

आयकरअपीलीयअधिकरण,राजकोटन्यायपीठ,राजकोट।  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
RAJKOT BENCH, RAJKOT  
(THROUGH E-COURT)**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER  
And  
SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER**

आयकरअपीलसं./I.T.A. No.63/Rjt/2023  
(निर्धारणवर्ष / Assessment Year 2009-10)

Bhavish Hiralal Moradia M. N. Manvar & Co., Chartered Accountants, 504, Star Plaza, Nr. Circuit House, Phulchhab Chowk, Rajkot-360001	बनाम/ Vs.	Income Tax Officer, Ward-1(1)(3), Rajkot
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : ACHPM6171H		
(अपीलार्थी/ <b>Appellant</b> )		(प्रत्यर्थी / <b>Respondent</b> )

अपीलार्थीओरसे/ <b>Appellant by :</b>	Shri M. N. Manvar, A.R
प्रत्यर्थीकीओरसे/ <b>Respondent by:</b>	Shri K. L. Solanki, Sr. D.R.

सुनवाईकीतारीख/ <b>Date of Hearing</b>	19/07/2023
घोषणाकीतारीख / <b>Date of Pronouncement</b>	02/08/2023

आदेश / O R D E R

**PER WASEEM AHMED, ACCOUNTANT MEMBER:**

The captioned appeal has been filed at the instance of Assessee against the order of the Learned Commissioner of Income Tax, [Ld. CIT(A) in short], National Faceless Appeal Centre (in short "NFAC"), Delhi dated 14.02.2023 arising in the matter of assessment order passed under s.143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") relevant to the Assessment Year (A.Y.) 2009-10.

- 2 -

2. The assessee in the ground of appeal has challenged the initiation of the proceedings under Section 147 of the Act and the assessee also challenged the addition made by the Assessing Officer for Rs. 8,50,000/- on account of on-money paid to the builder.

3. The facts in brief are that the assessee in the present case is an individual and engaged in the business of manufacturing and trading of PSC sale. The assessee in the year under consideration has purchased a residential house from the builder namely Parijat Residency on the payment of Rs. 20,50,000/- as per the sale deed. However, the Assessing Officer was of the view that the assessee has made payment in cash for Rs. 8,50,000/- without recording the same in the books on account. Thus, as per the Assessing Officer the assessee has made the payment of on-money for the purchase of residential property for Rs. 8,50,000/- only. The opinion of the Assessing Officer was based on the affidavit furnished by Shri Rushabh Chandrakant Sheth partner of Parijat Residency which was furnished during search under Section 132 of the Act. However, the assessee also furnished the affidavit dated 01.10.2016 during the assessment proceedings contending that no payment of the on-money has been paid for the purchase of residential house from the impugned partnership firm. However, the Assessing Officer was not satisfied with the contention of the assessee and therefore, he made the addition to the total income of the assessee.

4. Aggrieved assessee preferred an appeal to the Ld. CIT(A). The assessee before the Ld. CIT(A) submitted that there was no material available with the Assessing Officer for making the addition of on-money of Rs. 8,50,000/- except the affidavit furnished by the partner of the builder (Parijat Residency). As per the assessee, there cannot be any addition merely based on the statement of the third party until and unless, there is also some corroborative material on record and that too without affording the opportunity of cross-examination. However, the Ld. CIT(A) was not satisfied with the contention of the assessee on the

- 3 -

reasoning that the assessee has not made any request for the cross-examination of the affidavit during the assessment proceedings. As such the assessee first time has raised the issue of cross-examination before the Ld. CIT(A). The Ld. CIT(A) further observed that the partner of Parijat Residency has clearly admitted having received on-money and denied availing the opportunity of cross-examination. Likewise, the assessee also remained silent for availing the opportunity of cross-examination during the assessment proceedings. Thus, the Ld. CIT(A) after considering all the facts was of the view that the assessee has made the payment of on-money and accordingly confirmed the addition made by the Assessing Officer.

5. Being aggrieved by the order of the Ld. CIT(A), the assessee is in appeal before us.

6. The Ld. AR submitted before us filed a Paper Book running from Pages 1 to 56 and contended that no addition can be made in the absence of any material on record.

6.1 On the other hand, the Ld. DR vehemently supported the order of the authorities below.

7. We have heard the rival contentions and perused the materials available on record. In the present case, the proceedings were initiated under Section 148 of the Act and not under the provisions of Section 153C of the Act. Thus, it is transparent that there was no document of incriminating nature found during the search proceedings at the premises of the builder being Parijat Residency. Otherwise, the proceedings under Section 153C could have been initiated by the Assessing Officer. However, the Assessing Officer has recorded the reasons to believe for the escape of income for Rs. 8,50,000/- on the basis of the affidavit furnished by the partner of the builder i.e. Parijat Residency. In simple words, the

- 4 -

entire thrust of the Revenue was based on the affidavit for the impugned addition which was not corroborated by any documentary evidence suggesting that the assessee has made payment by way of on-money in the purchase of the residential property. Now the controversy arises whether the addition can be made merely based on the affidavit of the third party. The answer is no. It is because the affidavit given by the third party cannot be used against the assessee without affording the opportunity of cross examination. It is equally important to note that the assessee has also furnished the affidavit dated 01.10.2016 stating that there was no investment of on-money in the purchase of residential property but the authorities below without pointing out any defect or infirmity in such affidavit of the assessee as relied on the affidavit of the third party for making the impugned addition. In our considered view, it was the onus upon the Revenue to disprove the affidavit furnished by the assessee based on cogent reasons. Had there been recovered any tangible material during the search, the Assessing Officer would have initiated the proceedings under Section 153C of the Act, but the situation establishes the fact that no material of incriminating nature was found during the search proceedings belonging to the assessee. Accordingly, the Assessing Officer initiated the proceedings under Section 147 of the Act in place of the provisions of Section 153C of the Act. It is the trite law that affidavit is written statement and a statement given by the third party cannot bind the assessee as held by the Hon'ble Bombay High court in the case of Aditi construction vs. DCIT reported in 454 ITR 456 where it was held as under:

*9. We find that the jurisdictional conditions for invoking section 147 - 148 are not satisfied as there is no failure to disclose material facts fully and truly. It is not in dispute that by the letter dated 11th September 2015 (Exhibit H) the Petitioner have submitted all the particulars along with supporting documents to the Respondent No. 1. Hence the reasons to believe and a presumption based on the statement of Shri Bhanwarlal Jain (a third party) in the course of a search, that the loans of the entities were bogus or accommodation entries was clearly dispelled. Moreover, the specific provisions of s. 153C would prevail over the general provisions of section 147 in the case of search on 3<sup>rd</sup> party.*

7.1 At the cost of repetition, it is also pertinent to note that the assessee also furnished counter affidavit before the AO but the AO on one hand relied upon the affidavit of third party but rejected the affidavit of assessee without assigning any

- 5 -

reason to it. The Hon'ble Gujarat High Court in the case of Glass Line Equipments Co. Ltd vs. CIT reported in 253 ITR 454 held it is not open for the revenue to rely upon part of the affidavit which is favorable to department and against the assessee. The relevant observation of the Hon'ble High Court reads as under:

*As laid down by the Supreme Court in the case of Mehta Parikh & Co. v. CIT [1956] 30 ITR 181, none of the authorities considered it necessary to cross-examine the deponent with reference to the statement made in the affidavit, and, hence, under these circumstances it was not open to the revenue to challenge the correctness of the statement made by the deponent in the affidavit. In other words, consequently, the assessee was entitled to assume that the authorities were satisfied with the affidavit as sufficient proof on this point.*

*In the present case it was found that the Commissioner (Appeals) while dealing with the affidavit, had conveniently chosen to accept only one part of the statement which was in favour of the revenue and against the assessee while ignoring the rest of the portion wherein specific averments were made in relation to the balance items of expenditure.*

*In view of the settled legal position, it was not open to either the Commissioner (Appeals) or the Tribunal to ignore a part of the contents of the affidavit. The findings recorded by the Commissioner (Appeals) and the Tribunal were concurrent as regards the facts and evidence on record and but for the averments made in the affidavit which had been ignored, the said findings would not have been interfered with.*

7.2 In view of the above and after considering the necessary facts, we are of the view that the addition made by the authorities below based on the third-party statement is not sustainable. Hence, we set-aside the finding of the Ld. CIT(A) and direct the Assessing Officer to delete the addition made by him. As, we have decided the issue in favour of the assessee on merit, we do not find any reason to interfere in Ground No. 1 challenging the validity of the initiation of the proceedings under Section 148 of the Act. As such the technical ground raised by the assessee becomes infructuous. Hence, the ground of appeal of the assessee is partly allowed.

8. In the result, the appeal of the assessee is partly allowed.

<b>This Order pronounced in Open Court on</b>	<b>02/08/2023</b>
---	-------------------

**Sd/-**  
**(T. R. SENTHIL KUMAR)**  
**JUDICIAL MEMBER**

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

**TRUE COPY**

Ahmedabad, Dated 02/08/2023  
Tanmay/Manish