

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE
BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 113/Ind/2020
Assessment Year: 2013-14

M/s. Mars Colonizer Private Limited, C/o Hotel Amit Regency, Saibaba Complex, Moti Bag Chowk, Raipur	बनाम/ Vs.	ACIT, Central-2, Bhopal
(Appellant/Assessee)		(Respondent/Revenue)
PAN: AAFCA 6847 B		
Assessee by	Shri Hitesh Chimnani and Shri Yash Kukreja, ARs	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	08.02.2024	
Date of Pronouncement	04.04.2024	

आदेश / ORDER

Per B.M. Biyani, A.M.:

Feeling aggrieved by appeal-order dated 26.08.2019 passed by learned Commissioner of Income-Tax (Appeals)-3, Bhopal ["CIT(A)"], which in turn arises out of assessment-order dated 30.03.2016 passed by learned ACIT-2, Bhopal ["AO"] u/s 143(3) of Income-tax Act, 1961 ["the Act"] for Assessment-Year ["AY"] 2013-14, the assessee has filed this appeal on following ground:

- "(1) *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering the 'loss' shown at Rs. 18,09,968/- as per revised computation submitted before the Id. AO on 22.2.2016*

during assessment proceedings, in place of 'total income' shown at Rs. 56,90,030/- as per original return filed on 23.03.2014, thus, retraction of involuntary surrender made on ad hoc basis of Rs. 75 lakhs on survey u/s 133A, is liable to be considered judiciously, more so, in absence of any corroborative evidence/material found/brought on record by the Id. AO."

2. The background facts leading to present appeal are such that the assessee is a company engaged in the business of real estate developers and contractors. A survey u/s 133A of the Act was conducted upon assessee-company on 30.11.2012 alongwith searches u/s 132 on 'Amrit Bindra Group of Bhopal' and 'Mahendra Ahuja Group of Raipur'. During survey, the statements of Shri Amit Ahuja, director of assessee, were recorded wherein Shri Amit Gupta made a surrender of income of Rs. 75,00,000/-. Thereafter, the assessee-company filed return of AY 2013-14 declaring a total income of Rs. 56,90,030/- inclusive of the surrendered income of Rs. 75,00,000/-. The case of assessee was then taken for scrutiny by statutory notices u/s 143(2)/142(1). During scrutiny-proceeding, vide letter dated 22.02.2016, the assessee retracted surrender and also filed a revised computation of total income excluding the additional income of Rs. 75,00,000/-, thus showing a loss of Rs. 18,09,968/-. While completing assessment u/s 143(3), the AO rejected assessee's retraction-cum-revised computation and went ahead with the total income of Rs. 56,90,030/- already declared in the return of income. The AO also made a disallowance of Rs. 50,03,764/- out of interest expenditure and determined total income at Rs. 1,06,93,794/-. Aggrieved, the assessee carried matter in first-appeal and challenged the AO's actions. Although the CIT(A) deleted the disallowance of Rs. 50,03,764/- made by AO

yet approved the AO's action of completing assessment on the basis of returned income of Rs. 56,90,030/-. In essence, the CIT(A) did not grant any relief *qua* assessee's claim of exclusion of surrendered income of Rs. 75,00,000/- rejected by AO. Therefore, the assessee continues to be aggrieved and for resolution of this solitary issue, has come in next appeal before us.

3. Ld. AR for assessee filed a Written-Synopsis of 6 Pages, a Paper-Book of 173 Pages ["PB"] and a Case-Law Paper-Book of 95 Pages ["CLPB"] and also made an extensive oral submission during hearing. Ld. DR for revenue also made oral submissions and filed copies of certain judicial rulings favouring revenue. We have peacefully heard them at length and considered their submissions.

4. Ld. AR for assessee/appellant started his arguments by carrying us to the statements of assessee's director, Shri Amit Ahuja, recorded by authorities wherein the surrender of Rs. 75,00,000/- was made, copy filed at Page 4-9 of PB. Ld. AR referred various questions raised by survey-authorities and replies given by assessee's director, more particularly Q.No.10 which reads as under:

"प्रश्न 10) आज दिनांक 30/11/12 को आपके व्यावसायिक परिसर में सर्वेक्षण की कार्यवाही के दौरान लेखा-पुस्तिकाओं एवं दस्तावेजों में कतिपय विसंगतियां पाई गई हैं, क्या आप इन्हें स्पष्ट कर सकते हैं ?

उत्तर- इस समय क्योंकि मेरे पास में न ही मेरा अकाउन्टेंट है या चार्टर्ड एकाउन्टेंट है तथा क्योंकि मुझे अकाउन्टन्ट्स रिलेटेड जानकारी पूर्व रूप से नहीं है इसलिए

मेरी स्थिति ऐसी नहीं है कि मैं आपको सारी जानकारियां तुरंत उपलब्ध करा सकूँ, परंतु अपनी मानसिक शांति एवं कतिपय भूलों/त्रुटियों को ध्यान में रखते हुए मैं 75 लाख रुपये का सरेंडर ऑफर करता हूँ तथा आपसे यह अनुरोध करता हूँ कि इस सरेंडर पर मेरे ऊपर किसी प्रकार की शास्ति आरोपित नहीं की जाए। उपरोक्त सरेंडर आय चालू वित्त वर्ष में मेरी कंपनी की नियमित आय के अतिरिक्त होगा। इस पर बनने वाले टैक्स के भुगतान हेतु मैं कोटक बैंक का चेक क्रमांक 002079 जो कि रु. 25 लाख का है प्रस्तुत करता हूँ। कृपया इसे स्वीकार करें।”

Reading above question and reply word by word in open court, Ld. AR submitted that there is no single ‘incriminating material’ pointed by authorities and the surrender has been obtained on the basis of a vague question/confession of कतिपय विसंगतियां/भूलों/त्रुटियों. Ld. AR submitted that in the very first sentence of his reply, Shri Amit Ahuja, clearly stated to authorities that he was not having accountant or chartered accountant at that time and he was not having knowledge relating to accounts, therefore he was not in a position to provide instant information and hence made surrender to secure mental peace and to avoid any type of penalty. Ld. AR submitted that the question raised by authorities and reply given by assessee’ director clearly demonstrates that it was an erroneous as well as involuntary surrender taken from assessee without recourse to any factual basis. He submitted that Shri Amit Ahuja was a young director of just 30 years at the relevant time and accepted surrender only to buy mental peace.

5. Then, Ld. AR carried us to a retraction-letter dated 22.02.2016 filed by assessee to AO during assessment-proceeding, copy at Page 11-13 of PB, scanned and re-produced below for an immediate reference:

M/s.Mars Colonizers Pvt Ltd
AY13-14

110/c

Before

The Asstt Commissioner of Income-tax, Central Circle-2,
Aayakar Bhawan, Hoshangabad Road,
Bhopal (MP)

Name of the assessee: **M/s.Mars Colonizers Pvt Ltd.,**
Hotel Amit Regency, Sai Baba Complex,
Motibagh Chowk, Raipur (CG)
AY13-14

Subject: **Retraction of income disclosed/offered for taxation in the return
filed on 23-3-14 in respect of the income surrendered on ad hoc basis
on survey conducted u/s133A on 30-11-12.**

Hon'ble Sir,

It is respectfully submitted that a survey operation u/s133A was conducted on 30-11-12 (i.e., AY13-14) at the office premises of the assessee-Co. This survey operation was actually simultaneously conducted along with a search action u/s132 conducted at Amrit Bindra Group, Bhopal as well as Mahendra Ahuja Group, Raipur on the same date.

In the course of survey proceedings, the survey team has impounded the loose papers/documents found at the office premises of the assessee-Co and those were marked as **LPS-1, Pg.No.1 to 59 (enclosed at Pg No.11 to 69....)** and **LPS-2 Pg.No.1 to 100 (enclosed at Pg No.70 to 169..)**. The survey operation was conducted due to the search action u/s132 conducted on M/s.Amrit Homes Pvt Ltd., Bhopal and Shri Mahendra Ahuja, Raipur (i.e., brother of director of the assessee-Co).

On the date of survey u/s133A, statement on oath was recorded by the survey team and pressure was built up by the survey team to convert the 'survey operation' into 'search operation' and to buy mental peace and to avoid litigation, the assessee-Co has surrendered Rs.75 lakhs on account of coercion made by the survey team as mentioned in the affidavit dt.1-2-16 (enclosed at Pg No. 4 to 7....). All the LPS impounded were duly reflected/ recorded in the regular books of account of the assessee-Co.

Thereafter, the IT case of the assessee-Co was centralized to Bhopal, with the case of Shri Mahendra Ahuja and the proceedings were started in Bhopal IT office. Due to the centralization, the assessee-Co has appointed its counsel in Bhopal and thereafter, in the guidance of the then counsel, the assessee filed its ROI on 23-3-14 vide ack.no.136287841230314, by declaring total income at Rs.56,90,030 in which it has offered Rs.75 lakhs as 'additional income' on the count of closing stock as per the guidance of the then counsel, because opinion of the then counsel was that the ROI has to be filed only on the basis of the surrender made in the statement recorded on oath on 30-11-12 on survey operations.

M/s.Mars Colonizers Pvt Ltd
AY13-14

At the time of filing return, in the guidance of the then counsel, the surrendered amount was shown as income of the assessee-Co in the books of account by passing one entry and shown it, in the trading & P&L account as “disclosure u/s133A” on the basis of the statement recorded on oath at survey operations, and enhanced the closing stock valuation of land from Rs.646.89 lakhs to Rs.721.89 lakhs.

As the assessee-Co had no undisclosed income on any count and the surrender was made under the pressure and coercion built up by the survey team and only to buy mental peace and to avoid litigation, the assessee-Co has surrendered the alleged amount of Rs.75 lakhs.

Since, the said surrender of income is not binding on the assessee-Co in the absence of any material/ evidence found at the premises of the assessee-Co, the alleged surrender of Rs.75 lakhs is now retracted. Giving effect to the retraction, the ‘revised computation of income’ is enclosed (at Pg No.).
8

Details of the loose papers found (LPS-1 & LPS-2) at the time of survey u/s133A on 30-11-12, their nature, transactions mentioned in these loose papers and other details and relevancy is as under:
Documents found from the office premises at Panchsheel Nagar, Raipur:

Annx.	Page Nos.	Explanation
LPS-1	1 & 2	It was mere proposed calculation of brokerage to be given to the various persons in respect of plots to be sold by such persons in future, but, it was not materialized.
	3 to 19	In Pg No.3 to 19, this is list of customers to whom the plots were sold of Phase-I and Phase-II, these are duly reflecting in the books of account of the assessee-Co in relevant AYs.
	20 to 26	In Pg No.20 to 26, this is list of customers to whom the plots were sold of Phase-I, these are duly reflecting in the books of account of the assessee-Co in relevant AYs.
	27 to 29	In Pg No.27 to 29, this is list of customers to whom the plots were sold of Phase-I, these are duly reflecting in the books of account of the assessee-Co in relevant AYs.
	30 & 31	In Pg No.30 & 31, this is details of plots at Mujgahan Khar Phase-I.
	32 to 36	List of customer of to whom the plots at Phase-II Seoni was sold.
	37 to 42	Rough calculation of interest, not related to the assessee-Co.
	43 to 48	Proposed/ estimated balance sheet and P&L account of Mars Realtech (India) Pvt Ltd., in which the assessee-Co has made investment.
	49	Proposal from DLF bank.
	50 to 59	It is duly recorded in the books of account of the relevant period.
LPS-2	1 to 3	This is ‘draft document’ is actually terms and conditions of Easy day store, to

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		be finalized between Bharti Retail and a land owner.
4 to 6		This is 'draft document' made for obtaining NOC as to be required in future.
7 to 9		This is 'draft document' is actually terms and conditions of Easy day store, to be finalized between Bharti Retail and a land owner.
10 to 26		Copy of registered deed (sale deed) of plot No.224 sold to Abhiram Awasthi on 20-6-11, which is duly entered in the books of account of AY12-13 under the head sales of plot of Rs.78.40 lakhs. Copy of ledger account is enclosed (at Pg No.....9.....).
27 to 47		Copy of registered deed (sale deed) of plot No.36 sold to Sanjay Shamkuvar on 25-8-11, which is duly entered in the books of account of AY12-13 under the head sales of plot of Rs.78.40 lakhs. Copy of ledger account is enclosed (at Pg No....9.....).
48 to 62		Copy of registered deed (sale deed) of plot No.76 sold to Meenu lunkad on 1-8-11, which is duly entered in the books of account of AY12-13 under the head sales of plot of Rs.78.40 lakhs. Copy of ledger account is enclosed (at Pg No.....9.....).
63 to 81		Copy of registered deed (sale deed) of plot No.56 sold to Rajeev Giri on 10-10-11, which is duly entered in the books of account of AY12-13 under the head sales of plot of Rs.78.40 lakhs. Copy of ledger account is enclosed (at Pg No.....9.....).
82 to 99		Copy of registered deed (sale deed) of plot No.142 Phase-II sold to Smt.Sarita Sharma on 16-5-12, which is duly entered in the books of account of AY13-14 under the head sales of land of Rs.68 lakhs. Copy of ledger account is enclosed (at Pg No....!0.....).
100		Index of the papers containing in page no.10 to 99.

Kindly consider the above submissions and explanation given by the assessee-Co and do the needful and obliged.

Submitted for judicious consideration
Yours faithfully,

CA Sunil Kumar Agrawal
(Counsel for the assessee-Co)

Marscolonizers Pvt Ltd

Director

6. Ld. AR contended that in the above letter, which is very much self-explanatory, the assessee made a complete submission to AO. It was submitted to AO that the return of income including additional income of Rs. 75,00,000/- was filed under the advice of erstwhile counsel of Bhopal since the case of assessee was also centralized in the Bhopal office of Income-tax Department alongwith cases of searched groups. The counsel suggested that the return of income has to be filed on the basis of the surrender made in statements. But subsequently, the assessee engaged a different counsel, Shri Sunil Kumar Agarwal, from Raipur. The new counsel wanted to examine the documents impounded during survey. Therefore, on behalf of assessee, this new counsel himself filed an application dated 05.01.2016 to the AO requesting for supply of impounded documents and statements, copy of application is filed at Page 10 of PB. Thereafter, upon examination of documents and statements supplied by AO, the new counsel found that there was no discrepancy and the surrender was without any factual foundation. Then, the retraction-letter dated 22.02.2016 was filed to AO mentioning *inter alia* (i) that the survey was conducted upon assessee alongwith simultaneous searches on Amrit Bindra Group and Mahendra Ahuja Group and there was a pressure by survey-team to convert survey into search, therefore the assessee had to make surrender to buy peace, (ii) that the surrendered income was offered in the return of income under the advice of consultant of Bhopal by passing a journal entry in accounts and increasing stock of business from Rs. 646.89 lakhs to Rs. 721.89 lakhs, (iii)

a detailed explanation of all pages of impounded documents i.e. LPS-1 (Page 1 to 59) and LPS-2 (Page 1 to 100) was filed in a tabular format. Further, a detailed affidavit of Shri Amit Ahuja on stamp of Rs. 50/- duly solemnized and notarized was also filed alongwith retraction-letter, copy of affidavit is filed at Page 16-19 of PB. The assessee also filed a revised computation of total income to AO after excluding the additional income of Rs. 75,00,000/- wrongly offered in the return.

7. Ld. AR submitted that the assessee has filed full explanation of impounded documents being LPS-1 (Page 1 to 59) and LPS-2 (Page 1 to 100) in a tabular format on Page No. 2 and 3 of aforesaid letter dated 22.02.2016. He submitted that a careful reading of assessee's explanation clearly shows that there was nothing 'incriminating' in impounded documents. In the explanation so filed, the assessee has also mentioned at concerned places that the transactions reflected by documents pertained to earlier years which had already been recorded in the books of account of relevant years. Ld. AR also drew our attention to Page No. 20-173 of PB where the assessee has filed the copies of all impounded documents. Referring to same, Ld. AR showed that only Page No. 50-57 of LPS-1 (filed at Page 68-74 of PB) and Page No. 82 to 89 of LPS-2 (filed at Page 159-173 of PB) were the documents pertaining to financial year 2012-13 relevant to AY 2013-14 under consideration, all other documents are either undated or relate to earlier AYs 2009-10 to 2012-13. So far as the documents of AY 2013-14 under consideration are concerned, Ld. AR submitted that Page No. 50-57 of LPS-1

are the copies of a register maintained by assessee wherein the details of registered-deeds handed over to the buyers were maintained and signatures of buyers were taken as acknowledgement. Further, the Page No. 82 to 89 of LPS-2 are the copies of certain registered-deeds executed between assessee and buyers. The transactions relating to these registered-deeds are already recorded in assessee's books. Ld. AR questioned as to how these documents are 'incriminating material' and how they reveal any kind of unaccounted income? In nutshell, Ld. AR contended that there is no incriminating material whatsoever in the impounded documents for AY 2013-14 under consideration.

8. Ld. AR summed up above submissions thus: (i) that the surrender was made without any factual basis and it was involuntary and under forced circumstances, (ii) that there is no single document in LPS-1 and LPS-2 which can be said to be 'incriminating'. Even the AO has nowhere in assessment-order mentioned any kind of incriminating material, (iii) that all documents except Page No. 50-57 of LPS-1 and Page No. 82 to 89 of LPS-2 were not at all related to AY 2013-14 under consideration. Therefore, the assessee made an authentic retraction and filed a revised computation excluding the income of Rs. 75,00,000/-.

9. Having said thus, Ld. AR submitted that it is the duty of AO to examine correct facts and then assess correct income as per law; the AO cannot simply create estoppel by statements or take advantage of innocence of assessee and assess income which was not there. To support this

proposition, Ld. AR heavily relied upon following observations in ***Madan Lal Mohan Lal Sakhala Vs. Addl. Cit (2023) 154 taxmann.com 178 (Mumbai – Trib)*** as also the ***CBDT Circular No. 14/XL-35 dated 11/04/1955*** considered in these observations:

“4. We have heard both the parties and perused the records. It is not in dispute that the assessee has declared income of Rs.2,39,12,917/- which included capital gains of Rs.34,16,728/- which assessee has offered for taxation on sale of land. In the computation of income filed before the AO (a copy of which has been filed before us), it is discerned from perusal of page no. 4 of PB that the assessee had shown LTCG on sale of property [described therein as Agricultural Land] of land at Igatpuri dated 18.06.2009 which assessee has purchased on 09.11.2004 of Rs.28,05,017/- and net of sale at Rs.71,10,000/-. After indexation etc, the assessee has shown taxable @ 20% (LTCG) of Rs.34,16,728/-. And the AO after calling for the relevant documents in respect of sale of land has accepted the offer of tax from the assessee and accepted the return of income as returned by assessee. According to the assessee, he was on the bonafide belief that the sale of agricultural land would attract capital gain tax. However, only in year 2015 (on advice by Tax Consultant) that agricultural land if situated in the specified area as per Act are outside the purview of capital assets and so exempt from the levy of tax. In the light of the expert opinion, he had filed the appeal before the First Appellate Authority and due to which appeal couldn't be filed in time and thus delay happened for 790 days for filing of appeal. According to the Ld. AR, the Ld. CIT(A) erred in not admitting the appeal of the assessee because not filing of appeal was not intentional/deliberate. According to the Ld. AR, merely because the assessee has offered LTCG on sale of agricultural land, the AO after examination of documents ought not to have levied tax even if due to ignorance assessee has offered it for tax.

5. Drawing our attention to the Article 265 Constitution of India which reads as under: -

“No tax shall be levied or collected except by authority of law.”

6. Therefore, according to the Ld. AR, when the Constitution of India prohibits AO to impose the tax without authority of law and even if due to mis-conception of law if an assessee offers tax, then it should not have been brought to tax because Article 265 of the Constitution prohibits such an action. The Ld. AR also cited the CBDT Circular No. 14/XL-35 dated 11/04/1955 wherein it has been clarified that AO was duty bound to inform the assessee benefit available as per law and allow the same while computing the assessable income and the department should not take advantage of assessee's ignorance to collect more tax. And cited the decision of the Hon'ble Bombay High Court in the case of *Nirmala L. Mehta Vs. CIT (269 ITR 1)*

wherein the Hon'ble High Court held that merely because income was inadvertently offered to tax, it no way take away the right of the assessee to contest the action of tax authority that the said income was not chargeable to tax. It would be gainful to reproduce the observation the Hon'ble High Court wherein it was held as under: -

"The problem arose because the petitioner in her return for the assessment year 1988-89 filed on June 30, 1988, offered the prize money of the lottery to tax rather a fundamental error of law on the part of the assessee, but that error of law once detected by the petitioner, it was urged before the Commissioner of Income-tax that the prize money earned by the petitioner could not be taxed under the Income-tax Act, 1961. It is true that it was at a later stage that such contention was raised by the petitioner, but the said contention was a pure question of law and the Commissioner of Income-tax ought to have considered the said contention on its merits and ought not to have declined to entertain it on the ground of delay. There cannot be any estoppel against the statute, Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law."

*4.18 As per Article 265 of the Constitution of India, which reads as: -
"no tax shall be levied or collected except by authority of law."*

7. In the light of the aforesaid facts and circumstances and in the light of judicial precedents cited (supra), he pleaded that the issue regarding tax/LTCG offered by assessee to the tune of Rs.34,16,728/- on account of sale of agricultural land may be examined de novo as to whether the same is taxable or not.

8. Per contra, Ld. CIT-DR, submitted that no fault can be attributable to the Ld. CIT(A) in dismissing the appeal of the assessee. Since there was inordinate delay in filing of appeal (790 days) and the issue on which assessee claim relief is not emanating from the assessment order, according to him, the Ld. CIT(A) has rightly dismissed the appeal. So she does not want us to interfere with the order of the Ld. CIT(A).

9. In the light of the facts and circumstances taken note (supra), we note that the assessee has offered LTCG on sale of Agricultural land situated at Igatpuri LTCG of Rs.34,16,728/-. According to assessee, he was of the bonafide impression that the gain arising from such transaction was taxable; and after realizing mistake in year 2015, he has filed the appeal before Ld. CIT(A) and in that process couldn't file the appeal within the limitation time and delay occurred of 790 days for filing of appeal; and the Ld. CIT(A) has dismissed the appeal in limine without admitting the appeal as discussed (supra). Since Article 265 of the Constitution of India prohibit tax to be

collected without authority of law, the assessee's ignorance cannot be a ground to refuse examination of the claim made by the assessee. Even though, inadvertently assessee offered the LTCG on sale of land, he ought to have been allowed to urge the claim before the Ld. CIT(A) because there is no estoppel against law; and the Article 265 of the Constitution prohibits tax authority to collect tax without authority of law. Therefore, in the interest of justice and fair play, we set aside the impugned order of the Ld. CIT(A) and admit this issue in respect of sale of land at Igatpuri on which assessee has offered LTCG to the tune of Rs.34,16,728/- which assessee is now claiming to be exempt from taxation being agricultural land. We note that the issue raised before us is a mixed question fact and law which need to be adjudicated on the basis of relevant material/documents as to whether the assessee's asset qualify to be agricultural land to claim the exemption or not. Since this issue has not been examined by the AO and Assessee didn't get an opportunity to make such a claim during assessment stage, we rely on the decision of the Hon'ble Supreme Court in the case of Tin Box Company Vs. CIT (249 ITR 216) (SC) though in the context that if the assessee has not been granted proper opportunity before the AO, then it should be restored back to the AO for de novo assessment. However, the ratio can be applied in this case, and the Hon'ble Supreme Court held in the case of Tin Box Company (supra) has held as under:

"It is unnecessary to go into great detail in these matters for there is a statement in the order of the Tribunal, the fact-finding authority, that reads thus:

"We will straightway agree with the assessee's submission that the ITO had not given to the assessee proper opportunity of being heard." That the assessee could have placed evidence before the first appellate authority or before the Tribunal is really of no consequence for it is the assessment order that counts. That order must be made after the assessee has been given a reasonable opportunity of setting out his case. We, therefore, do not agree with the Tribunal and the High Court that it was not necessary to set aside the order of assessment and remand the matter to the assessing authority for fresh assessment after giving to the assessee a proper opportunity of being heard.

2. Two questions were placed before the High Court, of which the second question is not pressed. The first question reads thus:

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in not setting aside the assessment order in spite of a finding arrived at by it that the Income-tax Officer had not given a proper opportunity of hearing to the assessee?"

In our opinion, there can only be one answer to this question which is inherent in the question itself: in the negative and in favour of the assessee.

3. The appeals are allowed. The order under challenge is set aside. The assessment orders, that of the Commissioner (Appeals) and of the Tribunal are also set aside. The matter shall now be remanded to the assessing authority for fresh consideration, as afore stated. No order as to costs."

10. Since we have found in the present case AO didn't examine the issue since assessee himself offered tax (LTCG) on sale of land and the assessment need to be made by AO which matters, therefore this issue is admitted by us and the same is restored back to the AO for the limited purpose of examining the claim of assessee as discussed (supra). Therefore, we set aside the impugned order of the Ld. CIT(A) and remand the issue of sale of land at Igatpuri back to the file of the AO and direct the AO to examine this issue de-novo after hearing the assessee in accordance to law. The assessee is at liberty to file documents/material/written submission before the AO to substantiate its claim of agricultural land and exempt income on sale of it and AO to pass order in accordance to law."

10. Finally, Ld. AR made a strong prayer that in the light of aforesaid decision, the income of Rs. 75,00,000/- wrongly assessed by AO merely on the basis of statement of assessee and without any factual basis, deserves to be excluded from assessment. Ld. AR requested to delete the addition made/sustained by lower-authorities to meet the ends of law and justice.

11. Per contra, Ld. DR for revenue made following contentions:

- (i) The AO has noted on Page 6 of assessment-order that the assessee's director has made voluntary surrender during survey and also given cheque of Rs. 25 lakh for payment of tax. This shows that the surrender is voluntary and there is no coercion or duress exercised by survey-team.
- (ii) The assessee has voluntarily filed return and declared additional income therein. The blame on erstwhile counsel is a self-made story of assessee.

- (iii) The retraction is after-thought. Further, the retraction-letter had been filed on 22.02.2016 after 3 years of survey and just before 1 month of assessment getting time-barred. It is a settled judicial view that retraction has to be within a reasonable time. Hence, retraction filed by assessee cannot be accepted.
- (iv) The AO has clearly noted on Page 6 of assessment-order that there were incriminating documents but it is not possible for survey-officer to find every detail of discrepancy. Therefore, the survey officials required the assessee to explain the discrepancies but the assessee himself chose to make surrender instead of explaining discrepancies to officials.
- (v) The AO has rightly noted on Page 7-8 of assessment-order that the statement recorded u/s 133A itself is a piece of evidence and the admission/surrender made therein has to be taken as correct.

12. Ld. DR also relied upon certain decisions and filed a written-note. His thrust of argument, supported by following decisions, is such that the retraction made after 2-3 years of surrender is not acceptable or the retraction cannot make the statement unacceptable:

- (i) PCIT Vs. Avinash Kumar Setia (2017) 81 Taxmann.com 476 (Delhi HC)
- (ii) Navdeep Dhingra Vs. CIT (2015) 56 Taxmann.com 75 (P&H HC)

- (iii) Sanjeev Agarwal Vs. ITSC (2015) 56 Taxmann.com 214 (Allahabad HC)
- (iv) Rajhans Towers (P) Ltd. Vs. CIT (2015) 56 Taxmann.com 67 (Delhi HC)
- (v) Bhagirath Aggarwal Vs. CIT (2013) 31 Taxmann.com 274 (Delhi)
- (vi) Bannalal Jat Constructions (P) Ltd. Vs. ACIT (2019) 106 Taxmann.com 128 (SC)
- (vii) Roshan Lal Sanchiti Vs. PCIT (2023) 150 Taxmann.com 228 (SC)
- (viii) Thiru A.J. Ramesh Kumar Vs. DCIT (2022) 139 Taxmann.com 190 (Madras HC)
- (ix) CIT Vs. MAC Public Trust (2022) 144 Taxmann.com 54 (Madras HC)

13. In rejoinder, Ld. AR made following submissions:

- (i) That the AO issued first-query letter u/s 142(1) dated 17.12.2015 fixing the hearing on 04.01.2016. This fact is clearly borne out of the first para of assessment-order itself. The assessee immediately consulted the new counsel and the new counsel filed application dated 05.01.2016, as discussed earlier, to AO for providing documents and statements. Thereafter, the retraction was made on 22.02.2016. These facts cannot be disputed by anybody. Thus, there is no delay on the part of assessee and even if it is construed as delay, there is a reason that the assessee was not having impounded documents or statements to make any analysis.

- (ii) That the letter dated 22.02.2016 is not a simple retraction. The assessee has also given full explanation *qua* all pages of impounded documents.
- (iii) That majority of the judicial decisions relied by Ld. DR are related to searches u/s 132 whereas the assessee' case involved a survey. It is accepted in several decisions that the statements made during survey are not sacrosanct.

14. We have considered rival submissions of both sides and perused the orders of lower-authorities as also the documents held on record in the light of judicial rulings relied upon by parties. At first, we find that during survey the statement of assessee's director were recorded wherein he made a surrender of income of Rs. 75,00,000/- and in the return of income filed after survey, the assessee included additional income of Rs. 75,00,000/- by passing a journal entry increasing the value of closing stock from Rs. 646.89 lakhs to Rs. 721.89 lakhs. However, during assessment-proceeding, the assessee filed a revised computation of total income excluding the income of Rs. 75,00,000/- after re-consultation from another counsel who filed re-traction letter on behalf of assessee alongwith affidavit of assessee, after examination of impounded documents and statements. In the letter so filed, the assessee also submitted a detailed explanation on all pages of impounded documents to show that there was nothing incriminating. During hearing before us also, Ld. AR for assessee has referred contents of impounded papers and successfully showed a vital point that majority of

papers do not belong to AY 2013-14 under consideration and it is only that Page No. 50-57 of LPS-1 and Page No. 82 to 89 of LPS-2 bear the dates falling in financial year 2012-13 relevant to AY 2013-14 under consideration. Therefore, all other documents have no relevance to AY 2013-14 under consideration. So far as the Page No. 50-57 of LPS-1 is concerned, they are the copies of a register maintained by assessee containing the details of registered-deeds handed over to the buyers. Further, the Page No. 82 to 89 of LPS-2 are the copies of registered-deeds executed between assessee and buyers. These documents are not incriminating documents. Thus, we find that there is no incriminating document relevant to AY 2013-14 under consideration. Even in the assessment-order also, the AO has not referred any incriminating material. The AO has made addition only on the basis of surrender having been made by assessee's director. From perusal of Q.No. 10 and reply o of statements, as re-produced earlier, one can easily find that there is no incriminating material referred therein. The surrender was taken/made on a generalized or vague questioning of कतिपय विसंगतियां/भूलों/त्रुटियों. Even during hearing before us, Ld. DR for revenue is not able to pinpoint any incriminating material having been discovered by authorities. Ld. DR is only harping on the surrender made by assessee's director and relying upon the orders of lower-authorities ignoring the crucial fact that there is no basis or material to sustain the taxability of surrendered income. Therefore, the case of assessee is fully covered by *Madan Lal Mohan Lal Sakhala (supra)* wherein, taking note of Article 265

of the Constitution and CBDT Circular No. 14/XL-35 dated 11/04/1955, it was accepted thus:

"9.....Since Article 265 of the Constitution of India prohibit tax to be collected without authority of law, the assessee's ignorance cannot be a ground to refuse examination of the claim made by the assessee. Even though, inadvertently assessee offered the LTCG on sale of land, he ought to have been allowed to urge the claim before the Ld. CIT(A) because there is no estoppel against law; and the Article 265 of the Constitution prohibits tax authority to collect tax without authority of law. Therefore, in the interest of justice and fair play, we set aside the impugned order of the Ld. CIT(A) and admit this issue in respect of sale of land at Igatpuri on which assessee has offered LTCG to the tune of Rs.34,16,728/- which assessee is now claiming to be exempt from taxation being agricultural land."

15. For immediate reference, we extract below the relevant portion of Circular No. 14/XL-35 dated 11/04/1955 reading as under:

Central Board of Direct Taxes
Circular No. 14 (XL-35)

Miscellaneous—Refund and reliefs due to assesseees —
Departmental attitude towards

Dated: 11/04/1955

The Board have issued instructions from time to time in regard to the attitude which the Officers of the Department should adopt in dealing with assesseees in matters affecting their interest and convenience. It appears that these instructions are not being uniformly followed.

2. Complaints are still being received that while ITO's are prompt in making assessments likely to result into demands and in effecting their recovery, they are lethargic and indifferent in granting refunds and giving reliefs due to assesseees under the Act. Dilatoriness or indifference in dealing with refund claims (either under s. 48 or due to appellate, revisional, etc., orders) must be completely avoided so that the public may feel that the Government are actually prompt and careful in the matter of collecting taxes and granting refunds and giving reliefs.

3. Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a taxpayer where proceedings or other

particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the Department for it would inspire confidence in him that he may be sure of getting a square deal from the Department. Although, therefore, the responsibility for claiming refunds and reliefs rests with assessees on whom it is imposed by law, officers should :—

(a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other;

(b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs."

16. Therefore, in the light of decision in ***Madan Lal Mohan Lal Sakhala (supra)***, we are inclined to accept assessee's claim that the income of Rs. 75,00,000/- surrendered during survey but having no factual basis cannot be taxed by revenue authorities even if the same had been wrongly offered by assessee in return. In that view of matter, we direct the AO to modify assessment-order and exclude the impugned income from taxation. The assessee's ground is allowed.

17. Before parting we would like to make an important mention. As noted earlier, the assessee has accounted impugned income by passing a journal entry of Rs. 75,00,000/- in books of account whereby the closing-stock of AY 2013-14 had been increased from Rs. 646.89 lakhs to 721.89 lakhs. Since we have directed the AO to exclude the income of Rs. 75,00,000/- in AY 2013-14, it would reduce closing stock by same amount. Correspondingly, the opening stock of subsequent AY 2014-15 would have to be reduced. Therefore, the AO shall be entitled

to reduce the opening stock of AY 2014-15 by Rs. 75,00,000/- and give necessary effect in accordance with the provisions of law.

18. Resultantly, this appeal is allowed in terms mentioned above.

Order pronounced in open court on 04.04.2024.

Sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

sd/-
(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक /Dated : 04.04.2024

CPU/Sr. PS

Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore