

**IN THE INCOME TAX APPELLATE TRIBUNAL “F” BENCH, MUMBAI
BEFORE SHRI JASON P. BOAZ, AM AND SHRI SANDEEP GOSAIN, JM**

आयकर अपील सं./ I.T.A. No. 4521/Mum/2013

(निर्धारण वर्ष / Assessment Year: 2009-10)

Shri Viren Ahuja 1 Neelkanth, Road No.6, Chembur, Mumbai-400 071.	बनाम/ Vs.	DCIT,CC-47, Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No.		AACPA 4809M
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	Shri J.P. Bairagra
प्रत्यर्थी की ओर से/Respondent by	:	Shri G.M. Doss
सुनवाई की तारीख / Date of Hearing	:	05/08/2016
घोषणा की तारीख / Date of Pronouncement	:	21/09/2016

आदेश / ORDER

Per Sandeep Gosain, Judicial Member:

The Present Appeal has been filed by the assessee against the order of Commissioner of Income Tax (Appeals)- 38, dated 28.03.2013 on the grounds of appeal mentioned herein below.

1. *“The learned CIT(A) has erred in law and in facts in not holding that the notice issued u/ s. 153A and the consequential assessment are bad in law and without jurisdiction.*
 2. *The learned CIT(A) has erred in law and in facts in passing the order which is illegal and bad in law. The order passed by the learned CIT(A) purportedly on 28.03.2013 after the conclusion of hearing on 25.03.2013 which has been served on 25.04.2013 is illegal.*
 3. *The learned CIT(A) has erred in law and in facts in confirming the additions made by the Assessing Officer in the assessment order passed u/ s. 153A r.w.s. 143(3) of the Act which are illegal and bad in law.*
 4. *The order passed by the learned CIT(A) is in violation of principles of natural justice and is passed without giving a proper opportunity of hearing to the appellant.*
 5. *The learned CIT(A) has erred in law and in facts in not holding that the assessment order was passed in violation of principles of natural justice and was passed without giving proper opportunity of hearing to the appellant.*
 6. *The learned CIT(A) has erred in law and in facts in confirming the addition of Rs. 33,00,000/- made by the Assessing Officer u/ s.69 of the Act.*
 7. *The learned CIT(A) has erred in enhancing the income of appellant by Rs. 2,67,97,000/- on the basis of page 2 of diary marked as Annexure-23 of the seized material.*
 8. *The learned CIT(A) has erred in law and in facts in confirming the interest levied by the Assessing Officer u/ s. 234A, 234B and 234C of the Act.*
 9. *The appellant craves leave to add to, alter, amend and / or delete all or any of the aforesaid grounds of appeal.*
2. The brief facts of the case are that assessee is one of the director of the group company M/s. Flemingo/Bermaco Group. A search and seizure action u/s 132 of Act was carried out at the residence and business premises of M/s.

Flemingo/Bermaco Group on 31.10.2009 by the DDIT (Inv), Unit-II(3), Mumbai. During the course of search unaccounted cash and incriminating documents were found and accordingly appropriate assets/ documents were seized. Based on these seizures, the main person of the group concern of the flagship company M/s. Flemingo/Bermaco Group, Shri Viren Ahuja has offered u/s 132(4) undisclosed income to the tune of Rs.38.90crores, on account of various discrepancies found in the books of accounts of the companies Bermaco Industries Ltd & Bermaco Energy Systems Ltd on the issues namely bogus purchases. However, the statement u/s 132(4) was retracted by Shri Viren Ahuja vide affidavit dated 24.11.2009. After serving statutory notices u/s 153A of the Act and seeking reply from the assessee, the order of assessment u/s 153A r.w.s. 143(3) of the Act was passed on 08.06.2012 thereby making additions of Rs.33lakhs u/s 69 being the unexplained investment for AY 2009-10.

3. Aggrieved by the order of the AO, assessee filed the appeal before CIT(A) and the CIT(A) after considering the case of the assessee confirmed the additions by holding that assessee has not filed any specific objection during assessment proceeding therefore addition of Rs.33lakhs made u/s 69 was confirmed. In addition the CIT(A) also enhanced the income of the assessee of Rs.2,67,97,000/- on the basis of diary which is marked as a Annexure-23 as seized material vide order dated 28.03.2013.

4. Aggrieved by the order of CIT(A), the assessee filed the present appeal before us on the grounds mentioned herein above.

5. At the very outset, ld. AR appearing on behalf of assessee submitted that he do not want to press ground no. 1 to 5 and accordingly the ld. AR made his noting on the appeal file itself. Considering the submissions of the assessee we dismiss ground no. 1 to 5 of the appeal as being not pressed.

Ground no.6

6. We have heard counsel for both the parties and we have also perused the material on record as well as orders passed by lower authorities. Before we decide the merits of the case it is necessary to evaluate the orders of the CIT(A) while dealing with this issue.

“I have carefully examined the facts of the case, the stand taken by the AO in the assessment order and the grounds of appeal filed by the appellant. The ld. AR of the appellant has not filed any specific objections during the appeal proceedings. However, the issues have been examined on merits. It is not denied that the 33 companies were promoted by the appellant for the purpose of acquisition of land. Therefore, based on the findings gathered by the department, the appellant was given adequate opportunity to explain the sources of investment in the said companies. However, the appellant has not discharged the onus either during the assessment proceedings or during the appeal proceedings. Having regard to the facts and circumstances of the case, the addition of Rs.33,00,000/- in respect of A.Y. 2009-10 is assessable u/s 69 of the Act and accordingly, the addition is hereby confirmed.”

7. After perusal of the afore mentioned orders and after hearing both the parties on this issue we find that the ld. CIT(A) had rightly concluded that the assessee has not filed any specific objections during the appellate proceeding as well as it was

not denied by the assessee that the 33 companies were promoted by the assessee for the purpose of acquisition of land. Therefore, based on the findings gathered by the department the assessee was given adequate opportunity to explain the sources of investment in the said companies. Since the assessee could not discharge the onus either during the assessment proceedings or during the appeal proceedings, therefore, Id. CIT(A) considering the entire facts and circumstances of the case has rightly confirmed the addition made by AO u/s 69 of the Act. Even before us during the course of arguments Id. AR could not support his arguments with any documentary evidence that the amount invested by the assessee in these 33 companies [names of these companies are mentioned in assessment order as well as CIT(A)] does not belong to assessee. Therefore finding no convincing arguments from Id. AR we have no other option except to dismiss this ground of appeal and uphold the order of CIT(A) on this ground.

Ground No.7

8. In this ground Id. AR has challenge the enhancement of income of the assessee of Rs.2,67,97,000/- made by CIT(A) on the basis of page no.2 of the diary marked as Annexure- 23 of the seized material. We have heard the counsels for both the parties on this ground and we have also perused the material placed on record as well as the orders passed by the revenue authorities. Before we decide the merits of the case it is necessary to evaluate and analyse the orders passed by

CIT(A) while dealing with the said issue the operative para of CIT(A) is reproduced below:

“During the appeal proceedings, Ld. A.R. of the appellant has filed written, submissions and a paper book. It is submitted that nowhere on the said paper seized there is mention of the appellant and the entries on the said seized paper are not in the hand writing of the appellant except for entry "3/12 sold + new aggregating to 300000" appearing on lower page extracted on page 15 of the assessment order. It is further submitted that the seized paper depict working of proposed transactions, evaluation of whether the same can be undertaken, manner in which profits can be earned but it certainly does not represent actual transactions. Appellant has further stated in the written submissions that the amounts stated under 'Hotel A/c.' on lower portion of the seized paper represents expenditure incurred in hotel and it is not an investment. In respect of upper page portion of seized paper, appellant has submitted that the entries made therein were mere evaluation of proposals to investment and there is no mention of either purchase or sale against any transactions and therefore, it cannot be concluded that these transactions pertain to purchases. The appellant has further contended that the dates of transactions do not pertain to the previous year relevant to AY.2007-08 and as such, no addition can be made in, the hands of the appellant u/s.69 of the Act and the AO has not caused independent enquiry with Mr. Vikram Agarwal to ascertain the true nature of transaction.

12.0 On a perusal of the assessment order, it was apparent that the transactions reflected in the seized documents, in fact, pertain to the AYs.2008-09 and 2009-10. Having regard to these facts, a letter I notice dated 13.03.2013 was served on the appellant. In the said letter I notice, it was proposed to consider the transactions in the seized document in respect of AYs.2008-09 and 2009-10, which would result in enhancement of the assessed incomes. The appellant was also called upon to submit the objections and explanations, if any. A hearing was scheduled on 25.03.2013 and the appeal was heard.

Decision:

A decision on this issue has been rendered in the appellate order for AY.2008-09 by order No.CIT(A)-38/IT-62/2012-13 dated 28.03.2013, which is as under:

"14.0 The seized document has indicated certain specific dates on which certain transactions have taken place. If the transactions were only for the

purpose of projecting potential profits from certain proposed transactions, the document would not be written in such accurate terms to reject the dates as well as the quantum of money & cash transactions involved. The document was in possession of the appellant and therefore, it has to be reasonably presumed that the appellant is the owner / author of the document. However, the appellant was at liberty to discharge the onus by producing Mr. Vikram Agarwal and explaining the business relationship and various transactions with Mr. Vikram Agarwal. In this case, the appellant has not made any effort either at the stage of assessment proceedings or appeal proceedings to reveal the identity of Mr. Vikram Agarwal. A.O would not be in a position to summon and examine Mr. Vikram Agarwal unless the appellant furnishes the requisite information such as the identity and address and such other details of Mr. Vikram Agarwal. It is not the case of the appellant that he neither knows Mr. Vikram Agarwal nor he had any business relationship & transactions with Mr. Vikram Agarwal. As observed, specific dates with specific transaction amounts could not have been made by the appellant in case such transactions have not taken place.

14.1 It is seen from- the seized document that on the 'lower page', a description to the extent of '11 = 10 cheque' is written. Further, under the head 'Hotel Account', apart from the cash transactions amounting to Rs.575=00 lakhs, adjacent to the total aggregating to Rs.575=00 lakhs, cheque transactions details aggregating to Rs.16= 10 lakhs is also written. Further, on the right side of the document, it is reflected that 1,10,000 shares were sold @ Rs.1911- per share and an amount of Rs.2,10,10,000/- was realized. Similarly, the upper page of the same document reflected that 1,00,000 shares @ Rs.430/- per share were sold and Rs.4,30,00,000/- was realized. The profit margin was determined @ 70% and 30% to be shared by Mr. Vikram Agarwal and the appellant respectively is also clearly written. All the transactions in the lower page and upper page are very specific and clearly reflected that they are not imaginary figures. Therefore, the document does reflect certain undisclosed transactions and undisclosed income of Mr. Vikram Agarwal of Chennai and the appellant. As observed, the appellant was required to discharge the onus by either providing of the requisite details before the AO so as to enable the A.O to summon Mr. Vikram Agarwal. Alternatively, appellant ought to have produced Mr. Vikram Agarwal so as to explain the entire gamut of transactions. It is seen that the appellant has preferred to be evasive on the issue and stonewalled any further enquiry in this regard. In cases where the transactions recorded in a document can be correlated with the books of accounts and such transactions have in reality taken place, rest of the transactions recorded in the document have also to be taken as true. In

other words, in cases where a seized document shows that certain cheque transactions and cash transactions have been entered into by two parties and the cheque transactions are verifiable with the books of accounts and bank accounts, the remaining transactions such as cash transactions also have to be taken as true. The document has to be interpreted in its entirety and has to be given full and logical meaning and effect so that very purpose of investigation by the Income Tax Authorities is not stonewalled and frustrated by the ingenious methods adopted by the tax evaders. In such instances, onus shifts to the assessee / appellant to prove that such transactions, including the cheque transactions, had never taken place. In case the onus is not fully discharged, the transactions recorded have to be viewed in totality and the entire set of transactions have to be taken as true and necessary action has to be taken in terms of section 68 or other relevant provisions of the Income Tax Act. Having regard to the facts and circumstances of the case and on the basis of the analysis of the seized document and since the appellant has not discharged the onus placed on him, an addition of Rs.15,55,75,000/- is made in respect of A.Y.2008-09. Since this is the addition which was not made in the assessment order, the assessed income is enhanced by an amount of Rs.15, 55, 75,000/-."

13.1 Having regard to the facts and circumstances of the case and on the basis of the analysis of the seized document and since the appellant has not discharged the onus placed on him, an addition of Rs.2,67,97,000/- is made in respect of A.Y.2009-10. Since this is the addition which was not made in the assessment order, the assessed income, is enhanced by an amount of Rs.2,67,97,000/-.

9. We have perused the afore mentioned orders and we also heard the counsel for both the parties on this issue. Ld. AR appearing on behalf of assessee submitted that the additions of Rs.2,67,97,000/- was made by CIT(A) only on the basis of page no.2 of the diary marked as Annexure-23 of the seized material it was argued that initially the AO had not made any addition on this issue while passing the order u/s 153A r.w.s. 143 of the Act. It was further submitted by ld. AR that CIT(A) had discussed this issue in its order in para no.10 wherein the contents of

page no. 2 of the diary marked as Annexure-23 has been incorporated and addition of Rs.11,37,11,600/- was made by AO in the assessment order for AY 2006-07. Ld. AR further submitted that CIT(A) had also held that since the transaction reflected in the seized documents does not pertain to AY 2007-08 and deleted the addition for AY 2007-08. However the Id. CIT(A) held that since this transaction pertain to AYs. 2008-09 and 2009-10 thereby enhancing the income for AY 2008-09 by Rs.15,55,75,000/- and for AY 2009-10 by Rs.2,67,97,000/-. Ld. AR further submitted that CIT(A) has incorporated the findings given in the AY 2009-10 and confirmed the additions of Rs.2,67,97,000/- for this year.

10. Ld. AR also submitted that appeal of the assessee for AYrs. 2006-07 and 2007-08 and 2008-09 has already been decided by Hon'ble ITAT in ITA No. 3890/Mum/2013, 4171/Mum/ 2013, 4708/Mum/2013 and 4322/Mum/2013 vide order dated 29.04.2015. Ld. AR further submitted that Hon'ble ITAT has also dismissed the appeal of revenue for AY 2007-08 against the deletion of addition on the basis of these papers seized and allowed the appeal of the assessee for AY 2008-09 and deleted the addition of Rs. 15,55,75,000/- and also held that **“no additions on the basis of these seized papers can be made”**. It was further argued by Id. AR that after the afore mentioned decision by Hon'ble ITAT the assessee moved his MA against the order of Hon'ble Tribunal and the Hon'ble

ITAT has accepted the MA against the order of Hon'ble Tribunal and passed the order on Miscellaneous Application Nos.115 & 116/M/15 in ITA Nos. 4708 & 4322/Mum/2013 dated 29.05.2015 and incorporated full facts of the papers seized and the additions confirmed by the CIT(A) of Rs. 15,55,75,000/- for AY 2008-09 and Rs.2,67,97,000/- for AY 2009-10 and by incorporating these facts the Id. AR further submitted that another MA was again moved by the assessee vide MA No. 255&256/Mum.2015 dated 04.12.2015 on the ground that while allowing the earlier MA, inadvertently the tribunal in its findings at para no.24 to 30 of the order removed the existing observation of the tribunal which were there in ITA No.4708 and 4322/Mum/2013 and in this way the subsequent MA moved by the assessee was also allowed.

11. After perusal of all the orders as mentioned above and after considering the facts and circumstances of the case, we are of the considered view that in earlier appeals for AYrs. 2006-07 and 2007-08 and 2008-09 in assessee's own case the Hon'ble ITAT had already deleted the addition made on the basis of these seized papers and even in MA order it has been categorically held by the Hon'ble ITAT that no additions of Rs. 15,55,75,000/- could have been made for AY 2008-09 and of Rs.2,67,97,000/- for AY 2009-10 the operative para of MA No. 255&256/Mum.2015 dated 04.12.2015 decided by Hon'ble ITAT in assessee's own case is reproduced below:

"4. We have carefully gone through the contents of the Miscellaneous Applications qua Miscellaneous Application Nos. 115 & 116/M/ 15 qua (ITA Nos. 4708 & 4322/M/2013. We find force in the contention of the assessee. There is a mistake very much apparent from the record while allowing the earlier Miscellaneous Application at para 24 and 30 of the order of the Tribunal, the existing observations are found missing. We, therefore allow this Miscellaneous Applications of the assessee. Para 24 of the order of the Tribunal should be read as under:

24. This issue has been discussed by the AO at para 10 of his order wherein he has made reference to certain incriminating papers found and seized at the time of search. Scanned copies of the impugned documents are exhibited at pages 15 and 16 of the assessment order. The assessee was confronted with these documents and was also asked to explain the nature. The assessee vide his submission dated 5.12.2011 stated that this page contains some rough noting with respect to certain proposals being discussed with a proposed business partner and working of estimated profitability with reference to dates as well. It is having no other financial implication. The AO did not accept this explanation of the assessee and observed that this office has to interpret the papers for its contents based on the facts and figures."

The AO proceeded by holding that Rs. 5,90,00,000/- is paid by the assessee to Shri Vikram Agarwal and added the same to the income of the assessee as per document exhibited at page No. 15 of his order and added a sum of Rs. 5,47,11,600/- to the income of the assessee as per document exhibited at page No. 16 and therefore total addition of Rs. 11,37,11,600/- made to the income of the assessee.

And at para 30 should be read as under:

30. There is another entry of Rs. 15 lakhs on document exhibited on page no. 15 and accordingly addition of Rs. 5.90 crores was made. In respect of document exhibited at Page No. 16 of the assessment order refers to Shri Vikramji Chennai with profit margin 70% and 30% to the assessee, the AO has made the addition of Rs. 5,47,11,600/- being 30% of total amount of Rs. 18,23,72,000/- which is a sum of all the entries mentioned on the said document while the Ld. CIT(A) has enhanced the addition of Rs. 15,55,75,000/- in A.Y. 2008-09 on the basis of entries pertaining to financial year 2007-08 and addition of last entry of Rs. 2,67,97,000/- in A.Y. 2009-10, which tantamount to enhancement of addition being 100% of total of all the entries mentioned on document exhibited page no. 16".

We failed to persuade ourselves to give any logical conclusion / finding in respect of these documents on the basis of which the AO has made the addition. There is not even an iota of evidence to show that the AO has made an enquiry from the said Shri Vikramjee Agarwal. Merely because some figures, were found to be written in some document, the AO cannot extrapolate 50 and interpret 50 as 50,00,000, 575 as 575 lakhs without any corroborative / demonstrative evidence. Without there being any corroborative evidence additions made merely on the basis of some illogical and irrelevant entry / jotting on a piece of paper cannot justify the actions of the AO and of the Ld. CIT(A). We, therefore, do not find any merit in the additions made by the AO on the basis of these documents. We direct the AO to delete the entire additions made on the basis of these two documents. The appeal filed by the Revenue is dismissed and appeal for the assessee for A.Y. 2008-09 is allowed.”

12. From the afore mentioned order of the tribunal in assessee's own case it is clear that the ITAT had already come to the conclusion that no additions could have been made on the basis of these 2 documents and therefore the appeal of the assessee for AY 2008-09 was allowed thereby deleting the additions made and since in the afore mentioned order it is also mentioned that no addition could have been made even in AY 2009-10 i.e. year under consideration, therefore while maintaining judicial uniformity and judicial consistency as the matter in dispute i.e. making enhancement by CIT(A) of Rs. 2,67,97,000/- has already been decided by Hon'ble ITAT in the earlier years and also of year under consideration. Therefore concurring with the said findings we allow this ground of appeal and delete the additions/ enhancement of Rs.2,67,97,0000/- made by CIT(A).

Ground No.8

13. Ground No.8 is consequential in nature.

14. Ground No.9 of the Assessee's appeal is general in nature and hence, requires no specific adjudication.

In the result, the Assessee's appeal is partly allowed.

Order pronounced in the open court on 21st September, 2016

Sd/-
(Jason P. Boaz)

Sd/-
(Sandeep Gosain)

लेखा सदस्य / Accountant Member

न्यायिक सदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated :21.09.2016

Ps. Ashwini

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai