

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "B" JAIPUR

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI,

आयकर अपील सं./ITA No. 535/JP/2024
निर्धारण वर्ष/Assessment Year : 2014-15

AJD Developers Pvt. Ltd., Opp. Chaksu Thana, Tonk Road, Chaksu Jaipur	बनाम Vs.	Assistant Commissioner of Income Tax, Circle-07, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAKCA 8845 Q		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Sh. Shailesh Mantri
राजस्व की ओर से / Revenue by : Sh. Anup Singh, Addl. CIT

सुनवाई की तारीख / Date of Hearing : 18/09/2024
उदघोषणा की तारीख / Date of Pronouncement: 25/10/2024

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

By way this appeal the above named assessee challenges the order of National Faceless Appeal Centre, Delhi dated 05/03/2024 [for short CIT(A)]. The disputes relates to the assessment year 2014-15. That order of the Id. CIT(A) arise because the assessee challenged the order dated 30.12.2019 passed under section 143(3) r.w.s. 263 of the Income Tax Act,[for short Act] by The Assistant Commissioner of Income Tax, Circle-7, Jaipur.

2. In this appeal, the assessee has raised following grounds: -

“That the Ld. CIT(A)-NFAC, has erred in facts and in law in confirming the addition of Rs. 20 Lacs by disallowing the lump sum commission expenses.

That the appellant craves to add, amend and alter the grounds before or at the time of appellant hearing.”

3. Succinctly, the fact as culled out from the records is that the assessee e-filed its income tax return for the A.Y. 2014-15 on 30.11.2014 by declaring total income of Rs. 20,59,000/-. The assessee company is engaged in the business of real estate. After filling the return of income by the company the case of the assessee was selected for scrutiny under CASS and consequently income was assessed at Rs. 21,93,000/- u/s 143(3) of the Act dated 30.11.2016.

3.1 After completion of that assessment the assessment record was called for by the Id. PCIT-3, for examination and in that process, PCIT noted that the assessee claimed commission expenses amounting to Rs. 1,75,28,486/- against total turnover of Rs. 5,45,09,487/-. It was further observed that the AO allowed the claim of commission simply on the basis of payments made & TDS deducted there from, without inquiring into the details of services rendered by the commission recipients. Therefore, Pr.

CIT-3 in exercise of power vested upon him u/s 263 of the Act passed an order on 15.03.2019 giving directions to the Id. AO that ;

"10. The order passed by the AO deserves to be set aside on the limited issue of allowability of commission expenses to be decided afresh by the AO. AO will conduct necessary inquiries by issue of notice u/s 131/133(6) of the Act on test check basis to establish that brokers were instrumental in getting the plots sold. AO will also examine if commission is paid to any of the parties specified in sec: 40A(2)(b) and if the said commission is excessive in terms of sec. 40A(2)(a)."

3.2 Based on that set of fact set-aside a proceedings were initiated in this case and notice u/s 142(1) was issued to the assessee on 29.03.2019. Thereafter, notices u/s 142(1) along with query letter was issued to the assessee from time to time. In response thereto, the assessee vide its letter dated 14.11.2019, furnished the details of the persons to whom commission was paid. It has been observed that the assessee has paid commission to 70 persons. Thereafter, to verify the genuineness persons to whom commission paid, notice u/s 133(6) or summon u/s 131 of the Act were issued to 10 persons on test check basis. Out of that 10 notices so issued 7 was not served and 3 served but no information was submitted. Thus, vide notice dated 03.12.2019 the assessee was asked to show cause as to why the necessary disallowance / addition should not be made. In response the assessee submitted the current details of the said 10 persons selected by the Id. AO. Now at this stage out of 10 person selected

7 parties filed the reply and only 3 reply was not received but the notices were served on the address given by the assessee. Based on these set of facts and inquiry the Id. AO concluded the proceeding by observing as under :

“Thus, in absence of complete reply/details of 10 persons to whom notices u/s 133(6)/131 were issued regarding commission paid only on test check basis, the leakage of revenue cannot be ruled out. Therefore, under these circumstances, I am constrained to add 20,00,000/- out of total said expenses claimed/debited in its P&L account on account of commission expenses is hereby disallowed and added back to assessee’s total taxable income.”

4. Aggrieved from the above assessment order making the lumpsum addition without making any independent inquiry, assessee preferred an appeal before the Id. CIT(A). Apropos to the grounds so raised the relevant finding of the Id. CIT(A) is reiterated here in below:

“5. Decision

The appellant in its ground of appeal has assailed the addition of Rs.20,00,000/- by disallowing the commission expenses. The AO in the assessment order held that the appellant is engaged in the business of property development. During the year the appellant had claimed commission expenses of Rs.1,75,28,486/- against the total turnover of Rs.5,45,09,487/-. The appellant had paid commissions to 70 persons and the AO randomly verified 10 persons through notices u/s 133(6) and all the notices either get returned unserved or no compliance is received. Therefore, the AO disallowed Rs.20,00,000/- out of total commission paid of Rs. 1,75,28,486/- and added it to the income of the appellant.

5.1 It is pertinent that in order to decide this appeal in a timely manner a number of notices/ communications through ITBA portal were sent to the appellant, viz. Communications dated 27.01.2021, 21.09.2022, 18.04.2023 and 15.02.2024. However, there evidently has been no response from the appellant till date. There is no gainsaying that once the appeal is filed by the appellant, it is obligatory on its part to purposefully and co-operatively pursue the same in a worthwhile manner, which the appellant has evidently failed to do. It clearly appears that the appellant's compliance or rather lack of it, the appellant has not even bothered to pursue this

appeal in any productive manner. Hence, in view of the aforesaid total non-compliance/non prosecution of the instant appeal on the part of the appellant, the instant appeal is adjudicated and disposed of, as under, ex-parte, primarily on the basis documentation available on record.

5.2 Firstly, it is stated at the outset, that in the situation as obtained in the instant case, as evidently seen from the above, this appeal is liable to be dismissed in terms of the ratio of the judgements of the Hon'ble Apex Court and the various High Courts including the Hon'ble Apex Court which held in CIT v. B. N. Bhattacharjee and Another (10 CTR 354) that an appeal means an effective appeal and that to prefer an appeal would mean effectively prosecuting an appeal. "Purposefully and constructively interpreted, preferring an appeal means more than formally filing it but effectively pursuing it and if a party retreats before the contest begins, it is as good as not having entered the fray.

5.3 It is pertinent to add here that laws assist those who are vigilant and not those who sleep over their rights. This principle is embodied in the well-known maxim "Vigilantibus non dormientibusjurasubveniunt". It means equity comes to the aid of the vigilant and not the slumbering. In all actions, suits and other proceedings at law and in equity, the diligent and careful plaintiff is favoured and prejudicial of him who is careless. Viewed thus, it is presumed that the appellant has no further cogent reasoning or/and evidence to substantiate the grounds taken in this impugned appeal. It is trite that the onus is on person making the claim, and the primary responsibility/onus/burden for proving the claim made before the tax authorities (Assessing Officers/Appellate Authorities) lies with the assessee/appellant. In the present case, the appellant has not been able to even discharge the primary onus/burden statutorily & judicially cast upon him to substantiate the claims made in the grounds of appeal in spite of adequate time and opportunities given as brought out in the foregoing paras.

5.4 It is, thus, evident that the appellant has no evidence to substantiate the grounds taken and it has not even once argued with any supporting, relevant and cogent arguments/averments, constraining me to, therefore, go through the extremely brief non-speaking submission appearing in the grounds of appeal and statement of facts filed along with the impugned appeal to decide on the merits while adjudicating the same. But the narrative submission/contention made vide the statement of facts/grounds of appeal is by and large on the very same made at the time of instant assessment which the AO after considering, has duly rejected or found without much merit leading him/her to add the same i.e., the disallowance/additions made in the said assessment order and enumerated in the impugned grounds against which I am constrained to concur with the AO's findings of fact and decisions thereof, more particularly in the absence of any meaningful and worthwhile submissions/documentations even during the instant appellate proceedings in this case to counter effectively the position adopted by the AO on the concerned issues and reduced in writing in the assessment order. Therefore, I find no infirmity in the action of the AO in making addition of Rs.20,00,000/- on the

appellant. In this view of the matter, the decision of the AO is upheld. Consequently, the Ground of appeal are dismissed.”

5. Aggrieved from the above finding so recorded by the Id. CIT(A), the assessee preferred the present appeal before this tribunal. To support the various grounds so raised by the assessee Id. AR of the assessee, has filed the written submissions which reads as follows :

“Ground 1

That the Ld. CIT(A)- NFAC, has erred in facts and in law in confirming the addition of Rs.20 lacs by disallowing the lumpsum commission expenses.

Facts of the case:

1. The Assessee Company is engaged in the business of real estate. During the year under consideration company claimed commission expenses amounted to Rs.1,75,28,486/- against the total turnover of Rs.5,45,09,089/-.
2. During the assessment proceedings the AO issued notice u/s 133(6) to 10 parties to provide them opportunity to reply, out of which 7 persons replied. The AO, considering the absence of complete reply/details he disallowed an amount of Rs.20,00,000.00/- on lump sum basis.
3. The CIT(A) has dismissed the appeal and confirmed the addition of Rs. 20,00,000.00/-.

Submission:

1. The Assessee Company is engaged in the business of real estate. During the year under consideration company filed a return declaring turnover of Rs.5,45,09,089/- and Net Profit of Rs.12,39,074/-. The company is engaged in land development, it is buying agriculture land at outskirts area and developing it and then sell it. As the area is outside or away from the city therefore to attract the customers and to increase the sale, it get support from the agents and this is the main expenditure after the land and development cost. The company had claimed commission expenses amounted to Rs.1,75,28,486/- and also deducted TDS on transactions exceeding the threshold limit.
2. In response to the Notices issued by the AO, the Assessee Company has provided the complete details of parties as available with it including the PAN and

Address, further the TDS was duly deducted on these transactions as per the requirements of Income Tax Act, 1961

3. It is to be taken into consideration that AO has made addition on the basis of non-compliance of Notices by another parties, which can't hold a valid ground in itself to make the addition in income of assessee. AO have neither pointed any deficiency in the books of accounts nor rejected the books of accounts therefore the lump sum addition made by the AO was only on the basis of assumption and presumptions.

4. AO has considered the non-compliance of Notice served u/s 133(6) to prove that, the transactions and Parties are not genuine, however mere non reply to a notice is not conclusive evidence to harm the dignity of transactions with persons to whom notice u/s 133(6) was served. There may be various reasons for non-compliance of notices.

It is further submitted that just due to non-compliance of notice treating the complete transaction as bogus or sham is against the natural justice.

In respect of same we also submit as under: -

a. The assessee in the case is a Private Limited company and its books are duly audited in each financial year, therefore there is already an assurance that Financials of assessee are true and fair, and present a genuine view of books of accounts.

b. The assessee has already submitted the complete details of persons to whom commission has been paid.

c. Just only non-compliance of notice u/s 133(6) by third parties cannot be a valid reason for treating the transaction as bogus.

d. The AO has neither pointed any specific discrepancy in books of accounts nor rejected the books of accounts.

5. It is also settled by Law that Non-Compliance of Notice u/s 133(6) by the parties cannot be considered as base to make these transactions as bogus and also such non-compliance of Notice u/s 133(6) cannot be the concern of the assessee, and such addition/ disallowance cannot be added back to the income of assessee on this ground. Some of such decisions are:

(i) Phool Singh Vs. ACIT (ITAT Delhi) ITA no2901/Del/2014: It is held that Merely because 133(6) notices issued to the party returned un-served though it was the same address, which was supplied by supplier while filing its income tax return, no fault can be put on the shoulder of assessee.

(ii) Sonicwall Technology System India Pvt. Ltd. Vs ACIT (Mumbai) ITA no.3860/Mum./2019 It is held that merely on the basis that the entity has not

responded to notice issued under section 133 (6) of the Act the transaction cannot be doubted and be treated as non-genuine in the peculiar facts of the case, we find no basis in upholding the addition by the AO merely on the basis that only 2 out of 17 parties failed to respond to the notice issued under section 133(6) of the Act.

(iii) Cheil India Pvt. Ltd. Vs ITO Ward 3(3) (ITAT Delhi) ITA no. 6183/Del/2014 It is held that, it is a well-established position of law that genuineness of the claim cannot be denied merely because the party to whom payment claimed to have been made is not responding the notice issued by the Assessing Officer especially when the assessee claimant had filed sufficient documents in support of the claimed payment. There may be several reasons for a party for non-appearance or non-compliance before the Assessing Officer, for which the assessee cannot be penalized.

Judgment in above cases clearly states that: Merely because notices u/s 133(6) issued to the parties are not complied by such parties, in such case no fault can be put on the shoulder of assessee.

6. The company was incorporated on 09/04/2012. The year under consideration is second year of the company. The turnover and Net profit ratio of last two years are as under:

Particulars	AY 2013-14	AY 2014-15
Sales	Rs. 2,98,62,156	Rs. 5,45,09,089
Net Profit Before Tax	Rs. 9,54,993	Rs. 20,86,227
Net Profit Rate (Before Tax)	3.2%	3.83%

The Net Profit rate declared by the assessee is better as compare to previous year. It is further submitted that the assessment for AY 2013-14 is also done and the results of previous assessment year (AY 2013-14) is accepted by the authority. Copy of assessment order and CIT(A) order is enclosed.

The result declared by the company is better as compare to previous year and therefore the same should be accepted.

Prayer : As the relevant information from the part of assessee is duly provided and any non-compliance to notice u/s 133(6) can't be a basis for proving genuineness of transactions, it is therefore requested that kindly do not consider the genuine business transaction as bogus or sham and kindly delete the addition of Rs. 20,00,000/- based on lump-sum and estimation basis."

6. To support the contention so raised in the written submission reliance was placed on the following evidence / records / decisions:

Sr. No.	Particulars	Page No.
1	Balance Sheet and Profit & Loss A/c	1-15
2	Tax Audit Report	16-36
3	ITR V and Computation	37-40
4	Case Laws- Court Orders Phool Singh Vs. ACIT (ITAT Delhi) Sonicwall Technology System India Pvt. Ltd. Vs ACIT (Mumbai) Cheil India Pvt. Ltd. Vs ITO Ward 3(3) (ITAT Delhi)	41-64 65-73 74-79

7. The Id. AR of the assessee in addition to the above written submission so filed vehemently argued that the assessee has paid the commission after following the provision of the TDS. Where the assessee is having the PAN number TDS is deducted at the rate in force and when the PAN number is not available TDS is deducted as per prescribed rate of 20%. Thus, there is no failure on part of the assessee. The Id. AO has not made any independent effort except to issue notice u/s. 133(6) and out of 10 Notice so issued 7 parties have replied and rest 3 notices were served but the reply was not received. That reply did not receive cannot be considered a base to reject the book result and make lumpsum addition of Rs. 20,00,000/-, even when the book results are better than previous year. When the matter carried before the Id. CIT(A) the same was decided ex-

parte as the accountant of the assessee company who left the job the notice issued were remained to be attended. Assessee has not received any physical notice of hearing. The Id. AR of the assessee also submitted that there is no reference in the order of the Id. CIT(A) about the number of notices issued by him to the assessee. So the order is silent on that aspect of the matter and is against the principles of natural justice. In the first round of litigation the assessment is already completed and in the second round the Id. AO did not find any defect in the books of account and without rejecting the books of account lump sum was made that it self is against the provisions of the law and the addition so made by the Id. AO be deleted.

8. The Id DR is heard who relied on the findings of the lower authorities and more particularly advanced the similar contentions as stated in the order of the Id. CIT(A). The Id. DR also submitted that the assessee has not provided the correct details and has given the subsequent correct address even on that 3 parties have not replied the notices issued u/s. 133(6) by the AO. The assessee could not explained as to why they remain non compliant before the Id. CIT(A). Here in the second round out of the sample selected 30 % of the parties have not replied to the notice so that lump sum

addition made by the Id. AO is required to be sustained in the hands of the assessee.

9. We have heard the rival contentions and perused the material placed on record. In this appeal the solitary ground raised by the assessee is against the addition made by the Id. AO by disallowing the lump sum commission expenses of Rs. 20,00,000/-. The present appeal is in the second round of litigation. In the first round against the returned income of Rs. 20,59,000/- case of the assessee assessed at Rs. 21,93,000/- u/s 143(3) of the Act dated 30.11.2016. Thereafter consequent to the proceeding u/s. 263 of the Act the assessment was reframed wherein the Id. AO passed an order on making lump sum addition of Rs. 20 Lac and that too by observing as under:

“Thus, in absence of complete reply/details of 10 persons to whom notices u/s 133(6)/131 were issued regarding commission paid only on test check basis, the leakage of revenue cannot be ruled out. Therefore, under these circumstances, I am constrained to add 20,00,000/- out of total said expenses claimed/debited in its P&L account on account of commission expenses is hereby disallowed and added back to assessee’s total taxable income.”

As is evident from the above finding of the Id. AO that he has not rejected the books of account, has not given any finding as to how he has arrived at the figure of Rs. 20 lacs. No show cause notice was issued for observing any defects in the books of account of the assessee. The disputed

commission has already been paid after making necessary withholding of tax in the case of the payee and even the assessee has provided all the correct address of the 10 payee selected by the Id.AO where the notices were served. The assessee has also submitted the details of Name and address of all the payees, their mobile, total amount paid TDS deducted. From that details the Id. AO would have examined and find out the correct status of the amount paid or not and without doing so he has made the lump sum addition without stating that which amount was not correct or bogus. Thus, it is not the responsibility of the assessee to enforce the attendance or reply of the third party being the service provider to the assessee. The assessee has provided correct address where notice were served the payment is made in accordance with the law and the seven party filed the reply which was not discussed by the Id.AO. The Id. AO did not give basis for arriving at the figure of the lump sum disallowance. We note that while doing so Id.AO did not found defect in the books of accounts and has not issued any show cause notice proposing the disallowance of Rs. 20 lac and basis of doing so. Not only that we also observe that book results declared by the assessee in the year under consideration at 3.83 % whereas the same was 3.20 % in the immediately preceding year here also the books results cannot be questioned and when the same were not found

defective when the two round of litigation the assessee filed all the details as required by the Id. AO. Thus, we do not find any reason to sustain the lump sum addition of Rs. 20 lac made by the Id. AO and therefore, direct the Id. AO to delete the addition. Based on this observation ground no. 1 raised by the assessee is allowed. Ground no. 2 being general in nature does not require our adjudication.

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

Order pronounced in the open court on 25/10/2024.

Sd/-

(डा० एस. सीतालक्ष्मी)
(Dr. S. Seethalakshmi)
न्यायिक सदस्य / Judicial Member

Sd/-

(राठोड कमलेश जयन्तभाई)
(Rathod Kamlesh Jayantbhai)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 25/10/2024

*Ganesh Kumar, Sr. PS

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Appellant- AJD Developers Pvt. Ltd., Jaipur
2. प्रत्यर्धी / The Respondent- ACIT, Circle-07, Jaipur
3. आयकर आयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 535/JP/2024)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar