

IN THE INCOME-TAX APPELLATE TRIBUNAL "SMC" BENCH,
MUMBAI

BEFORE MS. KAVITHA RAJAGOPAL, JUDICIAL MEMBER
&
SMT. RENU JAUHRI, ACCOUNTANT MEMBER

ITA No. 4547/MUM/2024
(A.Y. 2008-09)

Dhanpriya Enterprises LLP B-401 Raghav Building, Film City Road, Malad East, Mumbai-400097	v/s. बनाम	ITO, 30(1)(3), Mumbai Bandra Kurla complex, Mumbai-400051
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAHFD5779N		
Appellant/अपीलार्थी	..	Respondent/प्रतिवादी

Appellant by :	Shri Haridas Bhat
Respondent by :	Shri Avinash Karpe

Date of Hearing	24.10.2024
Date of Pronouncement	28.11.2024

आदेश / ORDER

PER RENU JAUHRI [A.M.] :-

This appeal is filed by the assessee against the order of the Learned Additional Commissioner of Income-tax (Appeals), Kolkata-4 [hereinafter referred to as "Addl. CIT(A)"] dated 05.07.2024 passed u/s. 250 of the Income-tax Act, 1961 [hereinafter referred to as "Act"] for Assessment Year [A.Y.] 2011-12.

2. The assessee has raised following grounds of appeal:

"GROUND I

A. On the facts and circumstances of the case, and in Law, the Ld. CIT(A) erred in confirming the addition of Rs. 15,86,000/ in the income of the assessee being alleged "On Money" payment made to M/s. Kamla Mills Ltd.

B. The Ld. CIT (A) failed to appreciate the facts that:

i. The Flat was subsequently cancelled since the project was behind its schedule.

ii. The additions are made merely on the basis of information received from Investigation unit based on pen drive found, with Shri Nilesh Gawade, during the search and seizure action on the premises of Kamala Group without any corroborative evidence. Shri Nilesh Gawade has filed an affidavit clarifying he is not aware of the contents of Pen Drive, which is not maintained by him, and he is not aware of the Assessee.

iii. The AO did not provide opportunity to cross examine statement of Shri Mahendra Rawal, provided during remand proceedings, of the person on whose basis the case is re-opened even after specific request from the assessee. C. The appellant therefore prays that the addition of Rs. 15,86,000/- may kindly be deleted.”

3. The brief facts of the case are that during a search and seizure action conducted on Kamala Group of cases on 08.01.2013 by the Investigation Wing, Mumbai, a pendrive containing details regarding cash received from the sales of flat was recovered. The assessee is one of the customers whose name was found in the said list of on-money paid. As per the information, the assessee had paid Rs. 15,86,000/- in cash to an entity of M/s. Kamala Mills Ltd. Accordingly, the case was reopened by issuing notice u/s 148 of the Act on 28.03.2014. The assessee filed a reply stating that the return filed on 24.09.2011 may be treated as return filed in response to the notice u/s 148 of the Act. During the course of proceedings, the assessee claimed that it had not paid any amount in cash to M/s. Kamala Mills Ltd or its group entity. The assessee had booked a flat for total consideration of Rs. 55,09,000/- and token amount of Rs. 1,00,000/- was paid by cheque. Since the flat was booked in the first year of incorporation of the firm, the token money was funded by the partners by bringing capital in the



LLP firm. According to the assessee there was no possibility of payment of any cash as on-money for booking of the flat. The AO, however, did not accept the assessee's explanation and proceeded to make an addition of Rs. 15,86,000/- as income from undisclosed sources while finalizing the assessment order u/s 143(3) r.w.s. 147 of the Act passed on 27.03.2015.

4. In appeal also, the Ld. Addl. CIT(A) did not agree with the contentions of the assessee and upheld the order of the Ld. AO.

5. Before us, Ld. AR contended that the assessee had requested for an opportunity to examine the person concerned, based on whose statement the assessment had been reopened. In view of the assessee's submissions before Ld. Addl. CIT(A), remand proceedings were initiated vide order dated 04.04.2017 directing the AO to examine the affidavit filed by Shir Nilesh Gawade and also to provide a copy of the statement on the basis of which the addition had been made. Ld. Addl. CIT(A) further directed the AO to provide an opportunity of cross-examination of the concerned persons to the assessee. Accordingly, vide letter dated 17.04.2017, the assessee requested for opportunity to cross-examine Shri Nilesh Gawade and Shri Mahendra Rawat. However, the same was not provided to the assessee and remand report was submitted by the Ld. AO based on which the Ld. CIT(A) proceeded to decide the appeal. Ld. AR has also filed a copy of the affidavit given by Nilesh subsequently Gawade vide which he has retracted the statement given earlier during the search proceedings. Ld.



AR has also pointed out that in the case of Shri Ashok Jalan, designated partner of assessee LLP, a favorable order has been passed by the co-ordinate bench on same facts and circumstances. Lastly Ld. AR pointed out that the booking of the flat has since been cancelled due to delay in execution of project and money has been refunded back. On the other hand, Ld. DR strongly relied on the orders of lower authorities.

6. We have heard the rival submissions and perused the material placed before us. The facts of the present case are similar to the case of Shri Ashok Kumar Jalan, partner of the assessee LLP, in whose case the issue relating to payment of on-money in respect of the flat booked in his minor son's name in the same project has been examined by the co-ordinate bench. Relevant portion of the decision of the co-ordinate bench in **ITA No. 2401/Mum/2016** in the case of Shri Ashok Jalan, is reproduced below:

"2. I heard the parties and perused the record. The assessee had booked a flat in his minor son's name in the complex developed in Kamala mills compound. The revenue carried out search and seizure operations in the hands of Kamala group of cases on 08-01- 2013. During the course of search, a pen drive was found and seized, which contained details of bookings of flats. The entries made against the assessee's son's name showed that the assessee has booked a flat and it further showed that the consideration is to be paid by way of cheque to the tune of Rs.71,50,000/- and by way of cash Rs.21,45,000/-. However the assessee has declared only the payment made by way of cheque amounting to Rs.34,97,335/-. The AO took the view that the assessee would have paid the cash component of Rs.21,45,000/- outside the books of account as on- money. Hence he reopened the assessment. In the assessment proceedings, the assessee pleaded that he did not pay any amount by way of cash and, in fact, cancelled the booking later. The AO noticed that the assessee has cancelled the booking after the search operations and hence took the view that the assessee would have paid the amount outside the books. Accordingly he assessed the amount of Rs.21,45,000/- as income of the assessee.

3. Before Ld CIT(A), the assessee contended that he was not given any opportunity to cross examine the person who had given statement. He further submitted that he is an employee of M/s Siyaram Mills and hence there is no scope for generating income



beyond his salary. He submitted that the figures stated in the pen drive are in variation to the actual payments made by him. He submitted that there is no other evidence to corroborate the figures noted down in the pen drive. He also contended that there is no evidence to support the case of payment of cash and also for refund of the same. laws. The assessee also placed reliance on various case

4. In view of the above, the Ld CIT(A) called for a remand report from the AO and also directed him to furnish copy of sworn statement and also to provide opportunity to cross examination. The AO furnished relevant portion of the statement recorded from a person named Shri Nilesh Gawde, who happened to be the accountant in Kamala Group. The pen drive belonged to Shri Mahendra Rawal, M.D of Kamala Builders. It is pertinent to note that there is no mention about the statement, if any, taken from Shri Mahendra Rawal. The AO has fully relied upon the statement given by Shri Nilesh Gawde, accountant, who appears to have explained the entries. Though the AO summoned both Shri Nilesh Gawde and the assessee in order to provide an opportunity to cross examine, yet the same could not happen, since both the parties appeared on different timings. Accordingly the stood by the addition made by him. The Ld CIT(A) also confirmed the addition rejecting all the contentions of the assessee.

5. Having heard rival submissions, I am of the view that the impugned addition cannot be sustained on the following reasons:-

(a) The AO has placed reliance on the entries found in the pen drive. It is an admitted fact that the pen drive belongs to Shri Mahendra Rawal and it is not stated that Shri Mahendra Rawal has confirmed the transactions.

(b) The AO has not provided the statement, if any, taken from Shri Mahendra Rawal.

(c) Shri Nilesh Gawde was only an accountant and he has clearly stated that he is not involved in sale transactions. Hence it cannot be said that he has got full idea of all the deals. Accordingly, in my view, the AO should not have placed reliance on his statement alone without bringing any other corroborative evidence.

(d) No specific dates are mentioned in the pen drive. Hence it cannot be conclusively stated that the payments were made during the year under consideration.

The entries found in the pen drive show the cheque

(e) component of the consideration as Rs.71.50 lakhs. It is an admitted fact that the assessee has paid a sum of Rs.34.97 lakhs only by way of cheque, meaning thereby, the assessee has not paid entire amount shown in the pen drive. If the entries had been relied by the AO fully, he would have made addition of remaining amount of cheque component also, which means, the AO impliedly agrees that the transaction was not complete. Under these set of facts, in my view, it may not be proper to presume that the assessee would have paid cash component of Rs.21.45 lakhs, that too, during the year under consideration.

(f) It is a fact that the assessee has cancelled the booking, even though the cancellation has taken place after the date of search. However, there is no evidence to show that the assessee had paid the money by way of cash and also received back the same.

Hence I am of the view that the payment of cash component during the year under consideration has not been proved by the AO. In this view of the matter, I am unable to agree with the view expressed by Ld CIT(A), Accordingly I set aside the order



passed by Ld CIT(A) and direct the Ao to delete the addition of Rs.21.45 lakhs made during the year under consideration.”

7. Since the facts of the assessee's case are similar to the case of its partner cited above, therefore, respectfully following the order of the co-ordinate bench, we hold that the addition made on account of on-money paid to the extent of Rs. 15,86,000/- is not justified. Accordingly, the addition on account of undisclosed income of Rs. 15,86,000/- is hereby deleted.

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

Order pronounced in the open court on 28.11.2024.

Sd/-

KAVITHA RAJAGOPAL

(न्यायिक सदस्य/JUDICIAL MEMBER)

Sd/-

RENU JAUHRI

(लेखाकार सदस्य/ACCOUNTANT MEMBER)

Place: मुंबई/Mumbai

दिनांक /Date 28.11.2024

अनिकेत सिंह राजपूत/ स्टेनो

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,
Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,



ITA No. 4547/Mum/2024
A.Y. 2011-12
Dhanpriya Enterprises LLP

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench,
Mumbai.

