

IN THE INCOME TAX APPELLATE TRIBUNAL DELHI

(DELHI BENCH 'E' : NEW DELHI)

**BEFORE SH. G.S.PANNU, HON'BLE PRESIDENT
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No.5869/Del/2018
(Assessment Year : 2011-12)

Sh. Lalman Yadav Flat No. 401-402, Mahalaxmi CGHS Ltd., Sector-43, Gurgaon, Haryana-122001 PAN : AAZPY5305R	Vs.	ACIT, Central Circle-16 New Delhi
(APPELLANT)		(RESPONDENT)

ITA No.7061 /Del/2018
(Assessment Year : 2011-12)

ACIT, Central Circle-16 New Delhi	Vs.	Sh. Lalman Yadav Flat No. 401-402, Mahalaxmi CGHS Ltd., Sector-43, Gurgaon, Haryana-122001 PAN : AAZPY5305R
(APPELLANT)		(RESPONDENT)

Assessee by	Shri T.M.Shivakumar, Adv.
Revenue by	Shri N.C.Swain, CIT-DR

Date of hearing:	01.06.2023
Date of Pronouncement:	30.06.2023

ORDER

PER ANUBHAV SHARMA, JM:

The two appeals have been filed by the assessee & revenue against order dated 24 August, 2018 in appeal no. 10662/16-17 in assessment year 2011-12 passed by Commissioner of Income Tax (Appeals)-XXVI, New Delhi (hereinafter referred to as the First Appellate Authority in short 'Ld. F.A.A.') in regard to the appeal before it arising out of assessment order dated 31.12.2016 u/s 153(A)/ 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') passed by Assessing Officer ACIT, Central Circle-16, New Delhi (hereinafter referred to as the Assessing Officer 'AO').

2. Since the issue involved is common and the appeals were heard together so these are being disposed of by this consolidated order for the sake of convenience and brevity.

3. The facts in brief are pursuant to the warrant of authorization issued by the Director of Income Tax (Inv.)-II, New Delhi a search & Seizure operation u/s 132 of the Income Tax Act, 1961 was conducted on 20.01.2015 and on subsequent dates in different business and residential premises of Rathi Group of cases based at Delhi and National Capital Region (NCR). The case of the assessee was also found to be covered in the search. Various incriminating papers/documents were allegedly found and seized from the premises of the assessee. Accordingly, notice u/s 153A of the Income Tax Act, 1961 was issued on 21.03.2016 and served upon the assessee. In response to the notice u/s 153A of the Act, the assessee filed his return of income for A.Y. 2011-12 on 05.10.2016 declaring total income of

Rs. 36,19,184/-. During the relevant previous years the assessee claimed to have earned Income from house property & Income from business or profession. Statutory notices u/s 143(2) of the I.T.Act, 1961 and a questionnaire along with notice u/s 142(1) of the Act, dated 17.10.2016 were issued and served on the assessee fixing the date for compliance on 01.11.2016.

4. Thereafter based upon the submissions of the assessee the Ld. AO relied certain seized materials and made addition of Rs. 2,27,43,825/- on the basis of seized material Party H-6 inventory A-32/page 48 and an addition of Rs. 1,56,83,000/- on the basis of seized material Party H-6 inventory A-32/page 46. The Ld. CIT(A) had set aside addition of Rs. 1,56,83,000/- while the addition of Rs. 2,27,43,825/- was reduced to 55,60,825/- .

5. Now, the assessee is in appeal raising following grounds :-

“1. That the Ld. CIT(A) has erred in confirming the additions of Rs.55,60,825/- on the basis of documents found from the premises of the third party which was not corroborated or substantiated inspite of the fact that the department has used its longest arms against the assessee by conducting search at the premises of the assessee and could not found any iota or evidence corroborating the same thus, the same is liable to be deleted.

2. *Additional Grounds of Appeal:*

i. *THAT the assessment order framed under section 153A r.w.s. 143(3) of IT Act 1961 is invalid and non-est in the eyes of the Law having been framed on the basis of the alleged incriminating material found and seized during the search in the case of the ‘other person’ (Mr.Rajesh Bansal) and not based upon any material seized in the search conducted in the appellant’s case.*

ii. *THAT the Ld. AO erred in passing assessment order under section 153A instead of under section 153C of the Act as no incriminating material was neither seized nor made the basis for the instant additions in the assessment order and the assessment has been made on the basis of alleged incriminating material seized in the course of search conducted at the premises of Mr Rajesh Bansal.*

iii. *THAT the assessing officer having failed to comply with provisions of section 153C of the Act the impugned additions are not sustainable u/s 153 A of the Act.*

iv. *THAT in the facts and circumstances of the case the assessment framed under section 153A of the Act instead of u/s 153C of the Act is invalid and non-est in the eyes of the Law as held by this Hon'ble Tribunal in **Trilok Chand Choudhary vs ACIT in ITA No.5870/DEL/2017** as well as in **DCIT vs S.R.Credits Ltd. ITA No. 5216/D el/2 015 & CO. No.86/Del/2019.***

6. The revenue is in appeal raising following grounds :-

“1. Whether the Ld. CIT(A) has erred in facts and circumstances of the case in deleting the addition of rs. 1,71,83,000/- out of the addition Rs. 2,27,43,825/- made by AO on account of unexplained income.

2. Whether the Ld. CIT(A) has erred in facts and circumstances of the case in deleting the addition of Rs. 1,56,83,000/- made by AO on account of Unexplained expenditure.

3. The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.”

7. Heard and perused the record.

8. As with regard to the application for entertaining additional ground he relied judgment of Hon'ble Supreme Court of India in NTPC vs. CIT (1998) 229 ITR 383 (SC). At the outset considering the additional grounds arise out

of question of law touching the jurisdiction exercised. The same are allowed to be raised.

8.1 Further, on behalf of the assessee it was submitted that the impugned assessment was made without any incriminating material found during the search. It was also submitted that the impugned assessment has been drawn u/s 153A of the Act and not u/s 153C of the Act. Relying the judgment of Hon'ble Delhi High Court in **Pr.CIT vs. Meeta Gutgutial 395 ITR 526**. He submitted that invocation of Section 153A to reopen concluded assessment of assessment years earlier to year of search was not justified in absence of incriminating material found during. He also relied judgment of ITAT Delhi Bench in Trilok Chand Choudhary vs. ACIT in ITA No. 5870/Del./2017, DCIT vs. Shivali Mahajan in ITA no. 5585/Del/2015 and DCIT vs. M/s. S.R. credits Pvt. ltd. 5216/Del/2015 for stressing this proposition of law.

8.2 It was submitted that the statement of Rajesh Bansal whose premises was searched has been used and if his statement was considered to be gospel truth then he had made alleged confession of a partnership with assessee so against appellant as individual the assessment could not have been done u/s 153A and assessment should have been in the hands of AOP.

9. On the other hand Ld. DR submitted that as there was simultaneous action against the assessee and Rajesh Bansal, so there is no application of 153C. It was submitted that it is not a case where no incriminating material was found at all and the seized material was found directly connected with the undisclosed income. It was submitted that there was no justification to reduce the addition made by Ld. AO. It was submitted that Ld. AO had

rightly taken into consideration the documents while making addition of Rs. 1,56,83,000/- on account of unexplained expenditure.

10. Now taking up ground no. 2 of the appeal of Assessee, it can be seen that Ld. CIT(A) in its appellate order has observed categorically that no material against the assessee was found during the search which would corroborate document seized from the premises of Rajesh Bansal or corroborate his statement, to prove that the appellant made any cash payments as mentioned in alleged document seized material Party H-6 inventory A-32/Page 46, for deleting the addition of Rs. 1,56,83,000/-. However, with regard to other document Party H-6 inventory A-32/Page48 Ld. CIT(A) relied the document and its content too.

10.1 This Bench is of considered opinion that such act of approbation and reprobation at the same time in regard to admissibility and credibility evidences allegedly, said to be collected in the search, makes the impugned order of ld. CIT(A) not sustainable. If the Ld. CIT(A) was sure that in spite of search action carried out at the premises of assessee, nothing incriminating was found then the Ld. CIT(A) was also required to examine as to if the assessment could have been completed u/s 153A and not under 153C of the Act. It appears from the order of ld. AO while he mentioned in his order that various incriminating paper / documents were found and seized from the premises of the assessee as such he did not rely on the same for the purpose of assessment u/s 153A of the Act but relied papers exhibit page 46 and page 48, allegedly found from the premises of Rajesh Bansal.

11. Now, once Ld. AO and Ld. CIT(A) both mentioned in their respective orders of assessment and appellate order that the allegedly incriminatory

material was not recovered from the premises of assessee but from premises of Rajesh Bansal and same had no corroboration from any other source, then making assessment u/s 153A was beyond jurisdiction as assessment should have been under Section 153C of the Act. Only because they were alleged to be partners that does not change the status of assessee as “other person” for purpose of Section 153C as different from the “person searched” referred in Section 153A. That being so, the assessment order is void ab initio.

12. Even otherwise on merits, in regard to grounds no. 1 of Assessee and 1&2 of Revenue what can be observed from the matter on record is that the documents allegedly recovered from the premises of Sh Rajesh Bansal were not part of any books of accounts or other record kept in due course of business or to record transactions of regular nature. The well settled legal position is that a non speaking document or as called the dumb documents, without any corroborative material, evidence on record and finding that such document has materialized into transactions giving rise to income of the assessee which had not been disclosed in regular books of account by such assessee, has to be disregarded for the purposes of assessments to be framed pursuant to search and seizure action. It shall not be out of place to mention that the Hon’ble Supreme Court in the case of K.P. Varghese v. ITO [1981] 24 CTR (SC) 358/[1981] 131 ITR 597 (SC) held that the fictional receipt cannot be deemed to be a receipt in the absence of any cogent material to support the factum of actual receipt. The Hon’ble High Court of Delhi in case of Commissioner of Income-tax, Delhi (Central)-II v. D.K. Gupta [2008] 174 TAXMAN 476 (DELHI) upheld the order of the tribunal wherein it was held that Ad-Hoc/ Dumb Documents without any

corroborative evidence/finding that the alleged documents have materialized into transactions cannot be deemed to be the income of the assessee.

13. So the findings of Ld. CIT(A) that in present case these allegedly incriminating documents were not corroborated is factually correct. In this regard, the settled provision of law is also that presumption under section 132(4A) is only against the person in whose possession the search material is found and not against any other person. Further that the presumption is rebuttable and not conclusive and it cannot be applied in the absence of corroborative evidence. (Straptex India P Ltd. v Oy. CIT [2003] 84 ITO 320 (Mum).) In the case of Rama traders vs. First ITO [1998] 25 ITO 599 (Pat.) (TM) it was held that no addition could be made, on the basis of presumption raised by section 132(4A), in the hands of the assessee where in the books of another firm, certain figures were found showing the purchase made by the assessee. In Asst. CIT v Kishore Lal Balwani Rai [2007] 17 SOT 380 (Chd.), it has been held that though the diary seized enable the revenue to presume that its contents are true, such presumptions is available only against the person to whom it belongs and this is a rebuttable Presumption. The Hon'ble Delhi High Court in CIT V/s Harjeev Aggarwal (70 Taxmann.com 95; 10/03/2016) held that the statement recorded u/s 132(4) may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to sustain additions on the basis of recorded statement.

14. However, Ld CIT(A) seems to have erred in still relying one of the documents and that too to some part of it. The principle of approbate and

reprobate is based on the maxim “*allegans contraria non est audiendus*”, which means that when one utters statements contradictory to one another the same shall not be heard. It applies to parties in their pleading as well to courts sifting the evidence. In determining the question of threshold reliability, the Ld CIT(A) must have been mindful that evidence was presumptively inadmissible being uncorroborated in material particulars then it should have been completely discarded rather than relying some part of it to benefit of Revenue. Thus, Ld CIT (A) has fallen in error in confirming the additions of Rs.55,60,825/- while deleting the addition of Rs. 1,71,83,000/- out of the addition Rs. 2,27,43,825/- made by AO on account of unexplained income. Thus the ground no 1 raised by the Assessee also deserves to be sustained while ground no. 1 & 2 of Revenue’s appeal and determined against the Revenue.

15. Consequently there is no substance in the grounds of appeal of the Revenue and the same are decided against the Revenue and the appeal of Revenue is dismissed. As ground no. 1 and 2 of the assessee are allowed. The appeal of Assessee is allowed.

Order pronounced in the open court on 30th June, 2023.

Sd/-
(G.S.PANNU)
PRESIDENT

Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

Date:- 30.06.2023

Binita, SR.P.S

Copy forwarded to:

1. Appellant
2. Respondent

3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI