

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER

ITA No. 120/Srt/2020 (Assessment Year: 2015-16)

(Physical hearing)

A.C.I.T., Circle-3(2), Surat.	Vs.	M/s Swastik Oil Company, Ward No. 14B, R.S. No. 89-90, Sahara Darwaja, Fudinawadi, Ring Road, Surat. PAN No. AAJFS 8414 K
Appellant/ assessee		Respondent/ revenue

Department represented by	Shri Ashok B Koli, (CIT-DR)
Assessee represented by	Shri Rasesh Shah, CA
Date of hearing	01/03/2023
Date of pronouncement	29/05/2023

Order under Section 254(1) of Income Tax Act

PER: PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by the revenue is directed against the order of learned Commissioner of Income Tax (Appeals)-3, Surat (in short, the Id. CIT(A) dated 13/02/2020 for the Assessment year 2015-16. The revenue has raised following grounds of appeal:

“(i) Whether on the facts and in law, the Id. CIT(A) was justified in deleting the addition of Rs. 10,84,00,000/- made by the AO by observing that there is no concrete evidence against the assessee, without appreciating the fact that the AO had made addition based on the documents impounded during the survey proceedings at M/s Mahotsav Creation Pvt. Ltd. on 09/09/2016 as also corroborative evidences such as statement recorded of payer of “On-money” viz Shri Narendra Lunkad, to the assessee.

(ii) Whether on the facts and in law, the Id. CIT(A) was justified in ignoring the fact while granting relief to the assessee that the payer of ‘On money’ have also approached the Income Tax Settlement

Commission for the settlement of the tax disputes on these unaccounted transactions?

(iii) On the basis of the facts and circumstances of the case, the Id. CIT(A) ought to have upheld the order of the Assessing Officer."

2. The assessee has also filed an application for admission of additional ground under Rule 27 of Income tax (Appellate Tribunal) Rules 1963. In the application the assessee has contended that they support the order of Id CIT(A) and request to consider their application while hearing the appeal. The assessee has raised following ground;

"On the facts and circumstances of the case as well as on the subject, the Id CIT(A) has erred in not entertaining the plea of the assessee that the addition could not be made as income from the project had been declared under IDS-2016."

3. Brief facts of the case are that the assessee is a company engaged in the business of construction and dealer of Indian Oil Corporation (IOC). The assessee filed its return of income for the A.Y. 2015-16 on 30/09/2015 declaring income of Rs. 3,89,53,910/-. The case of assessee was selected for scrutiny. During the assessment, the Assessing Officer noted that a survey action under Section 133A of the Income Tax Act, 1961 (in short, the Act) was carried out on the business premises of Mahotsav Creation Private Limited on 09/09/2016. During the survey, a certain documents impounded were seized and inventorised as Annexure-A1. At page No. 18 and 19 of Annexure-A1, there was detail of certain cash payment to Shrikant Gheewala, partner

of assessee. As per details on such impounded document, the purchaser Mahotsav Creation Private Limited made a cash payment of Rs. 13.84 crores to Shrikant Gheewala, partner of assessee. On the basis of such evidence, the Assessing Officer issued a detailed show cause notice to the assessee. The contents of show cause notice is recorded on page No. 2 to 8 of the assessment order. In the show cause notice, the Assessing Officer asked the assessee to explain as to why Rs. 13.84 crores should not be treated as unaccounted money. The Assessing Officer further noted that the assessee made declaration of Rs. 3.00 crores in the project Sakar Textile House and by giving set off of such declaration, asked the assessee to explain as to why Rs. 10.84 crores should not be treated as unaccounted income. The assessee filed its reply vide reply dated 26/12/2016. The contents of reply is recorded in para 5 of assessment order. The assessee in its reply, submitted that they have made disclosure under IDS-2016 which has been accepted by the Principal Commissioner of Income Tax (Pr. CIT), who issued Form-4, evidencing the fact that the disclosure has been accepted by the Pr. CIT which established that the disclosure is valid and has not been made by suppression of fact or misrepresentation. The assessee in without prejudice submission, submitted that the allegation in the show cause notice are denied and explained the fact that as per allegation, the documents found at

Mahotsav Creation Pvt. Ltd. shown the cash payment of Rs. 13.84 crores to seller of shops i.e. partner of assessee Shrikant Gheewala. The assessee denied all such claim/allegation. They are unaware of impounding of any document as referred in Annexure-A1 during the survey proceedings on M/s Mahotsav Creation Private Limited. The assessee submitted that neither their firm nor its partner have received any cash payment as alleged. The reference to Mr. Gheewala has no connection whatsoever with the assessee. The assessee also explained the code word "GC" means "Gupt code" having been claimed by one Shri Narendra Lunkad in his statement, the assessee submitted that neither the assessee nor any of its partner have any dealing with Shri Narendra Lunkad. Statement of Narendra Lunkad has no relevance. Copy of such statement is not provided to the assessee. The assessee asked for supply of full statement of Narendra Lunkad and submitted that the statement relied upon should be provided to the person against whom it is to be used otherwise it has no evidentiary value. The assessee also explained the page No. 18 and 19 of Annexure-A1 and submitted that it can be seen that there is no mention of word Gupta Code as claimed by Assessing Officer so they required cross examination of Shri Narendra Lunkad. The assessee also denied and explained other contents of show cause notice. On the request of assessee, summon under Section 131 of the Act was issued to Shri

Narendra Lunkad for his cross examination on 28/12/2017. The Assessing Officer recorded that Narendra Lunkad failed to appear in response to summon under Section 131 of the Act and the proceedings under Section 272 was recommended against him. The Assessing Officer further recorded that Dhimant Gheewala from assessee firm attended on 28/12/2017 and he was provided copy of statement of Shri Narendra Lunkad recorded during survey in Mahotsav Creation Private Ltd. The Assessing Officer also recorded that he is not bound to allow examination of purchaser Mahotsav Creation Private Limited as they are not the witness of his office. The Assessing Officer on the basis of report of survey proceedings, noted that the Directors of Mahotsav creation and his family members have purchases six shops in Sahakar Textile House constructed by assessee company and these persons have made unaccounted cash payment of Rs. 13.84 crores in F.Y. 2013-14, Rs. 11.01 crores in F.Y. 2014-15. Survey was carried out on the basis of specific information. Later on, the assessee made disclosure under IDS-2016 on 30/09/2016 of Rs. 3.00 crores as net income and cash from real estate project Sahakar Textile House and included income of Rs. 51.00 lacs for A.Y. 2016-16. On the basis of such observation, the Assessing Officer after giving set off of declaration under IDS of Rs. 3.00 crores made addition of Rs. 10.84

crores in the assessment order passed under Section 143(3) on 29/12/2017.

4. On appeal before the Id. CIT(A), the assessee filed detailed written submission vide submission dated 25/09/2018 and 11/02/2020. The submission of assessee is recorded in para 4 of order of Id. CIT(A). In sun and substance in the submission, the assessee stated that the documents on the basis of which the addition is made is not in the hand writing of the assessee nor found from the premises of the assessee. The addition is based on the documents find at the premises of third party. There is no statement recorded during the course of survey or in past survey proceedings that the assessee received on money on sale of shops to Mahotsav Group. The presumption of section 292C is only against the person from whom the documents are recovered and cannot be against the third party. The assessee sold the shops to the Mahotsav Group @ Rs, 62,500/- to 63, 800/- per square meter, which is more than the jantri rate prevailing at that time. The Jantri rate at that time was of Rs. 49,000/- per square meter. The assessee filed the details of all the units sold by the assessee, their size, name of purchaser, documents number of registration at registrar office with date of 5th February 2015 and the sale consideration. It was also stated that the assessing officer in his finding referred the name of Narendra Lunkad, but the assessee has not done any dealings with

Narendra Lunkad. Further cross examination of Narendra Lunkad was not allowed to the assessee. Even otherwise, statement recorded during course of survey has no evidentiary value. To support their various submissions, the assessee relied on various case laws including in CIT Vs Kadar Khan and Sons (2012) 254 CTR 228 and Andaman Timber Private Limited Vs Commissioner of Central Excise (2015) 62 taxmann.com and in CBI Vs V C Shukla (1998) 3 SCC 410.

5. The Id CIT(A) after considering the assessment order and submissions of the assessee deleted the entire additions by taking view that the documents which was the basis of addition was not recovered from the possession of assessee, the documents were recovered from Mahotsav Creation Private Limited. Such documents are the computer printout, which is not in the hand writings of anyone including of assessee. Further, the documents are not signed by the assessee. No statement was recorded either during the survey or post survey action which may have suggested that the paper related to payment of cash to the assessee, thus, it is dumb document so far as assessee is concern. The assessing officer in his order has mentioned the name of Shrikant Gheewala but there is no partner in assessee is such name. The assessee has two partner namely Dhimant Gheewala and Shriwas Gheewala. The Id CIT(A) by refereeing decision of Hon'ble Apex Court in V.C Shukla (supra) held that documents found at the third party

cannot be used against the assessee without corroborative evidence. The stand of the assessee is that Narendra Lunkad nowhere in his statement stated that cash was paid to assessee, such contention of the assessee is correct. Further, the assessee asked for cross examination of Narendra Lunkad, but not granted to the assessee. The Id CIT(A) further held that statement recorded during the survey has no evidentiary value even in case of assessee. In the statement there is no mention of cash payment to the assessee, thus, said statement is not against the assessee. The Id CIT(A) also held that assessee sold the unit / shops to Mahotsav group about 28% higher than the prevailing jantri rate. There is no concrete evidence against the assessee either on writing or oral which establish that the assessee received alleged money. On the basis of the above observation, the Id CIT(A) deleted the entire addition of Rs. 10.84 Crore. Aggrieved by the order of Id CIT(A) the revenue has filed present appeal against the assessee.

6. We have heard the submissions of learned Commissioner of Income-tax –departmental representative (CIT-DR) for the revenue and the learned authorised representative (Id AR) for the assessee and have gone through the orders of lower authorities carefully. The Id CIT-DR for the revenue supported the order of the assessing officer. The Id CIT-DR for the revenue submits that during survey action on the business premises of Mahotsav Creation Private Limited on 09/09/2016 certain

documents impounded were seized and inventorised as Annexure-A1. From page No. 18 and 19 of Annexure-A1, it was clear that there was detail of certain cash payment, partner of assessee about Rs.13.84 crores. On the basis of such evidence, the Assessing Officer issued a detailed show cause notice to the assessee, the assessee simply denied such receipt of on money. During the assessment the Assessing Officer find that the assessee made declaration of Rs. 3.00 crores in the project Sakar Textile House and by giving set off of such declaration, made addition of Rs. 10.84 crores. The Id CIT(A) allowed the relief to the assessee on the basis of the submissions of assessee that the addition is based on the evidence found at the third party premises and that assessee was not allowed cross examination of Narendra Lunkad. The Id CIT-DR for the revenue submit that there was clear and unambiguous evidence against the assessee about receiving on money on sale of unit/ shops to Mahotsav Creation Private Limited. The Id CIT-DR for the revenue prayed for restoring the order of assessing officer by reversing the order of Id CIT(A).

7. On the other hand, the Id AR of the assessee supported the order of Id CIT(A). The Id AR for the assessee submits that there is no direct evidence against the assessee about the receipt of unaccounted money/ on money. The Id CIT(A) in his order clearly held that documents which was the basis of addition was not recovered from the

possession of assessee, the documents were recovered from third party / Mahotsav Creation Private Limited. The impugned documents are the computer printout, which is not in the hand writings of anyone including of assessee and are not signed by the assessee. There is no direct statement either during the survey or post survey action which may have suggested that the paper related to payment of cash to the assessee. The assessing officer made addition on the basis of dumb document. The assessee sold the unit / shops to Mahotsav group about 28% higher than the prevailing market rate. The assessing officer has not made any independent investigation of facts and merely based his conclusion on alleged documents found at third party premises which cannot be basis of such evidence. The statement recorded during survey has no evidentiary value in absence of corroborative evidence. The Id AR for the assessee prayed for dismissal of the appeal. To support his application under Rule 27 of Income tax (Appellate Tribunal) Rules 1963, the Id AR for the assessee submits that no new facts are to be brought on record, all facts are emanating from the order of the lower authorities. To support his submission, the Id AR for the assessee filed a very long list of 24 cases, but mainly relied on the following case laws;

- CIT Vs Sunita Dhadha (2018) 100 taxmann.com 526 (SC),
- Common Cause Vs UOI (2017) 394 ITR 220 SC,

- Andaman Timber Industries Vs Commisioner of Central Excise (2015) 62 taxmann.com 3 SC,
 - CIT Vs Khader Khan Sons (2012) 25 taxmann.com 413 SC,
 - Kishan Chand Chellaram Vs CIT (1980) 125 ITR 713-SC,
 - ACIT Vs Lata Mangeshkar (1974) 97 ITR 696 (Bom),
 - Dhakeswari Cotton Mills Vs CIT (1954) 26 ITR 775 SC,
 - CIT Vs Inderjeet Singh Suri (33 taxmann.com 281) (Gujarat HC),
 - CCE Vs Cryptomet Limited (34 taxmann.com 249) (Gujarat HC),
 - Laxmanbhai S Patel Vs CIT (327 ITR 290 Gujarat HC),
 - CIT Vs Abhishek Corporation (Income Tax Reference No. 15 of 2003) dated 07.11.2014 and
 - PCIT Vs Manju Osatwal (2022) 139 taxmann.com 276 (Cal).
8. We have considered the rival submissions of the parties and also deliberated on the various case laws relied by the assessee. We find that the assessing officer made addition of Rs. 10.84 Crore by taking view that in the survey action on Mahotsav creation Private Limited, in the survey action a diary was seized as Annexure-A-1. On page No. 18-19 of Annexure A-1, there was certain date wise details of on money paid for purchasing the six shops at Sahakar Textile Market developed by the assessee. On page no. 18-19 name 'Gheewala' was written, on the basis of such word the name of partner of assessee was detected. As per the said documents Mahotsav Group paid 'on money' of Rs. 13.84 Crore to assessee for purchase of six shops/ units. The assessing officer also relied on the statement of Narendra Lunkad recorded during survey. The assessing officer held that on issuing show cause, the assessee denied about such cash transaction. The assessee also took

stand that they have declared Rs. 3.00 Crore in IDS-2016 for the impugned assessment year. The assessing officer by giving setoff of the income declared in IDS-2016 made addition of Rs. 10.84 Crore. We find that during the assessment, neither the statement of Narendra Lunkad was provided to the assessee, nor he attended the proceedings for his cross examination. The assessing officer also held that he is not under legal obligation to provide cross examination of Narendra Lunkad.

9. As recorded above that before Id CIT(A) the assessee filed detailed written submissions. On considering the submissions of the assessee Id CIT(A) held that documents which was the basis of addition was not recovered from the possession of assessee, the documents were recovered from Mahotsav Creation Private Limited, which is third party. The impugned documents are the computer printout, which is not in the hand writings of anyone including of assessee not signed by the assessee. There is no statement recorded either during the survey or post survey action, which may have suggested that the paper related to payment of cash to the assessee. The Id CIT(A) concluded that the documents are dumb documents so far as assessee is concern. The Id CIT(A) further held that the assessing officer in his order has mentioned the name of Shrikant Gheewala but there is no partner in assessee is such name, rather the assessee has two partner namely

Dhimant Gheewala and Shriwas Gheewala. The Id CIT(A) by refereeing decision of Hon'ble Apex Court in CBI Vs V.C Shukla (supra) held that documents found at the third party cannot be used against the assessee without corroborative evidence. Further, Narendra Lunkad nowhere in his statement stated that cash was paid to assessee. the Id CIT(A) also held that the assessee asked for cross examination of Narendra Lunkad, but not granted to the assessee. The statement recorded during the survey has no evidentiary against assessee. In the statement there is no mention of cash payment to the assessee, thus, said statement is not against the assessee. The Id CIT(A) categorically held that assessee sold the unit / shops to Mahotsav group about 28% higher than the prevailing jantri rate and there is no concrete evidence against the assessee either on writing or oral which establish that the assessee received alleged on money.

10. The Hon'ble Rajasthan High Court in CIT Vs Sunita Dandda (2018) 100 taxmann.com 525 (Raj) held that where the assessing officer made addition on account of on money on sale of land to a builder group relied on the statement of director and not allowed cross examination of the said director, there being violation of natural justice and the impugned addition is liable to be deleted. The Special Leave Petition of revenue is dismissed by Hon'ble Supreme Court.

11. The Hon'ble Apex Court in common cause Vs Union of India (supra) held that there must be some relevant and admissible evidence and some cogent reason which is prima facia reliable and that too, supported with some other circumstances pointing out that in particular third person against whom the allegation is made was involved in the matter or has done something during that period. In Andaman Timber Industries Vs CIT (supra) the Hon'ble Apex Court also held that when the statements of witness are made basis of demand, not allowing assessee cross examination of witness is a serious flaw which makes order nullity, as it amounts to violation of principles of natural justice. In Dhakeswari Cotton Mills Vs CIT (supra) it was held by Hon'ble Apex Court that though, the assessing officer is not fettered with technical rules of evidence and pleadings and he is entitled to act on material which may not be accepted as evidence on account of law, but in making assessment he is not entitled to make a pure guess and make assessment without reference to any material at all.
12. Further, Hon'ble Jurisdictional High Court in CIT Vs Interject Singh Suri (supra) also held that additions made on the basis of statements of persons who were not allowed to be cross examined by the assessee is not sustainable. In CIT Vs Lavanya Land (P) Ltd (supra) the jurisdictional High Court held that when entire decision was based on seized documents and there was no material to conclusively show that

huge amounts revealed from seized documents were actually transferred from one side to another, additions under section 69C were not sustainable. Thus, in view of the above factual and legal discussion, we find that the finding of the Id CIT(A) is based on sound legal reasoning, which we affirm. In the result, the grounds of appeal raised by the revenue are dismissed.

13. Considering the facts that we have affirmed the order of Id CIT(A) and dismissing the appeal of revenue therefore, admission and adjudication of additional grounds under Rule 27 of Income tax (Appellate Tribunal) Rule filed by the assessee, have become academic.

14. In the result, this appeal of the revenue is dismissed.

Order pronounced in the open court on 29th May, 2023 in open court.

Sd/-
(Dr. ARJUN LAL SAINI)
ACCOUNTANT MEMBER

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat, Dated: 29/05/2023

**Ranjan*

Copy to:

1. Assessee
2. Revenue
3. CIT(A)
4. CIT
5. DR
6. Guard File

By order

Sr. Private Secretary, ITAT, Surat