

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'F' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.3001/Mum/2024
(Assessment Year :2021-22)**

DCIT CC-6(1) 19 th Floor, Air India Building Nariman Point Maharashtra-400 021	Vs.	Shri Jayant Hiralal Shah Plot No.11, Sujay Garden 12, Mukund Nagar Market Yard, Pune- 411 037
PAN/GIR No.AEGPS3036L		
(Appellant)	..	(Respondent)

Assessee by	Shri Sanjay Kapadia
Revenue by	Ms. Rajeshwari Menon
Date of Hearing	25/07/2024
Date of Pronouncement	07/08/2024

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been filed by the Revenue against order dated 27/03/2024 passed by Id. CIT(A)-54, Mumbai for the quantum of assessment passed u/s.143(3) for the A.Y.2021-22.

2. In the grounds of appeal Revenue has challenged the deletion of addition of Rs.80,00,000/- made u/s.69C on account

of alleged cash payment made by assessee to Shri Shailendra Rathi.

3. The facts in brief are that assessee filed his return of income on 15/03/2022 declaring total income of Rs.4,37,06,390/-. A search and seizure action u/s.132 was conducted in case of some middle men / business men group on 23/09/2021 in which assessee was also covered u/s.132. Accordingly, the assessee's case was selected for compulsory scrutiny and notice u/s. 143(2) was issued on 29/06/2022. Ld. AO noted that in the course of search proceedings at the residence of Shri Shailendra Rathi at Flat no. 203, Building No B-3, Kumar Parisar, Near Mahesh Vidyalaya, New DP Road, Kothrud Pune 411038, certain incriminating evidences were found from WhatsApp chat in the mobile phone of Shri Shailendra Rathi. These chats were between Shri Shailendra Rathi and Shri Nilesh Toshniwal wherein Shri Rathi has texted to Shri Toshniwal “@ **received 80**”. Shri Shailendra Rathi in his statement recorded on oath dated 24.09.2021 u/s. 132(4) of the Act, explained the said message in the reply of Q. No. 32 of his statement and stated that they have received Rs. 80 lakh in cash through Shri Ashok Luniya, the contact given by Shri Nilesh Toshniwal. The Statement of Shri Shailendra Rathi recorded on oath u/s. 132 (4) dated 26.09.2021 was confronted to the assessee wherein the assessee has stated that he is not aware of any such transaction nor does he have any business relation with Shri Ashok Luniya. Ld. AO noted that Shri Nilesh Toshniwal and Shri Shailendra Rathi were working in tandem and were exchanging documents

and information with respect to various transactions. The assessee has clearly stated that he has no business relationship either with Shri Ashok Luniya nor he is aware of any such transaction. The assessee also denied the transaction or any connection with any such message or transaction either with Shri Shailendra Rathi or with Shri Ashok Luniya or with Shri Nilesh Toshniwal. The assessee's reply in response to show-cause notice has been incorporated from pages 4-5 of the assessment order. AO also noted that Shri Shailendra Rathi has retracted from his statement, which AO has rejected. The assessee also submitted that as per WhatsApp message the transaction pertains to A.Y. 2020-21 and cannot be taxed for the year under consideration. i.e., A.Y. 2021-22, but AO held that, Shri Shailendra Rathi during the search proceedings categorically admitted that he has received Rs.80,00,000 on 19/07/2020 which falls A.Y. 2021-22 and he also denied cross examination of Shri Shailendra Rathi or Shri Nilesh Toshniwal. AO made addition after observing as under:-

“5.10 The assessee has Shailendra Rathi is not connected to his business in anyway In this connection, it is to state that evidences have been found during the search proceedings in respect of other issues establishing that both Shri Nilesh Toshniwal and Shri Shailendra Rathi were communicating with each other and were exchanging the documents which are in the nature of various cash transactions. Thus, the assessee imply that Shri Shailendra Rathi is not connected to his business is not acceptable

5.11 Shri Toshniwal has been found to working on the directions of Shri Jayant Shah. Therefore, in absence of any plausible explanation, the payment received by the Rucha group from the friend of Shri Jayant Shah is considered to be payment made by

Shri Jayant Shah through Shri Nilesh Toshniwal. Accordingly, amount of Rs. 80 Lakh is added in the hands of the assessee as an unexplained expenditure within the meaning of provisions of the section 69C of the Income-tax Act, 1961. Penalty proceedings u/s. 271AAB(1A)(b) of the I.T.Act, 1961 are initiated separately.”

