

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI "B" BENCH : MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER  
AND  
SHRI RAJ KUMAR CHAUHAN, JUDICIAL MEMBER

<b>ITA No.</b>	<b>A.Y.</b>	<b>Appellant</b>	<b>Respondent</b>
2607/Mum/2024	2021-22	Naresh Bhavanji Chheda, 103, Pranav Residency, Plot No. 302, Bhimani Street, Matunga, Mumbai PAN : ADPPC4365E	Asst. Commissioner of Income Tax, Central Circle-6(1), 19 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai
2999/Mum/2024	2021-22	Dy. Commissioner of Income Tax, Central Circle-6(1), 19 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai	Naresh Bhavanji Chheda, 302, 1 <sup>st</sup> Floor, Pranav Residency, Bhimani Estate, Opp: Napoo Garden, Matunga, Mumbai PAN : ADPPC4365E

Assessee by : Shri Sanjay Kapadia &  
Shri Rashmikant C. Modi

Revenue by : Shri S. Srinivasu, CIT-DR &  
Shri Ashok Kumar Ambastha,

Date of Hearing : 26/09/2024

Date of Pronouncement : 05/12/2024

**ORDER****PER B.R. BASKARAN, A.M :**

These cross appeals are directed against the order dated 27-03-2024 passed by the Ld.CIT(A)-54, Mumbai and they relate to the Assessment Year (AY.) 2021-22. The Revenue is aggrieved by the decision of Ld.CIT(A) in granting relief in respect of three additions made by the AO u/s 69A of the Income Tax Act, 1961 ('the Act') and the assessee is aggrieved by his decision in confirming one addition made by the AO u/s 69A of the Act.

2. The facts relating to the case are discussed in brief. The assessee is engaged in the business of development of immovable property and he is also a partner in few partnership firms engaged in real estate business. The Revenue carried out search and seizure action u/s 132 of the Act in the case of middle men/business men group of cases on 23-09-2021. The assessee was also subjected to search on the very same day. Subsequently, the AO made four types of additions u/s 69A of the Act as detailed below:-

- |   |   |              |
|---|---|--------------|
| a. Addition made on the basis of Statement of Shri Shailendra Rathi     | - | 46.24 crores |
| b. Addition made on the basis of Statement of Shri Ashish Chhangani     | - | 1.00 crore   |
| c. Addtiion made on the basis of Statement of Shri Javed Shaik          | - | 0.43 crore   |
| d. Addition made on the basis of Whatsapp chat with Shri Jignesh Gopani | - | 1.73 crores  |

The Ld.CIT(A) deleted the additions mentioned in (a) to (c) above and confirmed the addition mentioned in (d) above. Hence, both the parties are

in appeal before the Tribunal on the issues decided by the Ld.CIT(A) against each of them.

3. We shall first take up the appeal filed by the Revenue. The facts relating to each of the additions mentioned in (a) to (c) are stated in brief:-

**a. Addition based on Statement of Shri Shailendra Rathi:-**

Shri Shailendra Rathi belongs to Rucha Group. During the course of search conducted in his residence in Pune, certain incriminating evidences were found in the “camscanner app” installed in his mobile phone. The scanned copy contained 9 pages of handwritten notes of cash transactions. The figures were mentioned in “kg”, which was deciphered as “lakhs”. It was noticed that certain payments were noted against a coded name, viz., “N.C” and the aggregate amount so noted was Rs.46.24 crores. Shri Shailendra Rathi submitted that the code “N.C” refers to the assessee and these payments were made to the assessee in Mumbai. When these details were confronted with the assessee, he denied the same. He submitted that he is unable to understand as to why Shri Shailendra Rathi has stated that “NC” refers to the assessee. He submitted that it may refer to any other person also. Hence, the assessee requested the AO to provide an opportunity to cross examine Shri Shailendra Rathi. However, the AO did not provide such an opportunity with the observation that relevant evidences have already been confronted with the assessee. Accordingly, the AO assessed the sum of Rs.46.24 crores as unexplained money (investment) u/s 69A of the Act.

**b. Addition based on Statement of Shri Ashish Chhangani:-**

This person also belongs to Rucha Group. He is personal assistant of Shri Prashant Nilawar. During the course of search proceedings at his residence located in Colaba, Mumbai, a document was found in his mobile phone, which contained unaccounted cash payments and receipts. The said document contained an entry of payment of One crore in the name of the assessee on 14.8.2020. In the sworn statement taken from him, Shri Ashish Chhangani admitted that the cash has been paid to the assessee and it must have been paid from the Prashant Nilawar's office at Maker Chamber, Nariman Point by either Pawan Mishra or Sonu or Ashish Jha who are working in that office. When confronted with the same, the assessee herein denied the transactions. He also requested the AO to provide an opportunity to cross examine Shri Ashish Chhangani. The AO did not provide such an opportunity of cross examination. The AO took the view that the assessee has received the payments as mentioned in the document seized from the phone of Shri Ashish Chhangani. Accordingly, he assessed the sum of Rs.1.00 crore as unexplained money (investment) u/s 69A of the Act.

**c. Addition based on the Statement of Shri Javed Shaikh:-**

This person also belongs to Rucha group. During the search proceedings of Rucha group at Nariman Point, Mumbai, the phone belonging to the above said person was examined, wherein a document containing money transactions was found. In that connection, Shri Javed Shaikh explained that there was deal for sale of land between Mr Manish Kala (buyer) and the assessee (seller), which was mediated by Shri Prashant Nilawar. He further explained that the sale consideration was Rs.2.65 crores, out of which a sum

of Rs.48.00 lakhs was paid in cheque and the remaining amounts were paid in cash. From the above said document, the AO noticed that the assessee has received a sum of Rs.42.80 lakhs in cash during the year under consideration. Accordingly, the AO made enquiries about these transactions with the assessee. In reply thereto, the assessee submitted that a land belonging to M/s Naresh Chheda HUF has been sold to Shri Manish Kala for a sum of Rs.48.00 lakhs. However, he denied receipt of any cash from Shri Manish Kala. Accordingly, he requested the AO to furnish copy of statement given by Shri Javed Shaikh and the relevant document and also requested for an opportunity to cross examine Shri Javed Shaik. The AO did not provide the such an opportunity of cross examination. Relying upon the statement of Shri Javed Shaik and the document, the AO assessed the sum of Rs.42.80 lakhs as unexplained money (investment) u/s 69A of the Act.

4. As stated above, the Ld.CIT(A) deleted the additions mentioned (a) to (c) above. The gist of his reasoning is summarized below:-

(a) The additions have been made by the AO relying on the statements of the third parties, viz., Sh. Ashish Chhangani, Sh. Shailendra Rathi and Sh. Javed Shaik and on the basis of material found in their respective hands during the course of search conducted on them.

(b) The addition cannot be made on the basis of documents/material found from the premises of a third party unless such material or statement is corroborated by the independent evidence linking such material to the assessee. Following case laws were relied upon in support of this proposition:-

- (i) Naren Premchand Nagda vs. ITO (ITA No.3265 (Mum) of 2015 dated 08-07-2016.
  - (ii) CIT vs, Santlal (2020)(118 taxmann.com 432)(Delhi)
  - (iii) Jawaharbhair Atmaram Hathiwala vs. ITO (2010)(128 TTJ 36 (Ahd)
  - (iv) Asst CIT vs. Prabhat Oil Mills (1995)(52 TTJ 533)(Ahd)
  - (v) ACIT vs. Anand Kumar Jain (2023)( 147 taxmann.com 124)(Mum – Trib)
- (c) The presumption prescribed u/s 132(4A) or 292C of the Act could be taken only in the case of a person from whose possession the document or material has been found. It was so held in the case of Pramod Pandey vs. ACIT (ITA No. 4295 (Delhi) of 2012 dated 06-12-2013) and also in the case of Straptex (India) P Ltd vs. DCIT (2003)(84 ITD 320)(Mum)
- (d) As regards noting/entries in loose papers/diaries, the Hon'ble Courts have held that such noting/entries are not sufficient evidence and additions cannot be made solely on the said basis. For this proposition, the Ld CIT(A) has placed reliance on the following case laws:-
- (i) CBI vs. V C Shukla & Ors (1998)(3 SCC 410)(SC)
  - (ii) Common Cause v UOI (2017)(394 ITR 220)(SC)
  - (iii) T.S.Venkatesan vs. Asst. CIT (2000)(74 ITD 298)(Cal)
  - (iv) Harmohinder Kaur vs. DCIT (2021)(124 taxmann.com 68)(Amrt Trib)

5. The Ld.CIT(A) summarized his views as under and accordingly deleted the three additions mentioned above:-

*“14.6 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. 1,00,00,000/- has been made by the AO relying on the statement of a third party i.e Sh. Ashish Chhangani. The addition of Rs. 46,24,00,000/- has been made on the basis of the statement of a third party i.e Sh. Shailendra Rathi, which had in any case been retracted. Similarly, the addition of Rs. 42,80,000/- has been made on the basis of third party statement of Sh. Javed Shaikh. Also, the addition has been made on the basis of material found, being certain images in the mobile phones of these parties, during the course of the search on these third parties i.e Sh. Ashish Changgani, Sh. Shailendra Rathi and Sh. Javed Shaikh. The assessee has 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. While the assessee Sh. Naresh Bhavanji Chheda was also covered under search, it is not the case that any corroborating evidence was found in his case linking him to the material found from these third parties. 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 statements or material found from the third parties cannot be sustained. The additions of Rs. 1,00,00,000/-, Rs. 46,24,00,000/- and Rs. 42,80,000/- respectively made by the AO in the case of the assessee u/s 69A are accordingly deleted and the grounds of appeal no. 7, 8 and 9 are allowed.”*

The Revenue is aggrieved.

6. We heard the parties on this issue and perused the record. We notice that the AO has placed his reliance, for making these three types of additions, on the statements given by the respective persons during the course of search. We notice that the relevant documents have been taken from the mobile phone of above said three persons, which contained certain financial transactions. Before the AO, the assessee denied the said financial transactions, which were claimed to be related to the assessee. The assessee had also asked for cross examining the three persons, but the AO did not afford such an opportunity. As noticed by the Ld.CIT(A), the AO has completely placed reliance upon third party statements and documents, but did not bring any other material to corroborate them, particularly when the assessee has denied those transactions. As noticed in the various case laws relied upon by the Ld.CIT(A), the AO could not have placed reliance on those third party statements and uncorroborated documents taken from the mobile phones in order to make the additions in the hands of the assessee.

7. One more important legal aspect is that the assessee has requested the AO to provide an opportunity of cross examining these three persons, on whose statements the AO had placed reliance. However, the AO did not provide the said opportunity, which will make the order a nullity. In this regard, we may refer to the decision rendered by Hon'ble Supreme Court in

the case of Andaman Timber Industries vs. Commissioner of Central Excise (Civil Appeal No. 4228 of 2006 dated September 02, 2015), wherein it was held that there will be violation of natural justice, if the opportunity of cross examining the person, on whose statement the authorities place reliance, is not given and consequently, the order would be a nullity. The relevant observations made by the Hon'ble Supreme Court in the above said case are extracted below:-

*“According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.*

*As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to*

*the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.*

*In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice.*

*We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal.”*

8. One another point we notice in these three additions is that the AO has made the addition u/s 69A of the Act. Section 69A of the Act reads as under:-

**“69A. Unexplained money, etc. [Inserted by Act 5 of 1964, Section 16 (w.e.f. 1.4.1964).]**

*-Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year.”*

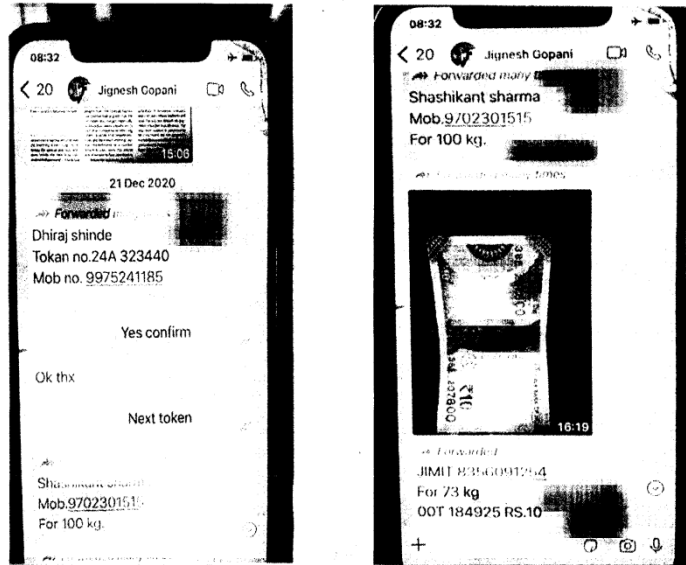
It can be noticed that the provisions of sec. 69A of the Act will have application only when the assessee is found to be the owner of any money, bullion, jewellery or other valuable article. In the instant case, all the three additions are not related to the money, bullion, jewellery etc., found during the course of search. In fact, during the course of search in the hands of the assessee, no such money, bullion, jewellery or other valuable article were found. Further, from the documents found in the mobile phone of above said three persons, it is only interpreted that the assessee has alleged to have received money. In the absence of any physical cash found, the question of making any addition u/s 69A will not arise.

Further, when the assessee is said to have received money, the question of assessing the same u/s 69A of the Act would not arise, since the said section relates to the investment in money, bullion, jewellery etc. Accordingly, we are of the view that the AO has misdirected himself in assessing the alleged receipts as undisclosed investments, which were not existing at all.

9. From the foregoing discussions, it can be noticed that the AO has violated the principles of natural justice in respect of these three additions by not providing opportunity of cross examination even after the said opportunity was asked by the assessee. Further, the AO has made the additions on the basis of uncorroborated third party evidence, which could not be the basis to make addition. Further, the alleged receipts have been misinterpreted as unexplained money possessed by the assessee without physically finding cash. All the case laws and proposition followed by the Ld.CIT(A) also hold that all the three additions made by the AO are not sustainable in law. Accordingly, we uphold the order passed by the Ld. CIT(A) in respect of the three additions mentioned above. Accordingly, the appeal filed by the Revenue is liable to be dismissed.

**ITA No. 2607/Mum/2024 (Assessee's Appeal):**

10. We shall now take up the appeal filed by the assessee. In this appeal, the assessee is challenging the addition of Rs.1.73 crores sustained by the Ld.CIT(A). During the course of search action conducted in the hands of the assessee, his mobile was examined. It was noticed that the assessee had done whatsapp chat with one Shri Jignesh Gopani on 21-12-2020, which appeared to be financial transactions.



The message “Shrikant Sharma Mob.9702301515 for 100 Kg” was interpreted as payment of Rs.1.00 crore by the assessee to him. Similarly the message of “JIMIT 8356091254 for 73 Kg 00T 184925 Rs.10” was interpreted as payment of Rs.73 lakhs to him. In the sworn statement taken from the assessee on 24.9.2021, he submitted that the code “kg” refers to “lakhs” and further replied that these are amounts of 1 crore and 73 lakhs, which are accounted cash, which was received from Shri Jignesh Gopani during December, 2020. He further submitted that he was unable to provide any further explanation. During the course of assessment proceedings, the assessee filed an affidavit retracting the statement given by him. The AO rejected the same, since the retraction was made after one year. Since the assessee did not submit anything further, the AO assessed the sum of Rs.1.73 crores as unexplained money (investment) u/s 69A of the Act.

11. Before Ld CIT(A), the assessee refuted that the term “Kg” denotes “lakh”. He further submitted that he had stated so in the sworn statement

taken from him, on the insistence of the search officials. He further submitted that Shri Jignesh Gopani is his friend and he may have transacted to purchase steel from him for the purpose of his construction business. The Ld.CIT(A), however, took the view that the presumption provided for in sec. 292C and 132(4A) of the Act will be applicable in this case also and accordingly confirmed the addition. The assessee is aggrieved.

12. We heard the parties and perused the record. We notice that this addition of Rs.1.73 crores has been made on the basis of a whatsapp chat with Shri Jignesh Gopani. The question that arises is whether the said chat establishes payment of money by the assessee to Shri Jignesh Gopani or not. A careful perusal of the above said whatsapp chat would show that there are three transactions noted in the chat:-

- (a) The first transaction is in the name of Dhiraj Shinde. However, it does not contain any figure or amount. This transaction appears to have been completed as can be seen from further chats, viz., "Yes confirm" (by the assessee) and "OK thx" (by Shri Jignesh Gopani). Thus, there was a request from Shri Jignesh Gopani and confirmation of completion of transaction if any, from the side of the assessee, which has also been acknowledged by Shri Jignesh Gopani. In fact, no addition has been made in respect of this chat.
- (b) The next transaction is in the name of Shri Shashikant Sharma for 100 kg. We notice that there was request from Shri Jignesh Gopani. However, there are no details, as in the first one, about completion of this transaction. However, addition of Rs.1.00 crore has been made on the basis of this chat.

- (c) The last transaction is in the name of "JIMIT" for 73 kg. In this case also, there are no details, as in the first one, about the completion of this transaction. However, addition of Rs.0.73 crore has been made on the basis of this chat.

Thus, we notice that the information found in the whatsapp chat are incomplete, i.e., there is no material to show that the transactions pertaining to 100 kg and 73 kg (which was translated into 1.73 crores) were completed, i.e., there is no material to show that the assessee had actual disbursed the above said amount. When this kind of incomplete information is to be relied upon, then it is incumbent upon the AO to corroborate his conclusions with any other credible evidence. The AO could have conducted enquiries with M/s Jignesh Gopani, Shasikant Sharma and JIMIT, since their phone numbers were available, which would have thrown light on the nature of the transactions. The above said action would become mandatory, when the assessee denies payment of any money. We noticed earlier that the assessee has retracted his statement, but his retraction was rejected by the AO stating that the retraction was late. The Ld.AR submitted that the search was conducted during Covid Pandemic and the copy of statement was given to the assessee only few weeks earlier. Accordingly, upon reading the statement given during mental stress, the assessee realized that the replies so given were incorrect and accordingly retracted it.

13. We notice that the whatsapp chats are incomplete and they do not prove that the said transactions were completed or not. When the document is incomplete, then it becomes dumb document and the AO could not have placed reliance on it without bringing any other corroborative material to support the transactions mentioned in the above said document. The question of invoking presumptions provided in sec.

292C and 132(4A) of the Act would apply only in respect of documents containing complete transactions. Accordingly, the AO could not have made this addition of Rs.1.73 crores on the basis of a dumb document. In our view, various case laws relied upon by the Ld.CIT(A) in deleting the earlier three additions would equally apply to this addition also. Accordingly, we set aside the order passed by the Ld.CIT(A) on this issue and direct the AO to delete this addition of Rs.1.73 crores.

14. To sum-up, the appeal of the assessee is allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open court on 05-12-2024

Sd/-  
[RAJ KUMAR CHAUHAN]  
JUDICIAL MEMBER

Sd/-  
[B.R. BASKARAN]  
ACCOUNTANT MEMBER

Mumbai,  
Dated: 05-12-2024

*TNMM*

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT concerned
- 4) The D.R, "B" Bench, Mumbai
- 5) Guard file

By Order

Dy./Asst. Registrar  
I.T.A.T, Mumbai