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आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

सर्वश्री आय.पी. बंसल, न्यायिक सदस्य एवं नरेन्द्र कुमार बिल्लैय्या, लेखा सदस्य के समक्ष

BEFORE SHRI I.P. BANSAL, JUDICIAL MEMBER AND

SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

आयकर अपील सं/ I.T.A. Nos.2321 & 2322/Mum/2013

(निर्धारण वर्ष / Assessment Years :2005-06 & 2007-08

Shri Ketan V. Shah, 1-28-41, Sharda, Dep Murti Road, Near Civil Club, Jalna-421 203	बनाम/ Vs.	The ACIT, Central Circle-11, M.K. Road, Mumbai-400 020
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आयकर अपील सं/ I.T.A. Nos.2241 & 2242/Mum/2013

(निर्धारण वर्ष / Assessment Years :2005-06 & 2007-08

The ACIT, Central Circle-11, M.K. Road, Mumbai-400 020	बनाम/ Vs.	The ACIT, Central Circle-11, M.K. Road, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ACYPS 9924F		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
अपीलार्थी ओर से/ Assessee by:		Shri J.P. Bairagra
प्रत्यर्थी की ओर से/Department by:		Ms. S. Padmaja

सुनवाई की तारीख / Date of Hearing :23.06.2015

घोषणा की तारीख /Date of Pronouncement :26.06.2015

आदेश / O R D E R

PER N.K. BILLAIYA, AM:

These are cross appeals by the assessee and the Revenue against the very same orders of the Ld. CIT(A) for assessment years 2005-06 & 2007-08. All these appeals were heard together and disposed of by this common order for the sake of convenience.

ITA No. 2321/M/2013 – A.Y. 2005-06 – Assessee’s appeal

2. Briefly stated the facts of the case are that search and seizure action u/s. 132 of the Act was carried on 21.2.2007 at the business premises of M/s. Shah Himmatlal Manilal & Co. Tobacco Products, Sanjay Agencies & Mr. Sanjay V. Shah at Jalna and residential premises of the assessee at “SHARDA”, Civil Club Road, Jalna was also covered. During the course of search, following seizures were made:

1.	Residence & Lockers	a) Cash of Rs. Nil b) Jewellery valued at Rs. Nil
2.	Residence “Sharda”, Civil Club Road, Jalna	Loose paper file Annexure A, Annexure A-1/1/1
3.	Premises of M/s. Sanjay Agencies	Annexure-A, A-2
4.	Residence of Shri Shanker Jhunjunwala	Annexure A-2
5.		Annexure A-1(Party No. 4A), Annexure A-1/1/1
6.	Residence of Shri Prakash Kasari at Arun Smruti, Kacheri Road, Jalna.	Annexure A-1, Annexure 17 (Party No. 4)

3. Statutory notices were accordingly issued and served upon the assessee. During the course of the assessment proceedings, the assessee

was issued a notice u/s. 142(1) of the Act which contains notings in Annexure A/1 which read as under:

Page No. 36

1.1.62 crores

Transfer arrangement is made

Account No will be submitted to you within half an hour.

Confirm amount.

1) Transfer arrangement is made. Issue one cheque equal amounting to Rs. 2 crores. Confirm.

1-2 million equity. Outstanding 3 million. 28 lakh dollars. 4.5 lakhs. 17 million value-capital gain. 1.2 million.

Dr – 9738002209.

Page No. 37.

Received 3 SMS as under:

Ketan-1, 3-11-2—6.

I have got no confirmation for transfer. I can give 9000 tomorrow and property papers are with me.

2) Transfer is difficult in one day. Tell him to arrange for transfer. I have called many people. I will have definite answer tomorrow.

3) Transfer is difficult for big amount in one day. Tell him to arrange for transfer. Have call many people. I will have definite answer tomorrow.

1) Yaswant 0017184650354.

You are requested to explain the above notings and state whether the above transactions are recorded in the books of accounts. Necessary documentary evidence may be filed to prove the sources of funds for making such transactions.

