

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA No. 7196/Mum/2019 (A.Y. 2008-09)
ITA No. 7197/Mum/2019 (A.Y. 2012-13)

Jagmohan Singh Arora,
1301/1A, Green Acres CHS,
Lokhandwala Complex,
Andheri (West), Mumbai-400053.

PAN: AAAPA8788M

..... Appellant

Vs.

DCIT-1-(1)(2),
Room No. 209, Aayakar Bhavan,
M.K. Marg, Mumbai-400020.

..... Respondent

Appellant/Assessee by : Ms. Priyanka Jain, Adv.
Sh. Aakash Gupta, CA
Respondent/Revenue by : Sh. Vranda U Matkarni- Sr. DR
Date of hearing : 20/10/2022
Date of pronouncement : 25/11/2022

ORDER

PER GAGAN GOYAL, A.M:

These two appeals by assessee are directed against the common order of Commissioner of Income Tax (Appeals)-17, Mumbai [for short 'CIT (A)'] vide common order dated 23.09.2019 for Assessment Years (AY) 2008-09 & 2012-13 respectively. We shall first take up appeal of assessee for A.Y. 2008-09 as lead case. The assessee has raised similar grounds of appeal for both the AYs except variation of amounts in figures, which are as follows:

"1. On the facts and in the circumstance of the case and in law, the learned C.I.T.(A) erred in dismissing the appeal and that too without appreciating fully and properly, the facts of the case.

2. On the facts and in the circumstance of the case and in law, the re-opening proceeding initiated is invalid and bad in law and the learned C.I.T.(A) erred in upholding the same.

3. On the facts and in the circumstance of the case and in law, the assessment order passed u/s 143(3) r.w.s. 147 is invalid and bad in law and the learned C.I.T.(A) erred in upholding the same.

4. on the facts and in the circumstance of the case and in law, the learned C.I.T. (A) erred in upholding the addition made by the learned A.O. of Rs.50,00,000/- u/s 69 of the Act.

5. On the facts and in the circumstances of the case and in law, the learned C.I.T.(A) erred in not dealing with the ground of appeal No. 4 & 5 raised before him.

The appellant craves leave to add, alter, amend or delete any or all of the grounds of appeal." (Total tax effect Rs. 16, 99,500/-)

2. Brief facts of the case are that assessee e-filed his return of income dated 29.09.2008 declaring total income of Rs. 1,49,38,200/-. Assessee return was processed u/s 143(1). Thereafter a search operation was carried out at Swastik Group of Virar on 31.07.2014. During the search operation a data backup was retrieved and certain information containing assessee name was also found as tabulated below:

Date	Amount in cash	Amount recc. In cheque
23.09.2007	50,00,000	--
01.01.2011	--	2,00,00,000
04.01.2011	1,00,00,000	--
21.01.2011	1,00,00,000	--
02.02.2011	--	1,25,00,000
15.03.2011	40,00,000	--
26.11.2011	20,00,000	--

3. During this search proceeding, it was found that assessee has given certain cash loans as tabulated above and also received payments through cheque from Swastik Group. Based on this information found at the site of Swastik Group during search case of assessee, was reopened and a notice u/s 148 was issued to the assessee. In response to this notice assessee submitted that return filed originally may be treated as return file in response to notice u/s 148.

4. Thereafter, assessee demanded the relevant documents and statements on which AO is relying to proceed against the assessee. Documents demanded by the assessee were duly supplied along with reason to believe.

5. During the assessment proceedings documents required by the AO were duly supplied by the assessee. AO further enquired about the cash loan of Rs 50 Lacs given by the assessee to Swastik Group as the same is appearing in the document found during the search at Swastik Group. Based on these facts a notice u/s 148 was issued vide pg 19 of the paper -book no-1 dated 18-08-2021. Thereafter a notice u/s 142(1) dated 22-02-2016 u/s 142(1) was issued along with an annexure supplying reasons for reopening of the case u/s 148 vide pg no-29-31 of paper -book no-1.

6. Considering the material seized at the time of search u/s 132 at the site of Swastik Group and submission of the assessee, AO made an addition of Rs 50 lacs in the hands of the assessee u/s 69. Aggrieved with this order of AO assessee preferred an appeal before the Ld. CIT (A).

7. Ld. CIT(A) after considering all the grounds/ additional ground taken by the assessee confirmed the addition made by the AO vide Para 5.5 of the appeal order dated 23-09-2019.

8. Relevant extracts of findings of the order of the Ld. CIT (A) are reproduced below:

“5.5 Ground No.3: *This ground relates to the addition of Rs. 50, 00,000 u/s 69 as unexplained investments. The cash loan has been denied and the relevant seized document has been referred as invalid loose paper. It has also been submitted the presumption u/s 132(4A) is against the person in case of whom Search and Seizer was conducted.*

First of all, the appellant has not denied the cheque entry referred in the same page retrieved from the computer server of M/s Swastika Group. How can part of a retrieved paper is correct and other part of the same seized paper is incorrect. It is true that the presumption u/s. 132(4A) is against the person which has been subjected to Search and Seizer operation, however, the presumption u/s 292C (1) (i) it is clear that the content of such books of accounts and other documents are true. In other words, the presumption of correctness of content of the seized documents. Here in this case, the content of the seized paper clearly proofs that the appellant has given a loan of Rs.50, 00,000/-. The appellate has placed lot of emphasis on the word "loose paper. First of all the evidence under reference is a retrieved piece of evidence from the computer server of the person who was subjected to search and seizure operation u/s. 132 of the Act. As referred the said page also contains check entry which the appellate has not denied. The document has therefore to be either accepted as a whole or rejected. No cherry picking is allowed with different entries depending on once advantage. The retrieved paper seized in the Swastik Group is to be given effect as a whole and the related parties cannot be allowed to pick and choose those part of the seized documents which is favorable them. Either the entire document has to be considered or it has to be treated as dumb document which does not have any evidentiary value. In this case the document having cheque entry duly accepted by the appellate cannot be brushed aside as a dumb document. The Hon'ble Supreme Court in case of Indore Malwa United Mill Ltd. vs State of M.P 60 ITR 41 has held that a document has to be considered as a whole i.e. one part of the document cannot be relied upon and rest cannot be rejected. The argument with respect to categorization of seized document as or "loose paper" is also to be seen from the Judgement of Hon'ble Supreme court in case of Arun Muchhala [2017] 85 taxmann.com 306 (Bombay). The Hon'ble High Court has held that the addition cannot be deleted simply because it relates to entry on a loose sheet. In this case addition was challenged on the basis of argument that "loose paper cannot be

treated as books of account. Thus, the Hon'ble High Court has upheld the validity of so called "Loose Paper" which the assessee has tried to take benefit of, if the same can be proved to be genuine statement of account because of admitted cheque entry, the retrieved paper is very much creditable evidence.

Shri Deepak Purshotam Shah was the authorized person of Swastik Group and has deposed during search & seizure operation. When all these seized material were confronted, Mr. Mehta after having discussion with other members of the Group has candidly admitted the receipt of amounts in cash together with the check amount. Mr. Mehta has further admitted that the amount received by check has duly been accounted for in regular books of account, however, the cash element of the retrieved seized materials have not been shown in the regular books of account. Mr. Mehta on behalf of the Swastik Group has declared substantial unaccounted income on the basis of such cash entries reflected in the seized material including the material pertaining to the appellant The Hon'ble Delhi High Court in case of M/s Mahavir Woolen Mills vs. CIT 111 Taxmann 566 had occasion to examine certain slips containing details of payment, seized during the Search & Seizure operation. It was held that if any entry is not rebutted or contradicted than cash payment has to be added u/s. 69 of the Act. In this case the cash payment by the appellant as evidenced in other wise a genuine a piece of evidence in the form of seized material. The entry has been owned up by the receiver of the cash i.e. M/s Swastik Group.

In the background of above factual matrix, the arguments of the appellant is legally not tenable. Thus, the addition of Rs.50, 00,000/- as unexplained investment u/s 69 is upheld and grounds of appeal on this issue are dismissed."

9. We have gone through the order of the AO, copy of notice u/s 148, order of the Ld. CIT(A) and submissions of assessee. For fair and just adjudication of the matter, the whole chronology of the events needs to be considered. Based on facts on record applicable to the case chronology of the events are tabulated here-in-below:

- i. Search & Seizure operation conducted at the site of Swastik Group on 31.07.2014;
- ii. Statement of Shri Deepak Purushotamm Shah dated 02.08.2014;

- iii. Notice under section 148 issued to the assessee dated 26.03.2015;
- iv. Notice under section 142(1) along with reasons recorded dated 22.02.2016.

10. Keeping in view the above chronology of events, we are reproducing here-in-below the relevant extracts of the statement of Shri Deepak Purushotamm Shah based on which the proceedings of re-opening was initiated against the assessee as under vide Question No.16 of statement:

“Q.16 Please again peruse the seized documents referred above. These documents clearly reveal the names of the persons against whom these amounts are shown and the title of the excel spread sheet is, "loans." There are interest rates and amounts of interest and terms of payments of interest are also written/mentioned on these documents. Therefore, please explain as to why these should not be considered as cash loans.

*Ans.: we have perused the said documents very carefully. I say and state that the names of the persons appearing on these sheets are our close friends, business associates and relatives. We have accepted cheque loans from some of them which are reflected in the regular books of account. **Such names of the close friends/relatives and business associates were handy and easy to be Identified with the amounts which were shown as cash loans. Such names are used only in order to give a perfect semblance to these cash amounts belonging to us so that there should not be any doubts in the minds of employees/business associates about the ownership of such cash amounts.** Further, it must be 2014 mentioned that the interest rates and amounts are in correlation with the interest rates and amounts paid for cheque loans. **I again request you to consider such cash amounts as our undisclosed income and not our cash loans.**”*

11. From the above mentioned statement of Shri Deepak Purushotamm Shah dated 02.08.2014 it is very much apparent that whatever may be the cash entries found during the search operations at Swastik Group has already been surrendered and owned by them. Still instead of taking cognizance of this information in right perspective, AO chosen to issue notice under section 148 of

the Act. It is very much clear from the reasons for re-opening supplied to the assessee that these cash transactions found at the premises of Swastik Group was a sole reason of re-opening.

12. Reference of the same is there in the order of Ld. CIT(A) also vide page no.14, wherein he confirmed *“cash element of the retrieved seized materials have not been shown in the regular books of account. Mr. Mehta on behalf of the Swastik Group has declared substantial unaccounted income on the basis of such cash entries reflected in the seized material **including the material pertaining to the assessee.**”* Despite of this fact finding brought on record by Ld. CIT(A) himself still, he upheld the action of AO which is beyond our understanding. As the Swastik Group has already surrendered the cash transactions found at their premises, adding the same again in the case of other parties including assessee will tantamount to double taxation which is not permissible in law.

13. From the day one of the re-opening proceeding, assessee was in a denial mode which is further supported by the statement of Shri Deepak Purushotamm Shah and confirmed by Ld. CIT(A) also, we hold that the re-opening in the matter was done on wrong appreciation of facts, and the same lacks jurisdiction gained by the AO. In the light of the above, we allowed Ground No.1 to 3 of the appeal of assessee and held that initiation of proceeding, re-assessment and order of Ld. CIT(A) all are invalid and erroneous.

14. In the light of above, we direct the AO to delete the addition made under section 69 of the Act as the order itself was invalid and without jurisdiction. In the result, Ground No.4 raised by assessee is allowed.

15. Ground No.5 raised by assessee is consequential in nature and no separate adjudication is required.

ITA No. 7197/Mum/2019 (A.Y. 2012-13)

16. As the facts and figures for this appeal is similar to ITA No. 7196/Mum/2019 for A.Y. 2008-09, this appeal of assessee is also allowed *mutatis mutandis*.

17. **In the result, appeals filed by the assessee for both the A.Y. are allowed.**

Order pronounced in the open court on 25th day of November, 2022.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER
Mumbai, दिनांक / Dated: 25/11/2022
SK, Sr.PS

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी / The Appellant ,
2. प्रतिवादी / The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई / DR, ITAT, Mumbai
6. गार्ड फाइल / Guard file.

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BY ORDER,

(Dy. /Asstt. Registrar)
ITAT, Mumbai