

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
" SMC" BENCH, AHMEDABAD

**BEFORE MS SUCHITRA KAMBLE, JUDICIAL MEMBER
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No. 2444/AHD/2018
निर्धारण वर्ष/Asstt. Year: 2012-2013

Shri Kirit Kalidas Gajjar, 1807, Pada Pole, Gandhi Road, Ahmedabad-380001. PAN: ABEPG4967B	Vs.	I.T.O, Ward-1(1)(2), Ahmedabad.
---	-----	---------------------------------------

(Applicant)		(Respondent)
--------------------	--	---------------------

Assessee by :	Shri S.N. Divatia, A.R
Revenue by :	Shri Ramesh Kumar, Sr. D.R

सुनवाई की तारीख/**Date of Hearing** : **03/11/2022**
घोषणा की तारीख /**Date of Pronouncement**: **09/12/2022**

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax(Appeals)-6, Ahmedabad, dated 24/10/2018 arising in the matter of assessment order passed under s.143(3) r.w.s 147 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2012-13.

2. The assessee in ground No. 1 has challenged the validity of the reopening of the assessment under the provisions of section 147 of the Act.

3. The facts in brief are that the assessee in the present case is an individual and filed the return of income declaring an income under the head business and profession. The proceedings for the year under consideration was initiated under section 147 of the Act by the AO after recording the reasons to believe which are extracted as under:

In this case, the assessee had filed his return of income for A.Y. 2012-13 on 28.09.2012 declaring total income of Rs.5,04,100/- the return was been processed u/s.143(1) of the Act on 15.01.2013 determining total income of Rs.5,04,100/-.

As per information received from the Assistant Commissioner of Income-tax Central Circle 2(4), Ahmedabad a search operation u/s.132 of the Act was carried on 15.10.2013 in the case of DHARMDEV INFRASTRUCTURE wherein incriminating evidences/document were seized in respect of ON MONEY received from various persons/parties/customers.

During the course of the hearing before the Settlement Commission the Company Dharmdev Infrastructure Ltd. admitted receipt of Rs.85.45 Crore from various persons/parties as on money. The assessee Shri Kiritbhai K Gajjar has also advanced cash and booked/purchased the property from M/s.Dharmdev Infrastructure Ltd and paid on money of Rs.4,00,000/- As the said payment of Rs.4,00,000/- has not been recorded by the assessee in his books of accounts/purchase deed, the same is unexplained investment which required to be disallowed and added to the total income of the assessee by taking action as per provisions of section 148 of the Act. By not doing so resulted in underassessment of Rs.4,00,000/- the escapement has occurred on the part of assessee and the income is required to be brought to tax.

4. Based on the above reasons recorded by the AO, it is revealed that there were recovered various evidences/documents, on account of search operation carried out at the premises of "Dharmdev Infrastructure Ltd", which were showing the receipt of on money from various parties/customers/persons. The party namely "Dharmdev Infrastructure Ltd" has also admitted before the settlement commission for having received on money of Rs. 85.45 crores from various parties. In the petition filed before the settlement commission, the "Dharmdev Infrastructure Ltd" has also admitted to have received a sum of Rs. 4 lakh in cash from the assessee against the sale of the Flat.

4.1 However, the assessee before the AO challenged the reopening under section 147 of the Act vide letter dated 17-07-2017 by stating that he has not made any cash payment against the purchase of the flat amounting to Rs. 4 lakhs. The assessee also requested the AO to provide the materials received as a result of search from the premises of "Dharmdev Infrastructure Ltd" based on which the proceedings under section 147 of the Act were initiated and further requested to provide the opportunity of cross examination of the statement if any recorded during the search proceedings at the premises of "Dharmdev Infrastructure Ltd".

4.2 However, the AO disposed of the objection raised by the assessee vide order dated 08-08-2017 by holding that the reopening under section 147 was initiated based on the letter received from the office of ACIT, central circle-2(4) in connection with the document found during the search proceedings at the "Dharmdev Infrastructure Ltd" wherein it was stated that the assessee has made cash payment for the purchase of flat. The information received from the ACIT was analysed with the return of income of the assessee and it was noted that there was no assessment framed in the case of the assessee under section 143(3) of the Act which evidences that there was no verification about the investment made by the assessee in the flat. The AO further supplied the details/ledger copy obtained from the office of the ACIT, Central Circle-2 which was recovered during the search proceedings at the premises of "Dharmdev Infrastructure Ltd". The AO further noted that all the banking transaction towards the purchase of the flat shown by the assessee were matching with the ledger copy recovered during the course of search except the cash payment of 4 for lakhs only. The AO further held that the amount of consideration shown in the sale deed was less than the amount of consideration paid by the assessee to the builder. Accordingly, the assessee held that the proceedings under section 147 of the Act are valid.

5. Aggrieved assessee preferred an appeal before the learned CIT-A

6. The assessee before the learned CIT-A vide letter dated 22nd October 2018 contended that the AO has not brought anything on record suggesting that the disclosure made by the company namely "Dharmdev Infrastructure Ltd" was representing the on money paid by the assessee in cash. As such the AO has not established any vital nexus and the live link between the income admitted by the "Dharmdev Infrastructure Ltd" before the settlement commission viz a viz the cash payment made by the assessee for Rs. 4 lakhs towards the purchase of flat which was not accounted. The assessee further submitted that the admission of the 3rd party before settlement commission about the receipt of on money is not a conclusive evidence or binding upon the assessee that any unaccounted cash payment was made by him (the assessee). The assessee in support of his contention relied on the judgement of Hon'ble Supreme Court in the case of CIT versus Gangasaran & Co reported in 120 ITR 1.

6.1 The assessee further submitted that the AO while recording the reasons for reopening the assessment under section 147 of the Act has referred the disclosure made by the search party being "Dharmdev Infrastructure Ltd" before settlement commission whereas in the assessment the addition has been made based on the copy of the ledger recovered from the "Dharmdev Infrastructure Ltd" wherein the alleged cash payment of Rs. 4 lakhs was shown in the name of the assessee. As such there was a vast variance between the reasons recorded for initiating the proceedings viz a viz the basis adopted for the purpose of the addition. Accordingly, due to such great variance, the assessment is liable to be quashed.

6.2 The assessee further contended that once the addition has been made based on the document found in the course of the search at the 3rd party premises being "Dharmdev Infrastructure Ltd" then the proceedings should have been initiated in his hands under section 153C of the Act instead of 147 of the Act. Thus, the assessment framed under section 147 of the Act is in itself bad in law.

7. However the learned CIT-A disregarded the contention of the assessee by observing as under:

In this ground the appellant has challenged validity of re-opening of assessment u/s 147 of the Act. The contention of the appellant is that the AO has placed reliance on the alleged ledger account of the appellant in books of the said company for the purpose of making the addition. The appellant submitted that however, the copy of said ledger account was not furnished to the appellant. The appellant further submitted that the AO has placed sole reliance on the ledger account in books of the said company for the purpose of making the addition. The appellant further submitted that this ledger account cannot be said to be conclusive evidence against the appellant unless, the AO has allowed the opportunity to cross examine the concerned party. After considering all facts and circumstances of the case I find that there is no substance in the contentions of the appellant. It is a fact that incriminating documents in respect of "On Money" were found from Dharamdev Group during search proceedings. Further, it is a fact that Dharamdev Group in their petition before Settlement Commission has conceded that they received Rs, 35.45 crores on account of "On Money" . from various customers. Thus, there is no substance in the contention of the appellant that this is not a conclusive proof for payment "On Money" by the appellant. Further, there is no substance in the contention of the appellant that he was not provided the document on the basis on which the additions has been made./The AO has reproduced the ledger account of the appellant which was obtained from the Dharamdev Group in the assessment order. Case laws relied on by the appellant do not apply to the present case as the facts are different.

8. Being aggrieved by the order of the learned CIT-A, the assessee is in appeal before us.

9. The learned AR before us filed a paper book running from pages 1 to 50 and reiterated the contentions made before the authorities below whereas the learned DR before us vehemently supported the order of the authorities below.

10. We have heard the rival contentions of both the parties and perused the materials available on record. The prerequisite for initiating the proceedings under section 147 of the Act is this that the AO should have reasons to believe that the income of the assessee has escaped assessment. The controversy arises whether the reasons to believe formed by the AO are within the provisions of law or the AO without having proper reasons to believe is trying to reassess the income in the garb of income escaping assessment. There is no definition provided under the Act with respect to the term reasons to believe. However the Hon'ble courts time and again have propounded that there has to be vital link or live link between the

reasons recorded for initiating the proceedings viz a viz the income which has escaped assessment. Such link should be based on some tangible material which was not available before the AO at the time of assessment or the information concerning to such tangible material was not furnished in the income tax return by the assessee. In the case on hand, the AO while recording the reasons has clearly recorded the fact that there was a search conducted at the premises of the builder "Dharmdev Infrastructure Ltd" wherefrom the information was received that such builder was found in receipt of on money from various customers. Therefore, such builder has also accepted to have received a sum of ₹85.45 crores as on money before the settlement commission. In the petition filed before the settlement commission, it was also disclosed a sum of Rs. 4 lakhs received from the assessee against the purchase of flat. Based on this information the proceedings under section 147 of the Act were initiated. In our considered view, such information was tangible material in the sense that it was received from the outside party and that too based on search and consequently disclosure was made before the settlement commission. Thus, to our mind there was sufficient material available with the AO to draw an inference that the income of the assessee has escaped assessment.

At this juncture, the AO while initiating the proceedings under section 147 of the Act, has to make a prima facie opinion about the escapement of income which must be based on some tangible material. As such the AO is not expected to draw a conclusion that the income of the assessee has escaped assessment while recording the reasons to believe. In holding so, we draw support and guidance from the judgement of Hon'ble Gujarat High Court in case of Zaveri & Company (P.) Ltd. Vs. DCIT reported in [2021] 133 taxmann.com 397 (Guj.), where in similar facts & circumstances it was held as under:

The Assessing Officer has sought to reopen the assessment for assessment year 2012-13 of the petitioner on the basis of fresh material having been received as a result of the search made by the office of Deputy Director (Investigation) conducted at the premises of SS and JS and as a result of the investigation carried out during the search proceedings conducted by the office of Pr. Director (Investigation) at the premises of NJ and his associates that the petitioner-company was one of the beneficiaries of the accommodation entries as the petitioner had entered into the transactions in penny stock with two companies, which companies were used for bogus LTCG and contrived losses. The Assessing Officer had also received specific information from the said investigating wings outlining the systemic evasion

of taxes by the petitioner and others, and had therefore reason to believe that the petitioner had sold scrips to said two companies, which were penny stock to the extent of Rs. 97 lakhs during financial year 2011-12. Such satisfaction arrived at by the Assessing Officer being subjective in nature and based on the fresh material for coming to the prima facie conclusion that the petitioner had failed to disclose fully and truly all material facts necessary for his assessment for the assessment year 2012-13, it could not be said that the respondent had initiated the proceedings under section 147 on the basis of incorrect facts or on the basis of borrowed belief of the Investigation Wings as sought to be submitted by the assessee. The court also does not agree with the submission made by the assessee that the respondent could not have reopened the assessment of the petitioner under section 147/148 after the scrutiny assessment having been undertaken by the Assessing Officer under section 143(3) for the assessment year 2012-13. The Assessing Officer having arrived at his subjective satisfaction based on additional fresh material placed before him that the petitioner had not fully and truly disclosed all the material facts necessary for his assessment for the relevant assessment year and prima facie his income chargeable to tax had escaped assessment, he was fully justified in initiating the proceedings under section 147/148. [Para 11]

10.1 In view of the above and after considering the facts in totality, we are of the view that there was no illegality in the initiation of the proceedings under section 147 of the Act and therefore the issue raised by the assessee on technical ground fails. Hence, the ground of appeal of the assessee is hereby dismissed.

11. The 2nd issue is that the learned CIT-A erred in confirming the addition made by the AO for ₹3.85 lakhs representing the cash payment against the purchase of flat.

12. The AO during the assessment proceedings found that there was the cash payment of ₹3.85 lakhs which was made by the assessee to the builder namely "Dharmdev Infrastructure Ltd" against the purchase of flats. The foundation of the AO for doing so was based on the copy of the ledger found from the premises of impugned builders during the search operation wherein the cash payment and bank payment was shown which is nothing but receipt of money from the assessee. As such the AO based on the ledger copy found from the premises of such party has drawn an inference that the assessee has made unaccounted investment of Rs. 3.85 lakhs in the purchase of the flat. As such, the copy of the ledger was reflecting the cash and cheque payment by the assessee against the purchase of flat aggregating to ₹22 lakhs whereas the assessee shown to have made the payment of ₹18.15

lakhs only which was duly reflected in the books of accounts. The AO also noted that such party namely "Dharmdev Infrastructure Ltd" has also admitted to have received on money to the tune of ₹85.45 crores before the settlement commission. As such, the builder "Dharmdev Infrastructure Ltd" in the disclosure made before the settlement commission has computed the receipt of on money from the assessee to the tune of ₹4 lakhs in cash based on such ledger. Thus the AO concluded that information received was reliable and tangible. Thus the AO made the addition of ₹3.85 lakhs to the total income of the assessee being difference between the sale shown by the builder (Rs. 22 lakh) and investment shown by the assessee (Rs. 18.15).

13. Aggrieved assessee preferred an appeal to the learned CIT-A who confirmed the order of the AO by observing as under:

A perusal of the above shows that payments in the ledger account of the appellant in the books of builder and payments as per the appellant match except the cash payments mentioned in the ledger of the appellant in the books of builder. It is further seen that cash payments have been made after every cheque payment, Further, also four (4) cash payments have been made before payment from the loan taken from HDFC. Once the payment from loan taken from HDFC is made there is no cash payment. The appellant submitted that he paid total Rs. 19,69,000/- to the builder. However, it is seen that the sale deed was registered for Rs. 13,65,000/- only. The appellant failed to explain this discrepancy also. From the above discussion it is clear that the AO was right in making addition of Rs. 3,85,000/- on account of cash payment made by the appellant to the builder. Accordingly, addition of Rs. 3,85,000/- is upheld. This ground of appeal is rejected.

14. Being aggrieved by the order of the learned CIT-A , the assessee is in appeal before us

15. The learned AR before us filed a paper book running from pages 1 to 50 and contended that there cannot be any addition merely on the basis of the document found from the 3rd party premises until the same is confronted to the assessee. Likewise, there cannot be any addition to the total income of the assessee merely on the reasoning that the 3rd party have made a disclosure before the settlement commission.

16. On the other hand, the learned DR before us vehemently supported the order of the authorities below.

17. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion we note that the entire basis of allegation made by the Revenue is that there was a copy of the ledger found from the premises of the builder "Dharmdev Infrastructure Ltd" wherein the total consideration against the purchase of flat by the assessee was shown at Rs. 22 lakhs including cash payment of Rs. 4 lakhs whereas the assessee has shown consideration in its books of accounts to the tune of ₹ 18.15 lakhs including the cash payment of ₹15,000 only. Besides the above there was the admission or the disclosure by the impugned builder before the settlement commission to have received the on money from the customers to the tune of Rs. 85.45 Crore including Rs. 4 lakh from the appellant assessee. There is no ambiguity to the fact that the copy of the ledger recovered from the premises of the search party i.e. seller and further admission by the such party before the settlement commission is a vital piece of evidence which strongly suggests that there was unaccounted cash payment of ₹3.85 lakhs by the assessee to the party against the purchase of flats. It can also be said that there are enough materials and circumstantial evidences suggesting the unaccounted cash payment of ₹3.85 lakhs.

17.1 However, the controversy arises whether document found from the premises of 3rd party and the disclosure made by such 3rd party before the settlement commission can be used against the assessee without affording the opportunity of cross-examination. Admittedly, the assessee while raising the objection against the initiation of the proceedings under section 147 of the Act has made the following submission before the AO:

Please provide copy of material/records on the basis of which you form a belief that assessee had paid on money of Rs.4 Lakh. In case any statement is made by any party of Dharmadev Infrastrure Ltd, in this regards copy of statement may be furnished to us and opportunity may be provided for cross verification.

17.2 Likewise, the assessee before the learned CIT-A has also made the submission as detailed below:

Secondly, the AO has placed sole reliance on the said ledger account in books of the said company for the purpose of making impugned addition. However, such account cannot be said to be conclusive evidence against the appellant unless, the AO has allowed the opportunity to cross examine the concerned party as held in case of Amdaman Timber Works.(281 CTR 241) (SC) it is held as under:

17.3 However, the vital fact is this that no such opportunity was afforded to the assessee by the authorities below except providing the copy of the ledger and the information about the disclosure made by the search party before the settlement commission. To our understanding, it is the fundamental right of the assessee to have the opportunity of cross-examination to the party who stated to have received on money from the assessee as part of principles of natural justice. We also note that the coordinate bench of ITAT Indore in case of Smt Manorma Singhal vs. ITO bearing ITA No. 130/Ind/202 in identical facts and circumstances deleted the addition made by the AO merely on basis of material found during the search on the premises of third party with regard to on money paid against purchase of land without affording the opportunity of cross examination. The relevant finding of the ITAT Indore bench reads as under:

11. As regards the legal ground raised in ground no. 4 challenging the addition having been made without providing the opportunity of cross examination of the search parties to the assessee before making impugned addition. We find that the addition made by the Ld. Assessing Officer is solely based on the seized material found from the Garha Group & Apollo Group. The registered documents for the purchase of plot of land shows that the consideration is not less than the guidelines rate and both buyer and seller have agreed to this consideration. Assessee has seeked opportunity for cross examination of the searched person, during the proceedings before the Ld. CIT(A) and the same was ignored.

12. We, observe that such action of the Ld. Assessing Officer of making addition in the hands of assessee based on 3rd party statement/evidence cannot withstand unless proper opportunity of cross examination is provided to the assessee. For this proposition we find support from the judgment of Hon'ble Apex Court in the case of M/s Andaman Timber Industries Vs. CCE (supra) wherein Hon'ble Court held as under:

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 inasmuch 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.

Appellant has contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the adjudicating authority simply relied upon the priced list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the priced list itself could be the subject matter of cross-examination. Therefore, it was not for the adjudicating authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. Para7

If the testimony of these two witness is discredited, there was no material with the department of the basis of which it could justify its action as the statement of the aforesaid two witnesses was the only basis of issuing the show cause notice. Para8

Conclusion:

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 inasmuch as it amounted to violation of principles of natural justice"

13. Similar view was also taken by Hon'ble High Court of Rajasthan in the case of CIT vs. Smt. Sunita Dhadda (supra) wherein Hon'ble Court has considered the judgment of Hon'ble Supreme Court in the case of M/s Andaman timber Industries vs. CCE (supra) and confirmed the view taken by the Tribunal holding that "if the assessee is not provided any opportunity to cross examine the person who stated to have received 'on-money' is a violation of principles of natural justice. We, thus called for the deletion of addition so made by the Ld. Assessing Officer".

14. We, therefore, under the given facts and circumstances of the case, respectfully following the decisions referred hereinabove, are of the considered view in the instant case also assessee has not been provided any opportunity of cross examination of the parties who have stated to have received 'on-money' from sale of land. We, thus, set aside the finding of Ld. CIT(A) and delete the addition of Rs.36,46,175/- and allow ground no.4 raised by the assessee. Ground No.5 & 6 raised by the assessee becomes merely academic in nature as we have already deleted the addition allowing ground no.4 of the assessee. Ground no.7 is general in nature which needs no adjudication.

17.4 From the above, it is revealed that the opportunity of cross-examination was sine quo non before making any addition to the total income of the assessee based on the 3rd party information especially in the circumstances when the assessee time and again has demanded for such cross examination opportunity. Thus, in the absence of such cross-examination opportunity, to our understanding the addition

is not sustainable despite the fact that there are material evidence available before the AO which are against the assessee.

17.5 A question also arises whether the revenue should be directed to provide the opportunity of cross-examination at this stage. The answer stands in negative. In this regard, we draw support and guidance from order of Delhi Tribunal in the case the ACIT Vs. Sh. Subash Dabas in ITA No. 2399/Del/2016 vide order dated 25-11-2021 wherein it was held under:

In this regard we are of the opinion that the Revenue is not entitled to second inning, for correction of its own mistake. Assessee cannot be made to run again for many more years for contesting the litigation. Hon'ble Supreme Court also in the case of Parashuram Pottery Works Co. Ltd. v. ITO 106 ITR 1 observed that "It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted with the task of calculating and realising that price should familiarise themselves with the relevant CO No.222/Del/2016 provisions and become well-versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi judicial controversies as it must in other spheres of human activity, (emphasis supplied) In view of these peculiarity of the facts we are of the opinion that second inning cannot be granted to the revenue.

17.6 In view of the above and after considering the facts in totality, we set aside the finding of the learned CIT(A) and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

18. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the Court on 09/12/2022 at Ahmedabad.

**Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 09/12/2022
Manish