Please note that if the details as called for are not furnished the assessment will be finalized u/s. 144 of the Income Tax Act. Presuming that you have nothing to say in the matter.”

4. On receiving no plausible reply, the AO observed as under:

“The above noting pertains to the transfer of funds from the current business of the assessee to other establishments, investment in other business avenues etc. The assessee left

for the USA in November 2004. It appears that the assessee apprehending liabilities under different tax authorities shifted his base to the USA. During the process he has transferred huge amounts out of India. Analysis of the above notings reveal the following:

S.No.	Notings	Amount involved	Remarks
1.	1.62 crores Transfer arrangement is made Account No. will be submitted to you within half an hour. Confirm amount.	Rs. 1.62 cr.	These notings pertain to transfer of funds may be to the USA amounting to Rs. 1.62 crs.
2.	Transfer arrangement is made. Issue one cheque equal amounting to Rs. 2 crores. confirm	Rs. 2.00 cr	These notings pertain to transfer of funds may be to the USA amounting to Rs. 2.00 crs.
3.	1-2 million equity. Outstanding 3 million. 28 lakh dollars. 4.5 lakhs. 17 million value-capital gain. 1.2 million.	Rs. 20 lacs Rs. 30 lacs Rs. 14.0 Cr (\$ 28 lac) Rs. 4.5 lacs 1.70 Cr. 12 lacs	The above transactions pertain to transfer of funds to may be the USA amounting to 28 lac dollars. This amount works out to Rs. 14 crores estimating the dollar rate around Rs. 50/- per dollar. The other transactions appear to be investments in equity, capital gain etc. The total of such notings amounts to Rs. 16,36,50,000/-

5. The Officer finally concluded as under:

“Since the assessee left for the USA IN November 2004, as per the statement given by Sh Sanjay Shah brother of the assessee,

during the course search, it is very likely that these noting pertain to this period i.e. F.Y 2004-05 relevant to A.Y. 2005-06. Since the assessee has not come forward with any explanation. The same is taxed in the hands of the assessee as undisclosed income which has been transferred out of the system. The addition on this score works out to Rs. 199850000/- pertaining to A.Y 2005-06. This addition is made on protective basis since this document was found from the premises of M/s. Sanjay Agencies. Since the documents were found and seized during the search on 21.2.2007. The transactions fall during the F.Y 2006-07 i.e. A.Y 2007-08. Hence this addition is also made A.Y 2007-08 on protective basis to protect the interest of the revenue.

(Addition on a/c of undisclosed income

for A.Y 2005-06 -Rs.199850000/-)

(Addition on a/c of undisclosed income

for A.Y 2007-08) -Rs.199850000/-)

6. Aggrieved by this, the assessee carried the matter before the Ld. CIT(A) but without any success. The Ld. CIT(A) was convinced that the assessee has failed to discharge the presumption u/s. 132(4A) of the Act and confirmed the addition made by the AO at Rs. 19,98,50,000/-.

7. Following observations of the Ld. CIT(A) need specific mention.

“Vide letter dt. 7.2.2012, an additional ground has been taken specifically in respect of addition of Rs. 19,98,50,000/- made on account of notings in seized documents at Annexure A-1, pages 36 & 37. As the ground No. 1 has generally challenged determining of total income of Rs. 20,37,66,697/- as against the returned income of Rs. 6,37,640/-, it would meet the ends of justice if the specific ground is allowed to be raised. However, as regards the merits of the addition, Ld. AR has relied on his submission as in A.Y 2005-06 (supra), it is seen that the Ld. AO has made this addition on protective basis so as to protect the interest of revenue in case it is held at any time by higher appellate forum that income

pertained A.Y. 2007-08 and not A.Y. 2005-06. As the Ld. AO has made the addition only on protective basis, for the detailed reasons given on similar ground for A.Y. 2005-06, I confirm the addition made as it no way harms the interest of the appellant. If the income is held taxable in A.Y. 2005-06 by the highest appellate forum automatically the addition made in this year would be deleted. Accordingly, this ground is dismissed.”

8. Aggrieved by this, the assessee is before us. The Ld. Counsel for the assessee vehemently submitted that the entire addition has been made on the basis of notings on a loose paper which is not more than a dumb document. It is the say of the Ld. Counsel that nothing can be made out from this dumb paper that it relates to the assessee's undisclosed income when this paper was not found from the premises of the assessee. In support of his contention, the Ld. Counsel relied upon the decision of the Tribunal in the case of ACIT Vs Rakesh M. Shah 86 TTJ 288, S.P. Goyal Vs DCIT 82 ITD 85, SMT. K.V. Lakshmi Savitri Devi Vs ACIT, DCIT Vs C. Krishna Yadav 46 SOT 250. The Ld. Counsel further strongly submitted that the Revenue authorities have grossly erred in drawing support from the presumption as envisaged in Sec. 132(4A) inasmuch as the loose paper was not found from the premises of the assessee nor it is the case of the Revenue that the assessee was in possession of the said loose paper therefore presumption drawn is not according to the law. The Ld. Counsel continued to argue that though the AO can pass a protective assessment order but the Appellate authority have to confirm addition on substantive basis only. In support of this proposition, reliance was placed on the decision of the Hon'ble Allahabad High Court in the case of CIT Vs Smt. Durgawati Singh 234 ITR 249, Smt. Hemlata Agarwal Vs CIT 64 ITR 428. The Ld. Counsel finally concluded by asserting that the entire assessment order is bad in law and the Ld. CIT(A) has grossly erred in confirming the impugned addition.

9. Per contra, the Ld. Departmental Representative strongly supporting the orders of the authorities below drew our attention to the various observations in the assessment order wherein the AO has mentioned the number of opportunities given to the assessee to explain his case. It is the say of the Ld. DR that the assessee never attended the assessment proceedings and never came forward with explanation therefore at this stage the assessee cannot say that no proper examination has been done.

10. We have given a thoughtful consideration to the rival contentions. We have also carefully perused the orders of the authorities below and with the assistance of the Ld. Counsel we have gone through the documentary evidence referred to and brought to our notice.

11. The basis for making the addition of Rs. 19.98 crores is the loose paper mentioned at para-2 (supra), we failed to persuade ourselves to make any sense out of the notings in this loose paper. Merely by making additions of all the figures mentioned in the loose paper would not justify the addition of Rs. 19.98 crores. Secondly, the entire addition has been made on the presumption mentioned u/s. 132(4A) of the Act. However, we failed to understand how this presumption is applicable on the facts of the case. Firstly, the loose paper was found in the premises of Shri Sanjay Shah i.e. it was not found in the premises of the assessee. Secondly, it was in the possession of Shri Sanjay Shah so obviously it cannot be in possession of the assessee. Therefore, the provisions of Sec. 132(4A) of the Act is not applicable as the paper was not found from the possession of the assessee.

11.1. The most important fact to be considered at this point of time is that the assessee was staying in USA for almost 5 years from 29.11.2004

to 19.1.2009. The search was conducted on 21.2.2007 which means that on the date of search, the assessee was not even present in India. Lastly, concluding observations of the AO as mentioned in para-5 (supra) clearly suggest that the additions have been made on protective basis so this is a protective assessment. However, there is no reference about any case/assessee, in whose hands substantive additions have been made. Even before us, the Ld. DR failed to bring any documentary evidence to show in whose hands substantive additions have been made.

11.2. Though the assessments were made on protective basis, the same has been confirmed by the First Appellate Authority also. The Hon'ble Allahabad High Court in the case of Smt. Durgawati Singh (supra) has held that *"It is settled that when there is a doubt as to which person amongst the two was liable to be assessed, parallel proceedings may be taken against both and alternative assessments may also be framed. It is also equally true that while a protective assessment is permissible, it is not open to the income-tax appellate authorities constituted under the Act to make a protective order."*

11.3. Considering all these facts in totality, we do not find any reason of addition in the hands of the assessee on protective basis. We, accordingly set aside the order of the Ld. CIT(A) and direct the AO to delete the impugned addition. Ground No. 1 to 11 are allowed.

12. Ground No. 12 relates to the addition of Rs. 3,00,000/- on account of estimated household expenses.

13. While scrutinizing the return, the AO noticed that the assessee has not furnished any details of household expenses or sources of meeting the same. No cash withdrawal was seen from the bank account. Considering

the status of the assessee, the AO estimated the household expenses @ Rs. 25,000/- per month and made an addition of Rs. 3,00,000/-.

13. The assessee carried the matter before the Ld. CIT(A) but without any success.

14. Before us, the Ld. Counsel for the assessee stated that a similar addition has been made in the hands of the HUF of the assessee. The fate of that appeal is not known. However, it is an undisputed fact that the assessee was staying in USA for almost 5 years and during the impugned assessment year the assessee was in India only for 7 months, considering that the assessee has come from USA, possession of some money cannot be ruled out. We therefore do not find any logic in making the impugned addition. Order of the Ld. CIT(A) is set aside and the AO is directed to delete the addition of Rs. 3,00,000/-

15. In the result, the appeal filed by the assessee for A.Y. 2005-06 is allowed.

ITA No. 2241/M/13 – A.Y 2005-06 – Revenue’s appeal

16. The first grievance of the Revenue is that the Ld. CIT(A) erred in deleting the addition of Rs. 31,31,429/- on account of unexplained bank deposit on the basis of bank statement.

17. The AO has considered this issue at para-15 on page-17 of his order. During the course of the assessment proceedings, copies of bank statement of HDFC bank were obtained. On going through the same, the AO found that Rs. 31,31,429/- has been credited. Since the assessee has not explained the source of credit, the AO treated the same as undisclosed income of the assessee.

18. The assessee carried the matter before the Ld. CIT(A). The Ld. CIT(A) has considered this grievance at para-2.10.1 at page-38 of his order. Before the Ld. CIT(A), the assessee produced the bank statement, bank summary explanation of each deposit made in the bank. It was explained that the bank account in question is reflected in the balance sheet of the assessee. These additional evidences were transmitted to the AO calling for his remand report. The AO did not object to the admission of the additional evidence and left the matter open to the discretion of the First Appellate authority.

18.1 The Ld. CIT(A) after carefully perusing the entries in the bank account of HDFC bank vis-à-vis the explanation of the assessee in respect of each entry and finally held that the assessee has discharged his onus for proving the source of the credit entries and accordingly direct the AO to delete the addition.

19. Before us, the Ld. DR strongly supported the assessment order.

20. The Ld. Counsel for the assessee reiterated what has been submitted before the lower authorities. It is an undisputed fact that additional evidences were furnished before the Ld. CIT(A) but it is also an admitted fact that the Ld. CIT(A) has transmitted all the additional evidences to the AO calling for a remand report. Instead of verifying the additional evidences, the AO left the matter at the discretion of the First Appellate authority. We find that after satisfying himself the Ld. CIT(A) deleted the addition. We, therefore, decline to interfere. Ground No. 1 is dismissed.

21. Ground No. 2 of Revenue's appeal does not survive because the Ld. CIT(A) has confirmed the impugned addition against which the

assessee is in appeal. The Revenue should not have any grievance for the addition confirmed by the Ld. CIT(A).

22. In the result, the appeal filed by the revenue is dismissed.

ITA No. 2322/M/13 – A.Y. 2007-08 – Assessee's appeal

23. Grievance raised vide ground No. 1 to 11 of this appeal are identical to the grievance raised for assessment year 2005-06 vide ground No. 1 to 11, which we have considered in detail in ITA No. 2321/M/2013. For our detailed discussion/reason given therein, ground No. 1 to 11 are allowed.

24. Ground No. 12 relates to the addition on account of estimated household expenses.

24.1. This grievance is similar to ground No. 12 considered by us in ITA No. 2321/M/13 for A.Y. 2005-06. For similar reason given therein, the addition of Rs. 3,00,000/- is deleted. Ground No. 12 is treated as allowed.

