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

BEFORE SHRI KULDIP SINGH, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA NO. 1292/MUM/2021 (A.Y. 2017-18)

Rohinton Homi Sanga Room No. 6, 1st Floor 36 Mistry Building, Sunmill Road Lower Parel, Mumbai - 400013 **PAN: AGTPS1061N**	*v.*	DCIT – Central Circle – 7(1) Room No. 653, 6th Floor Aayakar Bhavan, M.K. Road Mumbai – 400020
(Appellant)		**(Respondent)**

Assessee Represented by	**:**	**Shri J.D. Mistry & Shri P.K. Bhagwagar**
Department Represented by	**:**	**Smt. Sanyogita Nagpal**
Date of Conclusion of Hearing	**:**	**07.09.2023**
Date of Pronouncement	**:**	**22.11.2023**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax (Appeals)-49, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 20.05.2021 for the A.Y.2017-18.

2. Brief facts of the case are, assessee has filed his return of income on 14.07.2017 declaring total income of ₹.17,78,080/-. A search and seizure operation u/s. 132(1) of Income-tax Act, 1961 (in short "Act") was conducted at office premises of M/s. Blue Angel Construction Pvt. Ltd., on 27.07.2016 Shri Xerxes Talati and Shri Noshir Talati are the main persons controlling this company. The assessee was covered under u/s.132(1) of the Act on his residential premises as part of the search action initiated on 27.07.2016 which was concluded on 29.07.2016 and Panchanama was drawn. Consequent to search action, the case of the assessee was centralized with DCIT, Central Circle – 7(1), Mumbai and notices u/s.153 of the Act was issued on the assessee. Further, notices u/s. 143(2) and 142(1) of the Act were issued and served on the assessee along with seeking certain clarifications. In response, authorised representative of the assessee attended and submitted the relevant information as called for.

3. The Assessing Officer observed that during search, cash was seized of ₹.33.82 lakhs and gold bars of ₹.5,00,000/- along with documentary evidences and assessee was asked to explain the sources of above said seized cash and gold bars. In response assessee has submitted as under:-

> *"It is impossible to think of a situation where the Assessee is required to record statements and documents in the books of accounts. The Assessee is neither employee nor director nor shareholder of Blue*

Angel Constructions Pvt Ltd and hence it is hereby submitted that the allegations made in this para are irrelevant and the Assessee is in not concerned in any way with what is stated in this para.

Regarding Source of Cash of Rs. 33,82,000/- found and seized: During the course of search cash of Rs 33,82,000/- was seized from the Assessee's premises at Room No.6, 15 floor, 36 Mistry Building, Sun-mill Road, Lower Parel, Mumbai-400013. The source of the said amount of Rs.33,82,000/- is as under

i) Cash of Rs.16,00,000/- of Topworth Properties Private Limited of which the Assessee was the director, was lying with him on the date of search.

ii) Cash of Rs. 17,85,000: amount of Rs.15,00,000/- received as advance (pending negotiation) against sale of agricultural land owned by Mr. Noshir Talati was lying with the Assessee on the date of search and cash of Rs. 2,85,000/- is from his savings and gift from family members.

iii) Explanation regarding source of jewellery of Rs.5,00,000/- seized: Gold bars valued at Rs. 5,00,000/- were found and seized from the premises of the Assessee. The said Gold Bars were purchased by the Assessee in the past over a period of 10-15 years when the value of the Gold Bar was ranging from Rs. 5000 to Rs. 10,000 per Bar of 10 gms. All Gold Bars seized are of 10 Gms. Some of the Gold Bars were received by him in November, 1998 during the Navjote ceremony of his two sons. The balance Gold Bars have been purchased by him from his past savings over a period of time."

4. The Assessing Officer at Para No. 6.3 of the order observed that during search assessee was covered and recorded his statement u/s.132(4) of the Act where assessee has accepted that he is in practice of receiving cash from various clients and ₹.29 crores of cash was received from Ajeenkya DY Patil as per his knowledge on various dates. Assessing Officer has reproduced the statement in his order from question No. 15 to 23.

5. With regard to seizure of cash and gold bullion, the Assessing Officer has reproduced the questionnaire No. 13 to 18 where assessee has accepted that it belongs to him. However, assessee has retracted the statement given earlier on 01.08.2016. Subsequent to the retraction the assessee was once again examined on oath on 13.11.2018 u/s. 131 of the Act and Assessing Officer has reproduced the questionnaire No. 3 to 26 in his order in which assessee has confirmed that no coercion was applied by the revenue, however, the main reason for retraction by the assessee is under duress.

6. In the above statement, assessee has submitted that the cash seized in his hands during search were belongs to Topworth Properties Pvt. Ltd., (₹.16,00,000/-) and belongs to Shri Noshir Talati (₹.15,00,000/-) and the balance cash of ₹.2,82,000/- was a small savings of his family. With regard to gold bars seized he has submitted that it belongs to his family and this is out of gifts received.

7. The Assessing Officer rejected the submissions and made the additions ₹.33,82,000/- and ₹.5,00,000/- in the hands of the assessee with the following observations: -

"The submission of the assessee that the Cash of Rs.16,00,000/- of Topworth Properties Private Limited of which the Assessee was the director, was lying with him on the date of search, is not acceptable, as the assessee was only a dummy director working under the controls of Shri Noshir Talati and Shri Xerxes Talati. There was no occasion to keep the cash of a Company at the residential premises especially for only a single company amongst many where assessee is a director. He has categorically stated in his preliminary statement u/s 131 recorded by him in his own handwriting before commencement of search at his residential premise about 'Nil' position of the concerns which have kept cash and documents at his residential premises.

Thereafter, he admitted u/s 132(4) that the cash of Rs. 33.82 Lakh is unaccounted and offered the same for taxation. The cash amount of advance shown to have been received by the assessee is just an afterthought and was never stated in the preliminary statement or statement recorded u/s 132(4) in the search action.

The retraction and re-examination has already been discussed above wherein assessee stated that no force was used in recording his statement."

8. Aggrieved with the above order assessee preferred an appeal before the Ld.CIT(A). Before Ld.CIT(A), assessee has filed grounds of appeal and filed submissions wherein assessee has claimed the similar submissions which were made before the Assessing Officer. However, Ld.CIT(A) dismissed the appeal filed by the assessee sustaining the additions proposed by the Assessing Officer and rejected the plea of the assessee on retraction of the statements as well as subsequent statement made by the assessee as after-thought and he observed that no documentary evidences were submitted by the assessee in support of his claim.

9. Aggrieved assessee filed appeal before us raising following grounds in its appeal: -

1. The Order u/s. 250 of the Income Tax Act, 1961 ("the Act") bearing no.DIN & Order No: ITBA/APL/S/250/2021-22/1032995456(1) dated 20th May, 2021 for A.Y 2017-18 passed by the Commissioner of Income Tax (A) 49 Mumbai (CIT-(A)) is bad in law and void ab initio on the following amongst other grounds which are without prejudice to one another:

i) The CIT(A) has not given to the Appellant reasonable opportunity of being heard as the CIT(A) has not granted the Appellant personal hearing in the matter even though a specific request to that effect was made to the CIT(A) vide CA's letter dated 12th April, 2021.

ii) The CIT(A) has failed to adjudicate on ground no.1 which reads as under:

> *"The Assessment Order passed under section 143(3) of the Income Tax Act, 1961 dated 27th December, 2018 for A.Y 2017- 18 (the impugned order) by the Deputy Commissioner of Income Tax Central Circle 7(1), Mumbai (The Assessing Officer') is bad in law and void ab-initio on the following amongst other grounds which are without prejudice to one another:*
>
> *(a) Ex-facie the impugned order has been passed under section 143 (3) of the Act and is at the behest of the Additional CIT Central Range 7 Mumbai and is not the order passed by the Assessing Officer.*
>
> *Alternatively, if it is held that the impugned order is passed under section 143 (3) read with section 153A of the Act, the impugned order is barred by limitation*
>
> *(b) The Assessing Officer is not certain about the charge to be levelled against the Assessee as the Assessing Officer has invoked the provisions of section 69A for making addition of Rs. 33,82,000/- and at the same time has invoked the provisions of section 269SS and section 271D in respect of cash of Rs. 15,00,000/- included in the said amount of Rs. 33,82,000/-."*
>
> *iii) The search and seizure action against the assessee is illegal as the conditions precedent to taking action u/s.132 of the Act have not been complied with.*

2. The CIT(A) has erred in law and on facts by confirming the addition of Rs.33,82,000/- to the total income of the assessee as unexplained receipts u/s.69A of the Act.

3. The CIT(A) has erred in law and on facts by confirming the addition of Rs.5,00,000/- to the total income of the assessee as unexplained gold bars u/s.69A of the Act.

4. The CIT(A) has failed to appreciate the fact that the Appellant has explained the source of cash of Rs.33,82,000/- and also the source of gold bars of Rs.5,00,000 during the course of assessment proceedings and hence no addition can be made to the total income of the Appellant.

5. The CIT(A) has erred in law and on facts by confirming the additions made by the Assessing Officer to the total income of the assessee mainly on the basis of the statement of the assessee recorded u/s.132(4) of the Act during the course of search even though the said statement has been retracted by the Appellant within a short period of 2 days of completion of the search.

The CIT(A) has failed to take cognisance of the instruction dated 10 March, 2003 issued by CBDT to the effect that no addition can be made simply on the basis of the statement recorded during search and seizure action.

6. Without prejudice to what is stated hereinabove the CIT(A) has failed to appreciate the fact that the provisions of section 69A cannot be invoked in the facts and circumstances of the case and as such no addition can be made to the total income of the Appellant."

10. At the time of hearing, Ld. AR of the assessee submitted that the additions made by the Assessing Officer is purely based on statement recorded u/s. 132 of the Act and he brought to our notice Page No. 18 to 40 of the Paper Book to highlight the various statements recorded by the assessee before the tax authorities and he also brought to our notice Page No. 41 to 43 of the Paper Book wherein assessee has retracted the statement within few days of recording the above said statements. Further, he brought to our notice Page No. 45 of the Paper Book which is

subsequent statement recorded by the tax authorities u/s. 131 of the Act and he brought to our notice the admission of the assessee of the cash found in his possession during the search i.e., cash of ₹.16,00,000/- belongs to Topworth Properties Pvt. Ltd., and cash of ₹.17,85,000/- out of ₹.15,00,000/- belongs to Shri Noshir Talati which is an advance received on behalf of Shri Noshir Talati towards sale of agricultural land and balance cash belongs to assessee's savings and gifts from family members. With regard to gold coins he brought to our notice that the gold bars found during search are in the denomination of 10 grams and some of the gold bars were received by the assessee from the family in Navjote ceremony of his sons and rest purchased by him from the past savings.

11. Further, he brought to our notice Page No. 49 of the Paper Book wherein Shri Jitendra Suresh Jadhav has owned up the cash and confirmed that the cash was received by the assessee on behalf of Shri Noshir Talati. Copy of the letter is filed at Page No. 49 of the Paper Book. Further, he brought to our notice statements recorded u/s. 131 of the Act which is placed on record from Page Nos. 50 to 54 of the Paper Book wherein assessee has reconfirmed the details of cash seized during the search. Further, he brought to our notice Page No. 59 of the Paper

Book which is the Balance Sheet of Topworth Properties Pvt. Ltd., as on 31.03.2017 where the company has sufficient funds to the extent of ₹.44.01 lakhs.

12. Further, he brought to our notice Page No. 67 of the Paper Book which is Panchanama dated 27.07.2016 to bring on record the commencing of the search and conclusion of the search and seizure of various cash from the possession of the assessee. He submitted that the addition made by the Assessing Officer merely based on the statement recorded during search once such statement was retracted it loses its relevance and Assessing Officer does not have any material in support of the additions made by him other than the statement recorded u/s. 132 of the Act.

13. He brought to our notice Page No. 2 of the Ld.CIT(A) order and Page No. 14 of the Ld.CIT(A) order where Ld.CIT(A) has sustained the additions after considering the detailed submissions made by the assessee, however, rejected the submissions made by the assessee. Ld.AR submitted that no evidences were produced by the department except relying on statements which was retracted. Further, he brought to our notice CBDT Circular No. 10.03.2003 and he submitted that as per

the CBDT Circular no addition can be made without backed by proper evidences and cannot be merely relying on statements. Ld. AR submitted that Ld.CIT(A) has merely evaluated the statement recorded u/s. 132 of the Act and rejected the reasons for retractions and observed as, which is not supported by cogent or relevant evidences. Ld. AR of the assessee objected to the conclusion drawn by the Ld.CIT(A) and he relied on the following case law: -

i. *Jasmin K. Ajmera v. DCIT in ITA.No. 983/Mum/2020 dated 02.11.2021*

ii. *DCIT v. M/s. NIBR Bullion Pvt. Ltd., in ITA.No. 6320/Mum/2011 dated 05.12.2022*

iii. *Pr.CIT. v. Sunshine Import & Export Pvt. Ltd., [2020 118 taxmann.com 123 (Bombay).*

iv. *Milestone Brandcom Pvt. Ltd., v. National Faceless Appeal Centre, Delhi in Writ petition (Appeal) No. 28212 of 2021 dated 14.12.2021.*

v. *Golden Tobacco Limited v. National Faceless Appeal Centre, Delhi in Writ Petition No. 1282 of 2021 dated 28.10.2021.*

14. On the other hand, Ld. DR brought to our notice Page No. 7 of the Assessment Order and supported the findings of the Assessing Officer. He submitted that there is no duress on the assessee while recording the preliminary statement at the time of search and where assessee has accepted that it belongs to him. Ld. DR took us through various statements of the assessee during search proceedings and when assessee

retracted the same, assessee has not given any satisfactory evidences. The burden of proof was not discharged by the assessee at the time of retraction. The details of cash found in his possession were explained by the assessee only through subsequent statement and during the assessment proceedings without there-being proper evidences to discharge the onus of proof and he heavily relied on the findings of the lower authorities.

15. In the rejoinder, Ld. AR of the assessee brought to our notice Page No. 7 of the Assessment Order and submitted that subsequent statement u/s. 131 was recorded after one year of retraction. Further, he submitted that assessee did not have the copy of the above statement. In this regard he submitted that the Assessing Officer made the addition which is not based on the statement recorded u/s. 131 of the Act but based on statement recorded u/s. 132(4) of the Act.

16. Considered the rival submissions and material placed on record, it is fact on record that assessee is a salaried employee drawing monthly salary of ₹.1,00,000/- per month and as per the records submitted before us the assessee was handling cash on behalf of Directors of M/s. Blue Angel Construction Pvt. Ltd., and its group companies, i.e., Shri Xerxes

Talati and Shri Noshir Talati and it is accepted fact that the cash handled by the assessee is all unaccounted cash received from buyers on behalf of the above construction companies. Assessing Officer has brought on record assessee has handled the cash belongs to Ajeenkya DY Patil to the extent of ₹.29 crores. These facts on record clearly shows that assessee is an employee who handled the cash on behalf of Directors of M/s. Blue Angel Construction Pvt. Ltd., it shows that assessee himself does not possesses any means to earn income on his own. He is just a salaried employee and works under the directions of other Directors.

17. It is also fact on record that at the time of search cash of ₹.33.82 lakhs and gold bars of about ₹.5 lakhs was found in his possession. It is also fact on record that assessee has accepted during recording of statement u/s. 132(4) of the Act that these items belong to him. However, subsequently he has retracted. After retraction in subsequent statement recorded u/s. 131 of the Act, assessee has given details of cash found in his possession as per which these cash are belongs to Topworth Properties Pvt. Ltd., and Shri Noshir Talati. Accordingly, assessee has given the details of ₹.31 lakhs which was found at his premises. Since assessee being an employee who does not have any source of his own. Nothing was brought on record by the tax authorities

to show that assessee is holding the above said cash which is out of earning of assessee or any other sources which can link the assessee, that being so there is nothing on record of the tax authorities which shows that this cash belongs to assessee except relying on the statement recorded during search proceedings u/s. 132(4) of the Act. In our considered view, there is no means for assessee to earn such huge cash and subsequently assessee has brought on record details of the cash which belongs to Topworth Properties Pvt. Ltd., and Shri Noshir Talati family. Therefore, these cash can be treated as already explained by the assessee and no addition has to be made and the addition should be made on the respective persons.

18. With regard to additional cash of ₹.2.82 lakhs and gold bars found in his possession of ₹.5 lakhs, we observe that assessee has claimed that certain gold bars were received by him out of gifts and rest are out of family savings. As far as cash and gold bars are concerned since assessee is receiving considerable salary of ₹.1,00,000/- per month there is a chance of certain savings and also certain gold bars are received out of gifts and in our view, the benefit of doubt to certain extent has to be extended to the assessee. Since these cash and gold bars were not properly explained by the assessee and for the sake of overall justice we

deem it fit and proper to direct the Assessing Officer to restrict the additions to the extent of 50% of the above unexplained portion of the cash and gold bars i.e., 50% of ₹.7,82,000/-. Accordingly, Ground Nos. 2 to 6 raised by the assessee are partly allowed and Ground No. 1 raised by the assessee is dismissed as no submissions were made at the time of hearing.

19. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 22nd November, 2023.

Sd/-	Sd/-
(KULDIP SINGH)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 22.11.2023
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum