

*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "A" KOLKATA*

Before **Shri Waseem Ahmed, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

ITA No.1815/Kol/2014
Assessment Year:2010-11

Dr. Subrata Kundu D.N. Tiwari Road, Borehat, P.O. Nutangaj, Burdwan-713 101 [PAN No.AFFPK 8617 R]	<u>बनाम</u> / V/s.	ACIT, Circle-1, Aayakar Bhawan, Court Compound, Burdwan- 713 101
अपीलार्थी /Appellant		
..		
प्रत्यर्थी /Respondent		

अपीलार्थी की ओर से/By Appellant	Shri Soumitra Choudhury, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri Sallong Yaden, Addl. CIT-DR
सुनवाई की तारीख/Date of Hearing	27-03-2017
घोषणा की तारीख/Date of Pronouncement	12-05-2017

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-Asansol dated 24.07.2014. Assessment was framed by ACIT, Circle-1, Burdwan u/s 144 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 24.03.2013 for assessment year 2010-11.

Shri Soumitra Choudhury, Ld. Advocate appeared on behalf of assessee and Shri Sallong Yaden, Ld. Departmental Representative represented on behalf of Revenue.

2. First issue in ground No. 1 to 4 are inter-related as these were raised against the rejection of books of accounts u/s 145(3) of the Act and accordingly wrongly estimating the professional income of ₹ 39 lakh. Therefore, all these three grounds are considered together.

3. The facts in brief are that assessee is a professionally qualified doctor and acting as medical practicing in his individual capacity. Besides, he was also attached with the Burdwan Critical Care Unit Pvt. Ltd. & Diplomat Nursing Home as Visiting Doctor. The assessee in the year under consideration has filed his return of income declaring total income of ₹18,13,702/- which is comprising of business income only.

4. A survey operation u/s. 133A of the Act was conducted at the chamber of the assessee on 29.03.2010. At the time of survey a statement u/s. 131 of the Act was recorded and the relevant extract of the statement is reproduced below:-

“Q. 3. What is the cash balance today?

Ans. I have seven thousands and twenty rupees after meeting some petty expenses.

Q. 4. Cana you reconcile this with your cash book?

Ans. I do not maintain any cash book. So it is not possible to me to reconcile this at the moment.

Q. 5. What are other Registers do you maintain?

Ans. I maintain only one patient register and nothing else.

Q. 6. Do you have any patient list for today and earlier days also?

Ans. I already produced rough patient list for 28th and 29th March 2010 and earlier list of patient has been entered in the patient register.

Q. 7. Do you engaged in any other institutes/Nursing home/Govt. Hospital etc.

Ans. I admit my patient in Diplomat Nursing Home and charge consultations fees for Rs.500/- per day per patient. I am also Director of Burdwan Critical Care Unit (B.C.C.C.C) without remuneration but charge consultation fee @ Rs.500/- per patient per day.

Q. 8. Your daily sheet for 28th March 2010 shows number of patient examined 58 but the entry in patient register is 34. Kindly explain it.

Ans. This is a mistake.

Q. 9. As per daily patient list for 28th March 2010 number of patient is 58 and 29th March 2010 number of patient is 62. So average comes to 60/day. Do you agree for this?

Ans. Yes.

Q 10. What will be your estimated income for this financial year (2009-10)?

Ans. It will be approximately Rs.44,00,000/- (forty four lakhs).

Q. 11. What amount of tax you are going to pay for this financial year?

Ans. I have paid Rs.2,70,000/- as advance tax and I shall pay Rs.10,00,000/- in addition to that amount for this I am giving your one cheque of Rs.3,00,000/- for this date and two post dated cheques of Rs.3,50,000/- each.

Q. 12. Do you want to add, alter or omit anything what you have stated above?

Ans. What I have stated above I am fully agreed with above statements.

I declare what I have stated above without any pressure or coercion and with sound state of mind.”

In view of above, AO was of the opinion that the assessee was under the obligation u/s 44AA of the Act to keep the necessary books of account. However the assessee failed to furnish the necessary books at the time of survey operation and this fact was also admitted at that time by the assessee for non-maintenance of books of account. Therefore the AO rejected the books of account. Accordingly, AO estimated the taxable income of the assessee at ₹ 44 lakh which was admitted by assessee in his statement given u/s. 131 of the Act at the time of survey operation. The AO made the estimation of aforesaid income by considering the number of patients on an average 60 per day. The estimate with regard to the number of patients were determined on the basis of patients appeared before survey team at the time of survey and on the basis of list of patients found during survey which was containing the list of the patients appeared one day prior to the date of survey i.e. 28.03.2010. Thus the AO inter-alia estimated the income from the chamber of the assessee at Rs. 44 lacs which was added to the total income of the assessee.

5. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The assessee before Ld. CIT(A) submitted that the income of ₹ 44 lakh was admitted under pressure and coercion in the statement given at the time of deposition. The assessee also submitted that the books of account are duly audited and same was rejected without pointing out any defect. However, Ld. CIT(A) in his appellate proceedings has observed certain facts from the available record as detailed under :-

i) The assessee agreed at the time of survey operation the average number of patients visited to assessee on 28.03.2010 and 29.03.2010 at 60 per day;

ii) The AO on the basis of aforesaid number of patients has determined the taxable income at ₹ 44 lakh;

- iii) The assessee has paid taxes on the income admitted at the time of survey operation and retraction statement was filed on 16.12.2010 by way of affidavit.
- iv) The assessee at the time of survey has not produced books of accounts and has also admitted this fact that the necessary books as specified u/s.44AA r.w.r. Rule 6F of the IT Rules have not maintained.

However, Ld. CIT(A) has confirmed the order of AO after giving relief to the assessee in part by observing as under:-

“An affidavit is a piece of evidence, which along with other material on record, has to be taken into consideration before arriving at a finding. A statement by a deponent can be held to be unreliable either on the basis of cross-examination of the deponent or by reference to other material on record (Gunwantibai Ratilal Vs CIT (MP) 146 ITR 140, Silk Museum vs CIT (Guj) 257 ITR 22)

Affidavit need not always be accepted as correct. It is neither a rule of prudence nor a rule of law that the statements made in an affidavit which remains uncontroverted, must invariably be accepted as true and reliable. Ordinarily, in the absence of denial, the statements may be accepted as true but if there are circumstances which suggests that the statements on affidavit should not be accepted as true, the absence of denial by the other side, would not by itself be sufficient to clothe the statements on affidavit with truthfulness and reliability (Sri Krishna Vs CIT (All) 142 ITR 618).

9. In this case more than admission made on 29.03.2010 and 05.04.2010, actual tax payment corresponding to additional income offered was made. This cannot be said to be made on threat or coercion as Assessing Officer has no control over the cash deployment with the assessee. The physical payment of tax corresponding to disclosure of additional income is a self-controlled act of assessee. The case decisions listed above both on retraction and validity of affidavit are squarely pertinent to the facts and circumstances of the case. The retraction is made after inordinately long period of time and coercion or threat in obtaining statement is not proved. Hence I hold that retraction is not validly made.

*10. Having concluded that case for invoking section 145 exists and that there is no valid retraction, I have to decide between adoption of Rs.44,00,000/- stated on 29.03.2010 and Rs.39,00,000/- stated on 05.04.2010. The figure of Rs.44,00,000/- is a self given one on estimated income for the year as clear from statement given on 29.03.2010. The figure of Rs.39,00,000/- given on 05.04.2010 is a refinement of Rs.44,00,000/- given on 29.03.2010. On 05.04.2010 it was stated that **“taxable income will be Rs.39 lakh or a little lower.”** There is a claim of Rs.1,15,000/- under Chapter VI-A in return of income. This is not granted by Assessing Officer in the assessment order. The main change between the deposition on 29.03.2010 and I 05.04.2010 on the said sum of Rs.44,00,000/- is that in former it is stated as income and in) latter it is stated as net income. Overall, I hold that the statement given on 05.04.2010 given on balanced circumstances (including sufficient time to take professional advice) hold tight and since assessee claimed deduction under Chapter VI-A, not allowed by Assessing Officer in assessment order, it is fair and reasonable for to fix the net income at Rs.39,00,000/- in place of Rs.44,00,000/-. The eligible*

deduction under Chapter VI-A is considered to be allowed in fixing the income at RS.39,00,000/-. Accordingly, I direct Assessing Officer to fix income from medical practice at Rs.39,00,000/- after deduction under chapter VI-A and this direction disposes of grounds 1 and 2 and 3 in part, and is partly allowed.”

Being aggrieved by this order of Ld. CIT(A) assessee came in second appeal before us on the following grounds:-

“1. For that on the facts of the case, the order passed by the Ld. CIT(A) is completely arbitrary, unjustified and illegal.

2. For that on the facts of the case, the Ld. CIT(A) was wrong by holding the Assessing Officer's order as invoking sec. 145(3) of the IT Act which is completely arbitrary, unjustified and illegal.

3. For that on the facts of the case, the Ld. CIT(A) was wrong in estimating the professional income at Rs.39,00,000/- in place of Rs.18,13,702/- shown by the assessee which is completely arbitrary, unjustified and illegal.

4. For that on the facts of the case, the Ld. CIT(A) has estimated the income at Rs.39,00,000/- without any basis which is completely arbitrary, unjustified and illegal.”

6. Ld. AR for the assessee before us filed paper book which is running pages from 1 to 45 and submitted that the statement was taken by survey party under coercion and books of account of assessee was rejected only on the basis of statement. The AO has not pointed out any defect in the audited financial statements furnished while assessment proceedings. Ld. AR also submitted that there cannot be any reasonable estimate to determine the number of patients on daily basis. It is because number of patients keeps on changing on daily basis. Therefore, the estimation of no. of patients 60 per day is purely based on conjecture of the AO. The ld. AR also submitted that at the time of survey a document marked as SK-1 was seized which is placed on page 39 of the paper book. The documents SK-1 contain the list of the patients. But the income at ₹ 44 lakh has been estimated by the AO without referring to the seized documents marked as SK-1.

On the other hand, Ld. DR submitted that no evidence has been produced by the assessee that the statement was recorded under coercion. Ld. DR stated that assessee has estimated his income at his own in the disclosure statement at Rs. 44 lacs. He vehemently relied on the order of Authorities Below.

7. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the instant case relates to the income determined by the AO on the basis of the statement furnished by the assessee u/s. 131 of the Act at the time of survey operation conducted u/s. 133A of the Act. The assessee has furnished audited books of account at the time of assessment proceedings which was rejected by AO merely on the ground that assessee at the time of survey operation has admitted that no books of account was maintained as well as assessee failed to furnish the books of account at the time of survey. However on perusal of record, we find that assessee has retracted from his statement vide affidavit dated 16.12.2010. The retraction statement filed by assessee was rejected by Ld. CIT(A) at the time of appellate proceedings. However, we note that no defect of books of account has been pointed out by Authorities Below though books of account were duly audited by a qualified CA. It is settled law that assessee can retract from his statement filed at the time of survey. In holding so, we find guidance and support from the judgment of Hon'ble High Court of Chattisgarh in the case of ACIT Vs. Hukum Chand Jain reported in 337 ITR 238 where it was held as under :

“From the principles of law laid down in the aforesaid judgments, it may be deduced that, admission is one important piece of evidence but it cannot be said that it is conclusive. It is rebuttable. It is open to the assessee who made admission to establish that confession was involuntary and the same was extracted under duress and coercion. The burden of proving that the statement was obtained by coercion or intimidation lies upon the assessee. Where the assessee claims that he made the statement under the mistaken belief of fact or law, he should have applied for rectification to the authority who passed the order based upon his statement. The retraction should be made at the earliest opportunity and the same should be established by producing any contemporaneous record or evidence, oral or documentary, to substantiate the allegation that he was forced to make the statement in question involuntarily.”

On examination of the facts of the case on hand in the light of settled principles of law we find that survey under section 133A of the Act was concluded in the night at 9.30 PM when the statement was recorded as evident from the affidavit furnished by the assessee. Relying on the above judgment, we hold that assessee can retract from his statement filed at the time of survey after providing the reasonable reason. In the instant case, before us the assessee has filed an affidavit in support of his claim. Besides the above, the CBDT has issued vide F. No 286/98/2013-IT(Inv.II) dated 18th

of December 2014. The relevant extract of CBDT instructions issued vide F. No. 286/98/2013-IT(Inv.II) dated 18th of December 2014 reads as under:-

“Instances/complaints of undue influence/coercion have come to notice of the CBDT that some assessees were coerced to admit undisclosed income during Searches/Surveys conducted by the Department. It is also seen that many such admissions are retracted in the subsequent proceedings since the same are not backed by credible evidence. Such actions defeat the very purpose of Search/Survey operations as they fail to bring the undisclosed income to tax in a sustainable manner leave alone levy of penalty or launching of prosecution. Further, such actions show the Department as a whole and officers concerned in poor light.

2. I am further directed to invite your attention to the Instructions/Guidelines issued by CBDT from time to time, as referred above, through which the Boards has emphasized upon the need to focus on gathering evidences during Search/Survey and to strictly avoid obtaining admission of undisclosed income under coercion/undue influence.

3. In view of the above, while reiterating the aforesaid guidelines of the Board, I am directed to convey that any instance of undue influence/coercion in the recording of the statement during Search/Survey/Other proceeding under the IT Act, 1961 and/or recording a disclosure of undisclosed income under undue pressure/coercion shall be viewed by the Board adversely.”

We also find that the various Hon'ble Courts have held the income admitted in the statement should also be supported with the tangible materials otherwise the same cannot be made subject-matter of addition. In this connection, we rely in the case of D.S. Agency and Associates and Usha Distributors vs. ACIT reported in 44 ITD 46 where the Hon'ble Tribunal Mumbai has held as under:-

“2015(12) TMI 1459 – ITAT MUMBAI – [2015] 44 ITR (Trib) 46 (ITAT [Mum]) – Addition as undisclosed income in respect of commission expenses treated as non-genuine- Held that:

‘Assessing Officer has made addition purely on the basis of statement made during the course of survey under section 133A, which was later on retracted by the assessee, therefore, we are of the considered view that any addition made on the basis of these statements is without any basis and deserves to be deleted as there is no corroborative materials on record. It seems that addition has been made merely on the basis of statement/presumptive basis and no corroborative material has been brought on record. Presumption.’

On similar facts, we also find that Co-ordinate Bench has deleted the addition made on the basis of statement us. 133A of the Act in the case of *ACIT vs. Ajoy Bakli* in

ITA No. 312/Kol/2013 for A.Y.2009-10 vide order dated 06.05.2015. The relevant operative portion of this order is reproduced below:-

“6. We have duly considered the rival contention and gone through the record carefully. Hon'ble Madras High Court in the case of CIT vs. S. Khader Khan Son (supra) has considered the evidentiary value of the seta recorded during the survey and held that on the basis of the statement addition cannot be made. Similarly, the ITAT Delhi in the case of Mahesh Ohri (supra) has also considered this aspect and after putting reliance upon the judgment of the Hon'ble Kerala High Court in the case of Paul Mathews & Sons vs. CIT reported in (2003) 263 ITR 101 (Ker.) has held that section 133A empowers the authority to record the statement of any person, which may be useful for, or relevant to any proceedings under the Act. This section only enables the authority to record any statement of any person, which may be useful, but does not authorize for taking any sworn statement. On the other hand, such power to examine a person on oath is specifically conferred on the authorized officer u/s. 132(4) of the IT Act, 1961. The statement recorded by an officer on oath will be used as evidence in any proceeding, whereas statement recorded u/s. 133A has not given any evidentiary value because it was recorded by the authority, which has not been empowered to administer the oath to the assessee and take sworn statement.

6.1 Respectfully following the judgments of the Hon'ble Madras High Court, Kerala High Court and Hon'ble Supreme Court, we are of the view that the 1st appellate authority has not committed any error while deleting the addition. The ld. DR was also unable to point out any other corroborative evidence. In view of the above discussion, we dismiss the appeal of the revenue.”

The principles laid down by various courts as discussed above are squarely applicable to the instant case before us and therefore we rely on the same. Besides the above the assessee has produced the audited financial statements and no reference has been made to such books of accounts and accordingly no defect in books of accounts was pointed out.

We also find that the ld. CIT(A) has clearly recorded his finding in his order on page that the AO has not specified manner of quantification of professional fees of Rs. 44 lakhs only. Thus it can be concluded that the impugned addition was purely based on the statement recorded u/s 131 of the Act. Thus the statement of the assessee cannot be the sole basis addition. The provisions of the law require the Revenue is to tax the real income of the assessee which should be based on the documents.

Thus in view of above we reverse the order of Ld. CIT(A). Accordingly, AO is directed to delete the same. Hence, this ground of assessee's appeal is allowed.

8. Next issue raised by the assessee in this appeal is that Ld. CIT(A) erred in confirming the order of AO by restricting the disallowance at 2.24 lakh on account of foreign travel expenses.

9. The assessee in the year under consideration had visited foreign countries which was claimed to have been sponsored by Pharmaceuticals companies as academic tour. The assessee has visited Thailand two times for 4 days each and Canada for three day single trip. The AO during the course of assessment proceedings, called upon the assessee to furnish the details of expense and name of the Company which has sponsored the foreign tour programmes. However, assessee failed to furnish details as desired by AO. Accordingly, AO opined that the assessee has incurred expenses out of the books of account which was not disclosed to the revenue. Thus, the AO estimated expenditure at ₹8 lakh and added to the total income of assessee.

10. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who reduced the disallowance from 8 lakh to ₹ 2.24 lakh by observing as under:-

“12. The appellant objected to same before me. In view of section 28(iv) the value of the sponsored foreign trip is business receipt and taxable. Since exact figure is not known, the Assessing Officer has to estimate the same. The Assessing Officer has not given the computation. On a rational scale, the expense on 2 trips to Bangkok and 1 trip to Canada on economy class air travel will be Rs.30,000 x 2 for Bangkok trips and Rs.80,000 for Canada trip. This comes to Rs.1,40,000/-. Food and stay on twin sharing basis will cost Rs.12,000/- for 3 days in Canada and Rs.6,000/- each in Bangkok for 4 x 2 days. This come to Rs.84,000/-. Thus a total of Rs.2,24,000/- would suffice a addition. This is a conservative estimate as level of luxury involved is not proved. Accordingly, Assessing Officer is directed to replace the addition of Rs.8,00,000 by Rs.2,24,000/-. Thus disposes ground 4 and is partly allowed.”

Being aggrieved by this order of Ld. CIT(A) assessee came in second appeal before us on the following ground:-

“5. For that on the facts of the case, the Ld. CIT(A) was wrong in estimating foreign travel expenses at Rs.224,000/- which is completely arbitrary, unjustified and illegal.”

11. Ld. AR for the assessee before us submitted that the trip to Canada was sponsored by a company namely ERIS of Ahmedabad and he in support of assessee's

claim has produced confirmation which is placed on pages 33 of the paper book. The assessee also claimed that the income from academic tour was offered to tax in assessee's profit and loss account which is placed on paged 12 of the paper book.

On the other hand, Ld. DR vehemently relied on the order of Authorities Below.

12. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the instant case relates to the expense incurred by the assessee on his foreign trips. The assessee claimed the cost of foreign trips was sponsored by the company. The assessee had availed foreign tour in two countries namely, Thailand and Canada and confirmation was furnished by the assessee in respect of Canada trip. However, on perusal the order of Authorities Below we find that assessee failed to provide the details of expense actually incurred by assessee. Therefore, AO estimated expense at ₹ 8 lakh which reduced by Ld. CIT(A) at ₹ 2.24 lakh. However we find that the assessee before the lower authorities has furnished the confirmation from the party ERIS in respect of Canada tour. Therefore it can be concluded that the assessee has not incurred Canada tour expenses outside the books. In this regard we also find that the lower authorities should have confirmed the same from the company whether the Canada tour was sponsored by it under section 133(6) of the Act. But we find that the AO failed to exercise his power given under the Statute. However the assessee before us failed to furnish the details in respect to the tour expenses to Thailand. Therefore, we are inclined to confirm the same to the extent of Rs. 1.08 lakh in respect of Thailand tour. Thus, in view of above we delete the addition made by the lower authorities in respect of Canada tour for Rs. 1.16 lakh only. Thus this ground of the appeal of the assessee is partly allowed.

13. Last issue of levy of interest u/s. 234D is consequential. Therefore, ground No. 6 is liable to be dismissed and is accordingly dismissed.

14. **In the result, assessee's appeal stands partly allowed.**

Order pronounced in open court on 12/05/2017

Sd/-
(S.S.Viswanethra Ravi)
Judicial Member

Sd/-
(Waseem Ahmed)
Accountant Member

*Dkp, Sr.P.S

दिनांक:- 12/05/2017 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Dr. Subrata Kundu, D.N. Tiwari Road, Borehat, P.O.
Nutanganj, Burdwan-713101
2. प्रत्यर्थी/Respondent-ACIT, Cir-1,AyakarBhawan, Court Compound, Burdwan-713101
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

Sr. Private Secretary/
Head of Office/DDO
आयकर अपीलीय अधिकरण,
कोलकाता