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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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\+ **ITA 935/2016**

PR. CIT (C)-2 NEW DELHI ..... Appellant
Through: Mr. Zoheb Hossain, Senior Standing Counsel for Revenue

versus

AVINASH KUMAR SETIA ..... Respondent
Through: Mr. Inder Paul Bansal and Mr. Vivek Bansal, Advocates

CORAM: JUSTICE S.MURALIDHAR
JUSTICE CHANDER SHEKHAR

O R D E R

% 01.05.2017

Dr. S. Muralidhar, J:

1. This is an appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act') against the order dated 28th April, 2016 passed by the Income Tax Appellate Tribunal ('ITAT'), Delhi in ITA No. 1787/Del/2014 for the Assessment Year ('AY') 2009-10.

2. While admitting the appeal on 22nd February, 2017 the following question of law was framed:

> "Did the ITAT fall into error in holding that the surrender made by the assessee in the course of the survey and confirmed two months later in writing, was deserved to be deleted in the circumstances of the case for lack of any corroborative material?

3. The facts are that on 20th October, 2008 a survey under Section 133A of the Act was undertaken. Nearly two months later, on 18th December, 2008 by the Assessee submitted the following letter on his own before the Assistant Commissioner of Income Tax (Investigation):

> "Respected Madam,
>
> Kindly note that survey proceedings were carried out at my premises on 20-10- 2008/21-10-.2008 and certain records and documents were seized I have been tendering the explanations/clarifications about various documents from time to time.
>
> I hereby declare that I shall pay income tax on Estimated Income} over and above my Normal Income} of Rs. 1}2~00}000/- (Rupees One Crore Twenty Five Lacs Only) and pay income tax thereon in due course of time. This income will be as per the impounded documents} impounded computers and/or impounded record I his estimated Income shall be declared in my own individual case or any other associates concern or company in which I have interest.
>
> This declaration may be treated as a declaration made in pursuance of proceedings under Section 133-A of the Income Tax Act} 1961.
>
> This declaration is made voluntarily and to buy peace and avoid protracted litigation with the Income Tax Department with understanding that penalty U/s271(l) (c) the income Tax Act} as well as the prosecution proceedings shall not be initiated against me or any of my concern in which I have interest."

4. However, when the Assessee filed his return of income on 26th September, 2009 for the AY 2009-10, he did not include the aforementioned amount as part of his income. He made no reference to the declaration made by him on

18th December, 2008. Nearly two years after the above declaration, the Assessee submitted the following letter dated 16th December, 2010:

> "Withdrawal dated 16.12.2010 of declaration dated 18.12.2008
>
> Sir,
> Re:- In the matter of Sh. Avinash Kumar Setia withdrawal of surrender declaration made during survey operation conducted u/s 133 A of the Income Tax Act 1961
>
> This is to inform you that during survey operation conducted u/s 133A of the Income Tax Act 1961 declaration was made vide letter dated 18/12/2008 making a surrender of Rs 1.25 crore in my Individual case as well as any other associate concern in which I had interest.
>
> That the said declaration was made u/s 133(A) of the Income Tax Act -1961. In this connection it is submitted that letter for declaration was given to Investigation was filed to remove the pressure of the Income Tax Authorities and it does not represent true and correct picture of the affairs. Further it is also submitted that there was no incriminating documents seized/found during the course of suggesting the undisclosed income of Rs 1.25 crore in the hands of assessee. This fact is also proved from the seized documents and books of accounts regularly maintained by the assessee. Keeping this factual position into consideration and background, no such income is declared in the returns filed for A.Y. 2009-10.
>
> Further the assessment has to be made on the basis of actual income and not on the basis of hypothetical figure. The Income Tax return for the captioned assessment year was filed based on the regular books of accounts which are already seized by the department. Accordingly facts and figures can be verified from the seized material including the books of accounts.
>
> Further your kind attention is invited to instructions No. 286/2/200J/IT(lNV) dated 10th March 200J. by of India,

Ministry of Finance and Company affairs, Department of Revenue, CADT which is reproduced as under: (omitted)

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Further as informed earlier, that there was no incriminating documents seized/found during the course of suggesting the undisclosed income of Rs 1.25 crore and a/so no such incriminating documents has been pointed out by your goodself in the questionnaire issued by you to suggest that there was undisclosed income earned by the assessee during the captioned assessment year. It is submitted that as per instruction of CBDT on the captioned subject and also based on the various judgements, it is a well established precedence that in the absence of any evidence, no addition is required to be made for any adhoc declaration made by the assessee. And for this proposition of law we rely on the judgement:-

a) *Paul Mathew & Sons v. CIT 263 ITR 101 (Ker)*
b) *Sanjeev Kumar Pandhi v. CIT 305 ITR 101(P&H)*
c) *Abhi Developers v. ITO 12 SOT 444 (Ahm)*

In view of the above facts as informed earlier, no incriminating documents seized/found during the course of suggesting the undisclosed income nor any such documents were confronted by the assessing officer which can result into an addition of additional income of Rs 1.25 crore.

Hence no such income was included and in view of the above facts, no adverse inference may kindly be drawn in this regard.

Any other clarification if needed, the same shall be given at your convenience.

Sd/-"

5. Appended to the above letter was an affidavit to the same effect submitted by the Assessee.

6. The Assessing Officer ('AO') proceeded to pass the assessment order dated 29th December, 2011 adding the aforesaid sum of Rs. 1.25 crores to the Assessee's income as undisclosed income. The AO reasoned that "to presume pressure or coercion even after 2 months is against the common sense. It is possible that after having made surrender they had manipulated their accounts so as to negate the surrender which was voluntarily made".

7. The Assessee then filed an appeal against the above assessment order before the CIT(A). By order dated 14th January 2013, the CIT (A) rejected the plea of the Assessee *inter alia* on the ground that at the time of survey, when confronted with questions that were 'inconvenient', the Assessee gave an assurance that details would be provided later and, therefore, succeeded in getting an immediate reprieve. But at the time of declaring the unaccounted income, the Assessee changed his stand and filed a letter of retraction. It was noted that in the self-serving affidavit, "the Appellant attempted to seek refuge in the wording of the admission, claiming that it referred to his companies, firms and also his individual status." Thus at each stage "the Appellant has been employing a ruse to escape from the rigours of law. By not providing the basic details in a coherent manner, the Appellant has prevented the Revenue from examination of his affairs. Therefore, the disclosure of the unaccounted income quantified at Rs 1,25,00,000 by the Appellant and admitted voluntarily deserves to be accepted."

8. The CIT (A) then discussed the decisions relied upon by the Assessee and the Circular of the CBDT. It was noted that the reliance placed by the Assessee on the said circular was misplaced "since it deals with the

directions to the officers not to obtain declaration during search and survey. In the case in hand, no declaration was obtained by the officer, assessee himself submitted a typed letter, admitting to unaccounted income of Rs 1.25 crores, much after the conclusion of survey."

9. In the impugned order, the ITAT has, after considering the above material, come to the conclusion that the findings of the AO and the CIT (A) were not sustainable in the eyes of law in view of various decisions of this Court, some of which were also referred to by the learned counsel for the Assessee before this Court.

10. First, the learned counsel for Assessee sought to rely upon the decision dated 14th September, 2016 passed by this Court in ITA 585/2016 (***Pr CIT-4 v. IIBS Infonet Pvt. Ltd***.). By the said order this Court affirmed an order dated 8th March 2016 passed by the ITAT in ITA No. 6509/Del/2014. The facts of the said case are that a search and seizure operation was conducted on 30th June, 2009. During the course of a survey under Section 133 A of the Act of that very date, a statement was recorded of the Director of the Assessee company. The assessment proceedings were carried out under Section 143(3) of the Act and completed on 18th March, 2013. In the above context it was held by the ITAT that the statement recorded under Section 133 A of the Act could not be relied upon since in view of the CBDT Circular dated 1st March, 2003 such a statement had to be corroborated by other material.

11. The facts of the case on hand are plainly different. Here, there was no statement of the Assessee recorded during the survey under Section 133A of

the Act. As observed by the CIT(A), the Assessee voluntarily made a declaration two months after the survey. There was absolutely no compulsion on the Assessee to make such a declaration. The Assessee waited for two years to resile from the said declaration. The submission of learned counsel for the Assessee that since he had filed a return on 26th September, 2009 without disclosing the sum of Rs. 1.25 crores, he should be deemed to have resiled from the said declaration cannot be accepted. The retraction in writing happened only on 16th December 2010. It was much too delayed to be taken to be bonafide. The circumstances under which the retraction was made has also not been explained. The Court finds that the above retraction, without any explanation whatsoever, and without mentioning the offer of surrender of Rs.1.25 crores made earlier on 18th December, 2008 is not a retraction at all in the eyes of law. The above decision of this Court, therefore, does not come to the assistance of the Assessee.

12. Learned counsel for the Assessee next relied upon the decision of this Court dated 4th October, 2010 in ITA No. 1111/2010 (***Commissioner of Income Tax* v *M/s Dhingra Metal Works***). Here again, during the course of the survey conducted on 14th September, 2004, the Respondent Assessee surrendered an amount of Rs. 99.5 lakhs and offered it to tax. Within a period of slightly over two months thereafter, on 29th November, 2004, he gave a letter stating that the statement was incorrect and that no discrepancy had to be reconciled as it was only a mistake.

13. Again, the distinguishing feature is that the retraction was within a short

period of two months. This singular fact is sufficient to distinguish the said case from the case on hand.

14. The learned counsel for the Assessee relied upon the decision of the Madras High Court in ***CIT v. Khader Khan Son (2008) 300 ITR 157 (Mad.)***. In the said case, during the search action, one of the partners of the Assessee made a statement under Section 133A of the Act offering additional income. Less than 10 days thereafter, on 3rd August, 2001, the statement was resiled from in writing. This again, therefore, makes the case distinguishable from the case in hand where the Assessee has waited for 2 years to resile from the declaration earlier made.

15. On the side of Revenue, reliance was placed on the decision in ***Raj Hans Towers Pvt. Ltd. v. Commissioner of Income Tax-V (2015) 373 ITR 9 (Del)*** where the Court explained the evidentiary value of a statement under Section 133A of the Act.

16. The Court finds that in the present case, the ITAT erred in relying upon the decision in ***CIT v. Khader Khan Son*** (*supra*), which as noted hereinbefore, is distinguishable on facts. The Court is not satisfied that the retraction made by the Assessee two years after the declaration was bonafide. There was no satisfactory explanation for not including the said amount in the return of income filed by the Assessee on 26th September, 2009.

17. In the circumstances, there was no justification whatsoever for the ITAT to have deleted the additions made by the AO which were upheld by the

CIT(A). The question framed by the Court is answered in affirmative.

18. The impugned order passed by the ITAT is, accordingly, set aside. The appeal is allowed. No orders as to costs.

CM 47121/2016 (exemption)

19. Allowed, subject to all just exceptions.

CM 47122/2016 (delay)

20. For the reasons stated therein, the application is allowed and the delay of 45 days in re-filing the appeal is condoned.

S.MURALIDHAR, J

CHANDER SHEKHAR, J

MAY 01, 2017
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