4. Ld. CIT (A) in his detailed judgment has deleted the said addition after observing and holding as under:-

6.6. *The appellant has argued that the images of the WhatsApp chat have not been found from the possession of the appellant. Therefore, the presumption as to documents provided for in section 2920 and 132(4A) were not available against the appellant as to the correctness of the contents of the seized data found from the possession of a third party. The appellant thus pleaded that documents found from the possession of a third party could not be relied upon to make additions in the case of the appellant. According to the appellant Sh. Shailendra Rathi was a consultant to the Rucha Group and not connected to the assessee. Similarly Sh. Nilesh Toshniwal was an independent professional person who was a practicing advocate. According to the appellant, while Sh. Toshniwal at times rendered professional advice to the appellant in legal matters in connection with the real estate business activities, he was not assisting in financial matters. According to the appellant, there was no material to suggest that the appellant has entered into the alleged transaction. While Sh. Nilesh Toshniwal denied the impugned transaction of Rs. 80 lakh with Sh. Ashok Luniya, Sh. Shailendra Rathi had nowhere stated that the amount of Rs. 80 lakh was received by him at the instance of the appellant or on behalf of the appellant. The appellant stated that even if any transaction of Rs. 80 lakh took place between Sh. Shailendra Rathi and Sh. Ashok Luniya, he had nothing to do with the same. The appellant also questioned the admissibility of the digital evidence in the form of images of WhatsApp chats on the ground that the requisite certificate u/s 65B of the Indian Evidence Act had not been drawn. The appellant also argued that the statement of Sh. Shailendra Rathi recorded during the course of the search could not be relied upon as the same had since been retracted. Also, according to the appellant, the addition made was bad in law as cross-examination of Sh.*

Shailendra Rathi was not allowed to him. The appellant also relied on certain case laws to argue that the additions made on the basis of documents/material found from a third person could not be used against him in the absence of any Independent evidence to link him to such material. Moreover, according to the appellant the impugned WhatsApp conversation between Sh. Shailendra Rathi and Sh. Nilesh Toshniwal was dated 19.09.2019 and so the impugned transaction in any case was not related to AY 2021-22 in which the addition has been made by the AO. Also, according to the appellant, section 69C had in any case been wrongly Invoked by the AO as it had been nowhere alleged that the appellant had incurred any such expenditure. Thus, the appellant stated that the addition of Rs. 80,00,000/- made by the AO u/s 69C of the Act be deleted

6.7 In this regard it is seen that a search took place in the case of the assessee On 23.09.2021 along with the other entities of the Businessman/Middlemen Group of cases. Certain images from the WhatsApp chat between one Shri Shailendra Rathi and one Shri Nilesh Toshniwal were found during the search proceedings at the residence of Shri Shailendra Rathi. It was observed that Shri Shailendra Rathi had texted to Shri Nilesh Toshniwal as received 80. Sh Shailendra Rathi was a key associate of the Rucha Group also covered during search and Sh. Nilesh Toshniwal was allegedly a key associate of the assessee Shn Shailendra Rathi in his statement dated 24.09.2021 recorded on oath u/s 132(4) of the Act, stated that he had received Rs. 80 lakh in cash through Shri Ashok Luniya, the contact given by Shri Toshniwal. The statement was later retracted by Sh Shailendra Rathi It is also seen that the assessee, at the time of recording of his statement on oath u/s 132(4), was confronted with the statement of Shri Rathi, wherein the assessee stated that he was not aware of such a transaction and that he did not have any business relation with Shri Ashok Luniya.

6.8 It is also seen that during the course of the assessment proceedings also, the assessee was asked to explain the transaction. In response, the assessee reiterated that while Shri Ashok Luniya was a friend of the assessee but he had no business relationship with him. Also, he was not aware about any such transaction and these transactions were not related to him.

The explanation of the assessee was not found acceptable by the AO as Shri Shailendra Rathi in his statement recorded on oath had explained that on 19.07.2020, Rucha Group had received Rs. 80 lakhs in cash through Shri Ashok Luniya. The AO made the addition by observing that Shri Nilesh Toshniwal and Shri Shailendra Rathi were communicating with each other and were exchanging documents pertaining to various cash transactions and that Shri Toshniwal was found to be working on the directions of the assessee Shri Jayant Shah. The payment received by the Rucha Group from the friend of Shri Jayant Shah was considered by the AO as payment made by Shri Jayant Shah through Shri Nilesh Toshniwal, Accordingly, the AO made an addition of Rs. 80,00,000/- u/s 69C of the Act, as unexplained expenditure

6.9 It is thus seen that the addition has been made by the AO relying on the statement of a third party i.e Sh. Shailendra Rathi and on the basis of material found during the course of the search on a third party i.e Sh. Shailendra Rathi

6.10 In this regard, the legal position is well settled. The Hon'ble Courts in a series of judgments have held that documents/material found from the premises of a third party or a statement of a third party cannot be relied upon to make additions in the hands of the assessee, unless such material or statement is corroborated by independent evidence linking such material to the assessee).

5. Thereafter, he has referred to various judgments of Hon'ble High Courts and Tribunal decisions and finally observed as under:-

6.18 Thus it is seen that the Hon'ble Courts have clearly held that documents/material found from the premises of a third party or a statement of a third party cannot be relied upon to make additions in the hands of the assessee, unless such material or statement is corroborated by independent evidence linking such material to the assessee. In the present case it is seen that the addition of Rs. 80,00,000/- has been made by the AO relying on the statement of a third party i.e Sh. Shailendra Rathi, which had in any case been retracted. Also, the addition has been made on the basis of

material found being certain image in the WhatsApp conversation during the course of the search on a third party le Sh Shailendra Rathi. Both Sh. Nilesh Toshniwal and the assessee Sh. Jayant Hiralal Shah have consistently denied having any knowledge of the contents of the impugned material. It is seen that while such material could have been a reason for starting an investigation, the AO has simply relied on such material found from the premises of a third party and relied on third party statement to make the addition without corroborating it with any kind of independent evidence linking such material with the assessee. As per the plethora of Court judgments discussed above, such an act is not permitted under the law. The Hon'ble Supreme Court in the case of Umacharan Shaw and Bros v CIT (1959) 37 ITR 271 held that suspicion, however strong, cannot take the place of evidence. Similarly, raising presumption itself does not amount to proof. Presumption, however strong, cannot take the place of evidence as held in the case of Pooja Bhatt 66 TTJ (Mum) 817 and in the case of D.M Kamani HUF 65 TTJ (Pat) 504 Interestingly, even the WhatsApp conversation or the statement of Sh. Shailendra Rathi does not make any reference to the assessee but refers to one Sh. Ashok Luniya. It is also not the case that Sh. Ashok Luniya ever implicated the assessee Sh. Jayant Hiralal Shah in respect of the impugned transaction. While the assessee Sh Jayant Hiralal Shah was also covered under search, it is not the case either that any corroborating evidence was found in his case linking him to the material found from Sh. Shailendra Rathi. Thus, in the absence of any independent evidence linking the assessee with the material found from a third party or a third party statement, the addition made by the AO on the basis of such third party statement or material found from the third party cannot be sustained. The addition of Rs. 80,00,000/- made by the AO in the case of the assessee is accordingly deleted and the ground of appeal is allowed.

6. We have heard both the parties at length and also perused the relevant finding given in the impugned orders as well as materials referred to before us. The main reason for making the addition by the ld. AO is, firstly, there was a WhatsApp message

in the mobile of Shri Nilesh Toshniwal prior to 07/10/2019 by Shri Shailendra Rathi stating as **“Received80@Dubai”**. Second reason given by Id. AO is the statement of Shri Shailendra Rathi, which for the sake of ready reference is also reproduced hereunder:-

Q.32 I am showing you Exhibit 9 (12 pages) which is images taken of your whatsapp chat between you (9604561111) and Nilesh Toshniwalji (9890839995) from your iphone 12 pro. Please state about the identity of Shri Nilesh Toshniwalji. Further go through the exhibit and state the context of the conversation.

Ans. Sir, I have gone through the conversation on whatsapp chat and confirm that I had these conversations with Shri Nilesh Toshniwalji. Shri Nilesh Toshniwalji is a Chartered Accountant based in Pune. He works with Shri Jayant Shah of Jairaj group based in Pune. Jayant Shah is in line of business of real estate and trading of food grain. We are also in the business with Jairaj group where we were looking after the litigation related issue in M/s Nian Tech Pvt Ltd and Trendy Online Solution Pvt Ltd for their land in Hinjewadi, Pune. Further, during the pandemic lock down period, on many occasions, we helped Shri Jayant Shah to get e-pass for movement. Shri Jayant Shah is a friend of Shri Prashant Nilawar.

Pagewise comment is as under.

<i>Page No.</i>	<i>Comment</i>
<i>1</i>	<i>These are details of cheque given by me to Shri Nilesh Toshniwal ji to provide him the account details of Shri Prashant Nilawar (HDFC A/c no. 00071930012806) and Shri Pawan Chandak (IDBI A/c 0676104000045483) on 31.07.2019.</i>
<i>2</i>	<i>I asked Shri Nilesh to make transfer into the account of Shri Prashant Nilawar to the tune of Rs 4 crore and Rs 3 crore into the account of Shri Pawan Chandank. These are unsecured loans, the same may be verified from their bank accounts on 2.</i>
<i>3</i>	<i>On 14.09.2019, Shri Nilesh had given me details of</i>

	<i>Shri Ashok Luniya based in Dubai for coordination purpose and I had given him the detail of Kumar based in Dubai. His phone number +971506254258 is saved in my mobile as Ashok Luniya Dubai Ref Jayant Shah Sir. The number of Kumar was received from an Angadiya based in Mumbai for the transfer of money abroad.</i>
4	<i>I had received one document from Shri Prashant Nilawar on 17.09.2019 which pertains to some conflict in Ajanta Cooperative Housing Society Ltd with Allwell Prop Pvt Ltd, This conflict was associated with Shri Jayant Shah's interest. Shri Nilawar asked me to see if anything could be done through our end. Therefore, I asked Nilesh Toshniwal ji to provide me details related to same.</i>
5	<i>On 19.07.2020, We had received Rs 80 lakh in cash through Shri Ashok Luniya, the contact given by Shri Nilesh Toshniwal ji in Dubai on 14.09.2019.</i>
6	<i>On 08.10.2020, I had received Rs. 1,00,00,000 in cash through Shri Nilesh Toshniwal ji.</i>
7	<i>One payment was to be made by Shri Nilesh Toshniwal ji. In this regard, I had shared him the detail of the angadiya Shri Vinod (9370511116) to coordinate with him for the payment of Rs 1,00,00,000 in cash on 02.03.2020. Shri Nilesh told me to instruct Shri Vinod to call him on what's App only.</i>
8	<i>On 12.03.2021, I had sent Shri Nilesh Toshniwal the bank account detail of M/s Kalyan Toll Infrastructure Ltd wrongly.</i>
9	<i>On 17.03.2021, I had again sent him the bank account detail of M/s Guna Infrastructure Limited for reversal of loan from M/s Guna Infrastructure Limited. The amount of Rs 10 crore was made into Guna Infrastructure Limited on 17.03.2021.</i> <i>Further, I asked Shri Nilesh about the floor plan of worli flats of Subhada Society. Shri Nilesh assented to provide me details.</i>

10	<i>I had given Shri Nilesh the details of Prashant Nilawar's residence at Kumar Parisar, Pune.</i>

7. First of all so called What'sAPP message stating "received 80@Dubai" is not found from the mobile of the assessee. Albeit, from an independent third person who is a professional and no connection with assessee. Another important point is that, the message has not been sent by the assessee from his mobile but was found mobile phone of Shri Shailendra Rathi sent by someone else. None of these two persons are either connected with the assessee for any kind of business nor there is any common interest nor has any corroborative evidence been found from the assessee to correlate the alleged transaction. On perusal of the statement of Shri Shailendra Rathi, nowhere he has suggested that these payments relate to any transactions relating to the assessee on or behalf of the assessee or received on or behalf of the assessee. Only relevant content of the transaction of Rs.80,00,000/- in his statement is as under:-

"On 19-07-2020 we had received Rs. 80 lakh in cash through Shri Ashok Luniya, the contact given by Shri Nilesh Toshniwal ji in Dubai on 14-09-2019"

8. This statement merely states that on 19/07/2020 he had received Rs.80,00,000/- in cash through Shri Ashok Luniya. The contact was given by Shri Nilesh Toshniwal in Dubai on 14/09/2019. The date of message in WhatsApp chat is before 07/10/2019 and the transaction which is being referred is of 19/07/2020. There is a complete mismatch of time period between What'sApp message and the date mentioned in the

statement. When assessee was confronted with the statement of Shri Shailendra Rathi, he has categorically stated that he is neither aware of such transaction nor does he have any business relation with Shri Ashok Lunia. No enquiry whatsoever has been conducted by the ld. AO as to what was the connection between assessee and Shri Ahok Lunia and what the transaction was for and what is the business relationship with Shri Shailendra Rathi and how this transaction pertains to assessee. During the search at Assessee's place no corroborative evidence or material has been found. Nowhere Shri Shailendra Rathi has implicated the assessee that he has paid or received cash of Rs.80,00,000/- on behalf of the assessee.

9. Here, the addition has been made and secondary evidence of electronic record being What'sApp conversation from a mobile and statement of a person and from the statement nowhere the name of the assessee figures. If the message and the information has not been retrieved or recovered from the assessee, there cannot be any presumption against the assessee. The onus was on the persons who have given the statement or from whose mobile What'sApp chat had been found. Nowhere it has been brought on record whether Shri Nilesh Toshniwal has stated anything about the assessee or any enquiry was done from him. If the ld. AO is trying to use the What'sApp chat relating to some third person against the assessee, then its mandatory requirement u/s 65 B of the Evidence Act to comply with the procedures given therein. This has been categorically held by the Hon'ble Supreme Court in the case of **Arjun Panditrao Khotkar**

vs. Kailash Kushanrao Gorantyal vide judgment and order dated 14/07/2020, wherein three Judges Bench of the Supreme Court have held that electronic evidence has to be certified u/s.65B(4). There is no such certificate brought on record to ensure the authenticity of such message. Though there is no specific provision of digital data validity under the Income Tax Act, however, it is imperative that the Income Tax department / investigation wing has to adhere with the condition stipulated u/s.65A and 65B of the Evidence Act before relying on such digital evidence. Here none of these aspects have been discussed by the ld. AO.

10. As stated above, there is no material from the possession of the assessee which can remotely suggest that assessee had entered into alleged transaction. As noted by the ld. CIT(A), Shri Nilesh Toshniwal has nowhere admitted the impugned transaction of Rs.80,00,000/- with Shri Ahok Lunia and nowhere Shri Shailendra Rathi has stated that amount of Rs.80,00,000/- received by him was at the instance of assessee or on behalf of the assessee. Even if it is accepted that What'sApp message can be treated as evidence then, here the transaction took place between Shri Shailendra Rathi and Shri Ahok Lunia and the message appeared in the mobile phone of Shri Nilesh Toshniwal and Shailendra Rathi and there is no whisper about the assessee's name. Ld. AO has also denied the opportunity to cross examine Shri Shailendra Rathi whether this transaction at all pertains to the assessee, because nowhere he has even taken the name of the assessee that this transaction

pertain to assessee. The entire edifice of addition made by the ld. AO is reliance on the statement of third party and material found during the course of search of the third party. Nowhere there is material or evidence having any live link nexus with the assessee. In such a situation no adverse presumption can be drawn against assessee nor can any addition be made. The aforesaid observation and the finding of the ld. CIT (A) as noted above is not only based on correct appreciation of facts but also in accordance with the law and therefore, the aforesaid finding of the ld. CIT (A) is upheld and the grounds raised by the Revenue are dismissed.

11. In the result, appeal of the Revenue is dismissed.

Order pronounced on 7th August, 2024.

Sd/-
(GIRISH AGRAWAL)
ACCOUNTANT MEMBER

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai; Dated 07/08/2024
KARUNA, sr.ps

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

ITA No.3001/Mum/2024
Shri Jayant Hiralal Shah

(Asstt. Registrar)
ITAT, Mumbai