25. Ground No. 13 relates to the addition of Rs. 4,21,168/- on account of unexplained investment in silver.

26. This issue has been considered by the AO at para-25 of his order wherein the AO has observed that during the course of search, jewellery worth Rs. 2577204/- was found which consisted of silver article worth Rs. 4,21,168/-. Shri Sanjay Shah in his statement on oath has stated that Shri Ketan Shah (present assessee) is the only person who could give explanation in this regard. On receiving no explanation from the assessee, the AO made the addition of Rs. 4,21,168/- as unexplained investment in silver.

27. The assessee carried the matter before the Ld. CIT(A) but without any success.

28. Before us, the Ld. Counsel for the assessee reiterated what has been stated before the First Appellate authority.

29. We have carefully perused the orders of the authorities below. The undisputed fact is that the silver utensils were found from the bed room of Mrs. Mrtudulaben Shah and even panchanama and seizure memo are also in the name of Shri Sanjay Shah. If the additions have been made purely on the basis of presumptions as laid down in Sec. 132(4A), then the silver was not found from the possession of the assessee. The AO has relied upon the statement of Shri Sanjay Shah. However, the contents of such statement has not been referred to in the assessment order nor in the order of the First Appellate authority. The Ld. CIT(A) has confirmed the addition on the basis of presumption of Sec. 132(4A) which on the facts of the case is not at all applicable. We, therefore, set aside the findings of the Ld. CIT(A) and direct the AO to delete the addition of Rs. 4,21,168/-.

30. In the result, the appeal filed by the assessee is allowed.

ITA No. 2242/M/13 – A.Y. 2007-08 – Revenue’s appeal

31. The first grievance of the Revenue is against the deletion of the addition of Rs. 25,00,000/- in respect of purchase of immovable properties.

32. During the course of search, various documents were found indicating investment as well as sales of immovable properties. Taking a leaf out of such documents, the AO found that in financial year 2006-07 relevant to assessment year 2007-08, documents relating to property situated at Survey No. 46, Panchayat Samati at Jalna which was in the

name of Shri Kedar Mundra and Shri Prakash Kasari. Referring to the statement of Shri Prakash Kasari, the AO observed that he has admitted of having paid Rs. 12.50 lakhs which was deposited by Shri Khetan Shah (present assessee). The AO therefore made the addition of Rs. 25,00,000/- in the hands of the assessee.

33. The assessee carried the matter before the Ld. CIT(A). It was strongly contended before the Ld. CIT(A) that the said property was not owned by the assessee. It was explained that the said property was acquired by Shri Kedar Mundra and Shri Prakash Kasari. The documents were found at the time of search itself. Admitting the additional evidences, the Ld. CIT(A) called for a remand report from the AO. The AO in his remand report stated that the said land was purchased by Shri Kedar Mundra and Shri Prakash Kasari. The details of payments made by them were reflected in the paper book submitted. The AO remarked that the purchase consideration appears to have been made by cheque in October 2003 and falls outside the period covered in the year under consideration. The Ld. CIT(A) was convinced that the property in question was in someone else name and was acquired in 2003 which is not covered by the year under consideration and deleted the addition.

34. Before us, the Ld. DR could not add anything new to the assessment order. We find that the Ld. CIT(A) has given a categorical finding that the property was purchased in the year 2003. That being the fact of the matter, the impugned addition cannot be considered for the year under consideration. This ground of the Revenue is accordingly dismissed.

35. Ground No. 2 relates to the deletion of the addition of Rs. 6,35,529/- on account of unexplained bank credit on the basis of bank statement.

36. An identical issue was considered by us in ITA No. 2241/M/13 which was in Revenue's appeal for A.Y. 2005-06. For our detailed reasons given therein, this ground of the Revenue is dismissed.

37. In the result, the appeals filed by the assessee are allowed and the cross appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 26th June, 2015

Sd/-
(I.P. BANSAL)

Sd/-
(N.K. BILLAIYA)

न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 26th June , 2015

व.नि.स./ RJ , Sr. PS

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
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई
/ DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai