

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

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SHRI SUNIL KUMAR SINGH, JUDICIAL MEMBER

ITA No.	A.Y.	Appellant	Respondent
4477/Mum/2024	2018-19	ACIT, CC-6(1), Room No. 445, 4 th Floor, Kautilya Bhawan, BKC, Mumbai	Jayant Hiralal Shah, Plot No. 11, Sujoy Garden 12, Mukund Nagar Market Yard, Pune PAN : AEGPS3036L
4500/Mum/2024	2019-20		
4473/Mum/2024	2020-21		

Assessee by : Shri Sanjay Kapadia
Revenue by : Shri Solgy Jose T. Kottaram, CIT-DR

Date of Hearing : 15/10/2024
Date of Pronouncement : 06/12/2024

ORDER

PER B.R. BASKARAN, A.M :

The Revenue has filed these three appeals challenging the orders passed by the Ld.CIT(A)-54, Mumbai and they relate to the Assessment Years (AYs.) 2018-19, 2019-20 & 2020-21. All these three appeals were heard together and are being disposed of by this common order.

2. The Revenue is aggrieved by the decision of the Ld.CIT(A) in deleting the addition of Rs.1.50 crores, Rs.5.50 crores and Rs.2.05 crores made by

the AO in the hands of the assessee u/s 69C of the Income Tax Act, 1961 ('the Act') respectively; for the AYs. 2018-19, 2019-20 and 2020-21.

3. The Revenue carried out search and seizure operations u/s 132 of the Act in the hands of certain business group/middle men on 23-09-2021. The assessee was also subjected to search. Consequent to the information obtained from the search conducted from certain other people, the assessment of all the three years under consideration were reopened by the AO u/s 147 of the Act.

4. The assessee herein is an individual and is running a proprietary business in real estate & construction activities. Besides the above, he is also a Partner/Director in certain other firms/companies. The assessee is a non-executive director in M/s City Corporation Ltd.

5. The additions made in AYs.2018-19 and 2019-20 are based upon same set of facts. Hence, appeals of both the years are first disposed of together.

6. The background of additions made in AYs.2018-19 and 2019-20 is discussed in brief. During the course of search conducted in the case of M/s City Corporation Ltd, Pune, (CCL) a hard disk was recovered from an employee named Shri Chetan Borawake, who was working as Office boy of CCL, wherein Excel sheets were found. One of the sheets contained details of cash receipts and payments and the same is extracted below:-

PMK Actual Cash Recd and Exp(1000)-New							Recd	
Sr. No	Date	Particulars	Cash Recd	Exp	Balance	PMK	JHS	
2								
10	04-09-2018	Recd J.H.s	10000		10925.7	JHS	10000	
71	09-03-2018	Recd JS	10000		10016.2	JHS	10000	
79	28-09-2018	Recd JS	5000		5016.19	JHS	5000	
81	10-01-2018	Recd JS	5000		5016.19	JHS	5000	
137	14-01-2019	JS Mittha Poona- Mumbai	30000	30000	-19.61	JHS	30000	
140	16-01-2019	JS Mittha Poona- Mumbai	10000	10000	-69.61	JHS	10000	
250			218568	220596.4				
308			21250	21615.35		117185	70000	
						19950	0	

A sworn statement was taken from Shri Vijay Yewale, Accounts Manager of CCL u/s 132(4) of the Act, wherein he explained the work sheets. The Explanation given by him in respect of Worksheet named as '2017-18' is extracted below:-

"The sheet with heading "PMK – Actual Cash Recd and Exp (1000)-New" contains ledger of cash expenses made by Shri Pradeep M Kataria himself during FY 2017-18. The amounts mentioned in the sheets is to be followed by '000' i.e. 5000 is to be read as 50,00,000. Rest of explanation is same as for work sheet no.2 named as '12-13, 13-14'.

In 12-13, 13-14, Shri Vijay Yewale has further stated as under: -

"Shri Pradeep M Kataria used to convey me the cash expenses done by him whenever he came to the FC Road office of City Corporation Ltd. He used to convey the cash expenses details in order to record it. I used to record it and compile it in a pen drive and gave him the pen drive periodically. This practice is still continued."

He also explained the meaning of code words. For example, he stated that "PMK" would refer to Pradeep M Kataria, " J H S" would refer to Jayant Hiralal Shah etc.

7. Since JHS was mentioned as referring to the assessee herein, the AO examined the above mentioned Excel sheet. It contained entries in the

code of JHS showing receipts. The AO took the view that codes “JHS” and “JS” refer to the assessee only. Accordingly, the AO took the view that the amounts shown as receipts against the code “JHS” as well as “JS” represent money paid by the assessee during the years relevant to AY 2018-19 and 2019-20 to M/s CCL. The year-wise break up of receipts is mentioned below:-

(A) Financial Year 2017-18 relevant to AY 2018-19:-

09-03-2018	-	1,00,00,000
10-01-2018	-	50,00,000

Total	-	1,50,00,000
		=====

(B) Financial year 2018-19 relevant to AY 2019-20

04-09-2018	-	1,00,00,000
28-09-2018	-	50,00,000
14-01-2019	-	3,00,00,000
16-01-2019	-	1,00,00,000

Total	-	5,50,00,000
		=====

8. The AO confronted the assessee with the statements given by Shri Vijay Yewale and Shri Chetan Borawake. The assessee denied having paid any money as stated in the Excel sheet recovered from CCL. He submitted that the presumption prescribed in sec. 132(4A) and sec. 292C of the Act would apply to the person from whose possession the documents were seized. Accordingly, the assessee contended that he cannot be subjected to tax on the basis of uncorroborated entries found in the documents of third parties. He further submitted that the Excel sheet, being electronic evidence, the AO should comply with the requirements of sec.65-B of

Indian Evidence Act. Referring to the statements given by the above said parties, the assessee submitted that they have, nowhere, stated that the cash was received from the assessee. It was also submitted that Shri Vijay Yewale has retracted his statement made during the course of search and hence his statement should not be relied upon. The assessee accordingly reiterated that he has not entered into any cash transaction as mentioned in the Excel sheet. The assessee also requested the AO to provide an opportunity of cross examining the above said persons, on whose statements, the AO had intended to place reliance. However, the AO did not provide opportunity of cross examination. The assessee further submitted that the above said Excel sheet is a non-speaking dumb document and hence it cannot be relied upon for making addition in the hands of the assessee. In support of this legal proposition, the assessee relied upon various case laws.

9. Since the assessee was a director in CCL and since the Excel sheet was recovered from an employee of CCL named Shri Chetan Borawake, the AO held that the Excel sheet cannot be considered as a third party document. He further held that the entries in the Excel sheet have been explained by Shri Vijay Yewale, Accounts manager as cash transactions. With regard to retraction of the statement given by Shri Vijay Yewale, the AO took the view that the above said person has retracted his statement after two years and hence his retraction is not acceptable. The AO also mentioned that certificate u/s 65B of Indian Evidence Act was prepared at the time of search. Accordingly, the AO took the view that the assessee has paid cash to M/s CCL as mentioned in the Excel sheet. Accordingly, he assessed the sums of Rs.1.50 crores and Rs.5.50 crores respectively in Ays. 2018-19 and 2019-20.

10. The Ld.CIT(A), however, deleted the additions in both the years and the reasoning given by the Ld. CIT(A) are summarized below:-

- (a) Shri Chetan Borawake is an employee of M/s Saffron Manpower and HR Services P Ltd and not CCL.
- (b) The assessee herein is a non-executive director and he is not involved in the day to day working of the company. The Managing director of CCL, Shri Aniruddha Deshpande has stated that he looks after the overall administration and different departments of the company.
- (c) The Ld CIT(A) examined the statements given by Shri Chetan Borawake, Shri Atul Gogawale, Shri Prashant Pathak, Shri Vijay Yewale, Shri Pradeep Kataria and Shri Aniruddha Deshpande. After thoroughly examining the statements, the Ld CIT(A) gave a finding that there was no admission by any of the parties that any cash has been received from the assessee herein.
- (d) Shri Vijay Yewale had explained that the code "JHS" refers to the assessee herein. However, the AO has taken the noting made against the code "JS" also as that of the assessee. Further, the above code was explained in the context of file named "Yewale-2" , but the addition has been made from the file named "Yewale=1". The explanation given for "Yewale-2" should not have been used for "Yewale-1".
- (e) The Excel sheet contains only certain entries, but the dates are not in chronological order. Further, the balance struck down shows negative balances also. Hence the reliability of this Excel sheet becomes doubtful. Further, the Excel sheet only mentions as "receipts", but does not mention exact nature of the alleged transactions.

- (f) Ultimately, the addition has been made by the AO on the basis of statement given by Shri Vijay Yewale only, which has been retracted later and also on the basis of material found during the course of search of a third party named Shri Chetan Borawake.
- (g) 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 this regard:-
- (i) Naren Premchand Nagda vs. ITO (ITA No.3265 (Mum) of 2015 dated 8.7.2016.
 - (ii) CIT vs, Santlal (2020)(118 taxmann.com 432)(Delhi)
 - (iii) Jawaharbhai 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)
- (h) 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 6.12.2013) and also in the case of Straptex (India) P Ltd vs. DCIT (2003)(84 ITD 320)(Mum)
- (i) As regards notings/entries in loose papers/diaries, the Hon'ble Courts have held that such notings/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)

Accordingly, the Ld CIT(A) deleted the addition made in AY 2018-19 and 2019-2020. For the sake of convenience, the conclusion reached by Ld CIT(A) is extracted below:-

“7.25 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. 1,50,00,000/- has been made by the AO relying on the statement of a third party i.e Mr. Vijay Yewale, which had in any case been retracted. Also, the addition has been made on the basis of material found being certain image of extract of excel file found during the course of the search conducted on a third party i.e Mr. Chetan Borawake. This search which took place as a part of the search on CCL group on 15.02.2023 and it is pertinent to point out that the assessee was not covered under this search. This by itself shows that the assessee Sh. Jayant Hiralal Shah was not considered part of the CCL group. Moreover, the assessee Sh. Jayant Hiralal Shah has 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. 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 and is hereby deleted. The grounds of appeal are accordingly allowed."

The Revenue is aggrieved.

11. We heard rival contentions and perused the record. We noticed that the assessing officer has placed reliance on the statement given by Shri Vijay Yewale and it is stated that the said person has retracted his statement later. Further, the document relied upon by the AO to make the addition was recovered from Shri Chetan Borawake, who was employee of some other concern and not M/s CCL, wherein the assessee is non-executive director. Thus, as noticed by Ld CIT(A), the AO has relied 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 Ld CIT(A), the AO could not have placed reliance on those third party statements and uncorroborated documents taken from third parties in order to make the additions in the hands of the assessee.

12. We further notice that the assessee has requested the AO to provide an opportunity of cross examining Shri Vijay Yewale and other persons, on whose statements the AO had placed reliance. However, the AO did not provide the said opportunity. The Hon'ble Supreme Court has held in the case of Andaman Timber Industries vs. Commissioner of Central Excise

(Civil Appeal No. 4228 of 2006 dated September 02, 2015) 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 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.”

13. From the foregoing discussions, it can be noticed that the AO has violated the principles of natural justice in respect of the addition made in these two years 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. In the course of search conducted in the hands of the assessee, no material relating to payment of alleged cash mentioned by the AO was found. Further, all the case laws and proposition followed by Ld CIT(A) also hold that all the additions made by the AO in both the years are not sustainable in law. Accordingly, we uphold the order passed by Ld CIT(A) in AY 2018-19 and 2019-20 on this issue. Accordingly, the appeals filed by the revenue for these two years are liable to be dismissed.

14. We shall now take up the appeal filed by the revenue for AY 2020-21. In this year, the revenue is aggrieved by the decision of Ld CIT(A) in deleting the additions of Rs.1.05 crore and Rs.1.00 crore made by the AO u/s 69C of the Act.

15. During the course of assessment proceedings, the AO noticed that certain images relating to whatsapp chat between Shri Shailendra Rathi (Key associate of Rucha group) and Shri Nilesh Toshniwal (key associate of

Shri Jayant Shah) was found during search proceedings conducted in the hands of Shri Shailendra Rathi. One such image mentioned an amount of Rs.1.05 crore with a noting "from JS at Pune against Kulswa". In the sworn statement, Shri Shailendra Rathi stated that the above said amount was received from the assessee herein. Further another whatsapp chat between Shri Shailendra Rathi and Shri Nilesh Toshniwal was seen in the phone of Shri Shailendra Rathi, wherein Shri Rathi had send a text message to Shri Nilesh Toshniwal that "Bhaiya Vinod Bhai will call you for 100'. In the statement, shri Rathi explained that Shri Nilesh Toshniwal was requested to pay 1.00 crore and in that connection, he had shared the phone number of angadia Vinod in order to co-ordinate with the transaction. When confronted with these information, the assessee denied both the above said transactions before the AO. However, the AO observed that there were regular communications between Shri Nilesh Toshniwal and Shri Shailendra Rathi and they were also regularly exchanging the documents which were in the nature of various cash transactions. Accordingly, the AO assessed both the amounts of Rs.1.05 crores and Rs.1.00 crore aggregating to Rs.2.05 crores as the unexplained expenditure of the assessee u/s 69C of the Act.

16. The Ld CIT(A) deleted both the additions, following the various case laws mentioned above (in AY 2018-19 and 2019-20). The final conclusions recorded by Ld CIT(A) are extracted below:-

"6.20 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. 2,05,00,000/- 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 or chat in the WhatsApp conversation during the course of the search conducted on a third party i.e 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 image or chat or the statement of Sh. Shailendra Rathi does not make any direct reference to the assessee. 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. 1,05,00,000/- and Rs. 1,00,00,000/- totaling to Rs. 2,05,00,000/- made by the AO in the case of the assessee is accordingly deleted and the grounds of appeal are allowed."

17. We heard the parties and perused the record. We notice that the AO has made addition on the basis of whatsapp chat between Shri Shailendra Rathi and Shri Nilesh Toshniwal. However, the assessee has denied those transactions. The AO, however, proceeded to make the additions of Rs.1.05 crores and Rs.1.00 crore based on the third party evidences. We notice that the assessee has claimed that the date of whatsapp chat relating to Rs.1.05 crores was 11.03.2021, while the AO has taken the date as 11.3.2020. Hence, there is confusion about the date of the alleged transaction relating to Rs.1.05 crores. With regard to the amount of Rs.1.00 crore, the whatsapp chat shows that Shri Shailendra Rathi has

only requested Shri Nilesh Toshniwal to pay Rs.1.00 crore to the angadia Shri Vinod, meaning thereby, there is no proof that the said transaction was completed. In that case, no addition of Rs.1.00 crore was warranted. In any case, both the transactions were related to uncorroborated whatsapp chat, which have been denied by the assessee and the AO did not bring any material to corroborate the transactions. Accordingly, as per the various case laws relied upon by the Ld.CIT(A), the AO could not have made the addition of Rs.2.05 crores. Accordingly, we are of the view that the Ld.CIT(A) was justified in deleting the addition of Rs.2.05 crores.

18. In the result, all the three appeals of the Revenue are dismissed.

Order pronounced in the open court on 06-12-2024

Sd/-
[SUNIL KUMAR SINGH]
JUDICIAL MEMBER

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

Mumbai,
Dated: 06-12-2024

TNMM

Copy to :

1. The Appellant
2. The Respondent
3. The Pr. CIT, Mumbai concerned
4. D.R. ITAT, "F" Bench, Mumbai.
5. Guard File.

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//By Order//

Dy./Asst. Registrar,
ITAT, Mumbai