action was conducted by the investigation Mumbai in the case of M/s Ekta & Bhoomi Group and on 05.10.2015. It was stated that the data in respect of cash transaction pertaining to M/s Bhoomi group was found in digital form. As per data found and seized, M/s Kalpataru Ltd. assessee had entered into various transaction in cash with Bhoomi Group. The detail of the same mentioned in the assessment order are reproduced as under:

Sr. No.	Nature of Transaction	F.Y. of Transaction	Relevant	Amount(Rs.)
1.	Cash loan received by M/s Kalpataru from M/s Bhoomi Group	2009-10	2010-11	500,00,000/-
2.	Payments received in cash by M/s Kalpataru	2010-11	2011-12	500,00,000
3.	Loan repaid in cash by M/s Kalpataru	2015-16	2016-17	500,00,000

Further A.O has also stated that M/s Kalpataru Ltd, has also paid interest to Bhoomi Group in cash as under:

Sr. No.	FY of Transaction	Relevant A.Y.	Amount (Rs.)
1.	2009-10	2010-11	32,50,000/-
2.	2010-11	2011-12	35,20,800/-
3.	2011-12	2012-13	97,41,100/-
4.	2012-13	2013-14	48,83,900/-
5.	2013-14	2014-15	65,00,000/-
6.	2014-15	2015-16	32,50,000/-

The A.O stated that the loan and interest amount so received and paid back in cash by M/s Kalpataru Ltd to M/s Bhoomi Group were out of the books of account was admitted by Shri Akshay J. Doshi one of the director of Bhoomi Group. Therefore, the A.O observed that the cash amount was presumed to be undisclosed income of M/s Kalpataru Ltd. On query, the assessee had denied such loan transaction and payment of any interest to M/s Bhoomi Group. The assessee stated that no such transaction had taken place with M/s Bhoomi Group and said allegation was simply made on the basis of the third party information without any independent material to support such allegation. The assessee also submitted that any material including the statement of Shri Akshay Doshi and reason for reopening of the assessment was not given to the assessee. The assessee further pointed out that except the recorded statement no other material was brought to establish that assessee had received any cash loan. The A.O had not agreed with the submission of the assessee and stated that loan amount of Rs.5 crores and interest amount of Rs.32,50,000/- was paid in cash by M/s Kalpataru Ltd to M/s Bhoomi Group out of the books of account during the assessment year 2011-12, therefore, the A.O has treated the amount of Rs.5,32,50,000/- as unaccounted income of the assessee and added to its total income.

3. Aggrieved, the assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has allowed the appeal of the assessee. The relevant part of the decision of the CIT(A) is reproduced as under:

> *"5.3 The findings of the AO in the assessment order and the submissions of the appellant have been carefully considered. In the case of the appellant, the assessment for A.Y. 2010-11 was reopened on the basis of the information received from DCIT, Central Circle-6(2), Mumbai that during the search proceedings by ADIT (Inv.) Unit 3(4), Mumbai in the case of M/s Ekta&Bhoomi Group on 05 10 2015 the digital data seized indicated certain unrecorded cash transactions of the assesse M/s Kalptaru Ltd. The assessee has received cash loan of Rs. 500,00,000/- from and paid interest of Rs. 32,50,000/- to M/s Bhoomi Group Notice u/s 148 dated 29.03.2017 was issued and served upon the appellant Vide letter dated 04.04.2017, the appellant requested for the reasons for reopening of the assessment The AO provided a copy of the reasons recorded for reopening of the assessment for AY 2010-11. The Appellant vide letter dated 03 08 2017 objected to the reopening of the assessment and submitted before the AO that no transaction of cash loan and interest paid of Rs 5,32,50,000/- with M/s Bhoomi Groupby the appellant. The AO disposed off the objections raised by the appellant vide order dated 01.09.2017. In the order dated 01.09.2017, the AO has clearly mentioned in Para 4.3 of the order that the information regarding certain transactions were received from the sources and it was to be verified to check the genuineness of the information, It did not necessarily mean that the assessee had defaulted on the aforesaid issues It was also mentioned by the AO that proper hearing opportunity would be given to the assessee for producing relevant details/explanation in support of the assessee's contention before passing the order u/s 147 of the Act. The appellant vide letter dated 24.11.2017 addressed to the DCIT had again denied the cash transaction of loan and interest with M/s Bhoomi Group It was also stated by the appellant that the material on which the AO is relying had not been given to the appellant.*
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> *5.4 During the appellate proceedings, the appellant had contended that there was no cash loan and interest payment transaction with M/s. Bhoomi Group Further, it was also contended that the material forming the basis for issue of notice u/s 148 of the Act and addition made on such basis was not provided by the AO despite that the said was specifically asked by the appellant. My predecessor CIT(A), on perusal of the assessment order, noted that it did not indicate that the material was provided to the appellant. Therefore, my predecessor CIT(A) vide letter dated 29.11.2019 had sought a remand report from the AO with a direction to forward a copy of the material and evidence to support the reopening and addition made in the assessment order in the case of M/s. Bhoomi Group/Ajay Mehta/Akshay Doshi. In response, the DCIT-CC 5(3), Mumbai, has submitted a remand report vide letter dated 24.02.2020 which has been reproduced above.*
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> *In the remand report, the AO has not furnished the copies of the relevant information or material, which was received from the Investigation Wing, Mumbai*

and on the basis of which the addition has been made in respect of cash loan and interest paid TDR, to this office. The AO has simply submitted that for cross examination of Shri Akshay Doshi a summon u/s. 131 of the Act was issued to Shri AkshayDoshi, but he did not comply to the summons and did not attend his office.

5.5 From the assessment order as well as the remand report submitted by the AO, it is seen that the AO had reopened the assessment for AY 2010-11 merely on the basis of information regarding cash loan Rs. 5,00,00,000/- received from and interest of Rs. 32,50,000/- paid to M/s. Bhoomi Group by the appellant. The AO is not in possession of any document which could indicate that the appellant had in fact cash loan of Rs. 5,00,00,000/- received from and interest of Rs.32,50,000/- paid to M/s. Bhoomi Group by the appellant. Therefore, in absence of any material establishing the receipt of cash loan of Rs. 5,00,00,000/- from and interest of Rs. 32,50,000/- paid to M/s. Bhoomi Group, addition cannot be made."

4. During the course of appellate proceedings before us the ld. D.R has supported the order of A.O.

On the other hand, ld. Counsel vehemently contended that there was no corroborative material and the A.O made the addition merely on the basis of statement without giving opportunity to the assessee. The ld. Counsel also submitted that even before the CIT(A) in the remand report the A.O has not furnished the copies of relevant information or material which was received from the investigation wing on the basis of which the addition had been made in respect of cash loan and interest payment.

5. Heard both the sides and perused the material on record. Without reiterating the facts as elaborated above in this order the A.O has completed assessment u/s 143(3) r.w.s 147 of the Act and added loan amount of Rs.5 crores and interest amount of Rs.32,50,000/- on the basis of information received from the assessing officer of M/s Bhoomi Group on the basis of statement of their director as discussed supra in this order. The detail of submission made by the assessee before the ld. CIT(A) vide letter dated 12.12.2019 is reproduced as under:

"Merits of case:

The DCIT has made addition of Rs. 5,32,50,000/- by placing reliance upon the alleged information obtained from the investigation wing from the third party As submitted from time to time by us that no cash transaction on account of loan with M/s. Bhoomi Group was undertaken by us in the year under consideration. It is well settled law that no addition can be made merely on the basis of material collected from the third party in absence of any other corroborative material. The Delhi High Court in the case of PCIT vs. Manoj Hora (402 ITR 175) (Delhi) - Annexure 7 on similar facts have held as under:

> *"A search and seizure operation, under section 132 of the Income tax Act, 1961, was conducted in the premises of the R group. The assessee contended that the statement made, under section 132(4), by a supplier to the R group, who was a third party, was not binding upon him. The assessee further contended that in the absence of recovery of any incriminating material from its premises, the assessment completed was untenable. The Assessing Officer rejected the contention and made various additions to the income of the assessee on the basis of statement. The Commissioner (Appeals) held that the statement made by a third party in the course of a search could not be attributed to or lead to adverse consequences as far as the assesses was concerned. He further held that there was no corroborative material to connect those statements to the assessee's assessments and deleted the addition. The Tribunal affirmed the order of the Commissioner (Appeals). On appeals.*
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> *Held, dismissing the appeals, that the statement under section 132(4) could not bind the assessee, According to section 132(4) a presumption arose in the case of the searched party. In the case of statements by the party whose premises were searched, or attributed to a third party, there had to be a connect or corroboration and there was none in the case of the assessee. No incriminating material was found in the premises of the assessee. The addition made by the Assessing Officer was unsustainable. No question of law arose."*
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> *It is submitted that in spite of specific request made by us vide our letter dated 3rd August, 2017 the DCIT has not provided us with the material on the basis of which he has made addition of Rs. 5,32,50,000/- Further in spite of specific request made by us vide letter dated 3rd August, 2017 cross examine the said party no such opportunity was granted to us and which has resulted into violation of rules of natural justice and therefore in view of well settled law by the Hon'ble Supreme Court in the following decisions the order passed by the AO in violation of rules of natural justice is bad in law and therefore the assessment framed for the year under consideration is not valid in law and accordingly the addition made by him is not sustainable.*
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> ***The Hon'ble Court in M/s. Andaman Timber Industries vs. Commissioner of Central Excise reported in Civil Appeal no.4228 of 2006, dated 02.09.2015 (62 Taxmann.com 3)** Annexure 8 held that not allowing the assessee to cross-examine the witness by the*

adjudicating authority, where the statements of witnesses were made basis for impugned order, was a serious flaw which makes the order invalid in as much as it amounted to violation of principles of natural justice. The relevant findings of the Hon'ble Supreme Court are as under.

"According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity in as much as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them."

The Hon'ble Supreme Court in Sahara India (Firm) vs. CIT and Another (2008) 300 ITR 403 (SC) - Annexure 9 while deciding issue of principles of natural justice and Rule of audialterampartem held as under.

"11. Rules of "natural justice" are not embodied rules The phrase "natural justice" is also not capable of a precise definition The underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to act fairly i.e. fair play in action. As observed by this court in A.K.Kraipak vs. Union of India (1969) 2 SCC 262, the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. They do not supplant the law but supplement it. (Also see: ITO vs. Madnani Engineering Works Ltd (1979) 2 SCC 455.

Recently, the Hon'ble Supreme Court in the case of CIT vs. Sunita Dhadda - Annexure 10 after considering the consistent view taken by the Hon'ble Supreme Court has once again reiterated and held that principle of natural justice requires that when the AO places reliance on a particular evidence in that even that evidence should be given to the assesses to deal with it and effective opportunity should be given for cross examination of the same.

In the present case in spite of specific request made by us for examination/cross examination of the said party the same has not been granted to us which has resulted into gross violation of rules of natural justice."

During the course of assessment proceedings the assessee submitted that it had not received any cash loan from the said M/s Bhoomi Group and also submitted that no material except the statement of third party was indicated to establish that alleged cash loan was received by the assessee. The A.O submitted in the remand report before the ld. CIT(A), that the A.O submitted as directed the opportunity of cross examination to the assessee of Shri Akshay Doshi could not be provided as Shri Akshay Doshi had not made compliance to the summons. Therefore, it is clear that the cross-examination of the said party was not provided to the assessee without any lapse occurred at the part of the assessee. During the course of appellate proceedings before the ld. CIT(A) a remand report from the A.O was also called to furnish the copies of relevant material and evidence to support the reopening and addition made in the assessment order. The ld. CIT(A) further stated that in the remand report the A.O had not furnished the copies of the relevant information or material which was received from the investigation wing, Mumbai and on the basis of which the addition had been made in respect of cash loan and interest paid. In view of the above facts and finding of ld. CIT(A) as supra, the Revenue has not brought on record any material to controvert the findings of the ld. CIT(A), therefore, we don't find any reason to interfere in the decision of ld. CIT(A). Therefore, both the ground of appeal of the revenue stand dismissed.

5. The appeal of the revenue stand dismissed.

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6. As the facts and the issue involved in this appeal are the same as supra in ITA No. 1448/Mum/2022, therefore, applying the same findings mutatis mutandis, this appeal of the revenue is also dismissed.

7. In the result, both the appeals of the revenue are stand dismissed.

Order pronounced in the open court on 20.10.2022

Sd/-	Sd/-
(Kuldip Singh) Judicial Member	(Amarjit Singh) Accountant Member

Place: Mumbai
Date 20.10.2022
Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.

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