

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'B' BENCH, KOLKATA
[Virtual Court Hearing]**

**Before Shri J. Sudhakar Reddy, Accountant Member
&
Shri Satbeer Singh Godara, Judicial Member**

**I.T.(S.S.)A. No. 10/KOL/2018
Assessment Year: Block Period 01.04.1995 to 24.09.2001**

Shri Prabhu Shankar Agarwal,.....Appellant
P-420, Kazi Nazrul Islam Sarani,
VIP Main Road,
Kolkata-700052
[PAN:ADEPA4448F]
-Vs.-

Deputy Commissioner of Income Tax,..... Respondent
Central Circle-4(1), Kolkata,
Aayakar Bhawan Poorva,
101, Shantipally, Near Ruby Hospital,
Kolkata-700107

Appearances by:

Shri S.M. Surana, Advocate, appeared on behalf of the assessee
Shri Imokaba Jamir, CIT, appeared on behalf of the Revenue

Date of concluding the hearing : October 21, 2020
Date of pronouncing the order : January 5th, 2021

O R D E R

Per Shri J. Sudhakar Reddy, Accountant Member:-

This appeal filed by the assessee is directed against the order of Id. Commissioner of Income Tax (Appeals)-21, Kolkata dated 02.02.2018 under section 250 of the Income Tax Act, 1961.

2. The assessee in the present case is an individual. A search & seizure operation was conducted under section 132 of the Act at the residential premises of the assessee at P-420, VIP Road, Kolkata and at his shops at various places. The assessee is a proprietor of M/s. Haldiram Bhujawala and a Director of M/s. Haldiram Bhujawala (P) Limited. Notice under section 158BC(a) was issued to the assessee on 18.02.2002 and the

assessee filed his return for the block period in Form No. 2B on 12.04.2002. In his return of income, the assessee declared undisclosed income of Rs.65,60,902/-. Notice under section 143(2) was issued and thereafter assessment was completed under section 158BC(c)/143(3) of the Act on 28.11.2003 for the block period 01.04.1995 to 24.09.2001 making additions on various issues. The additions can be summarized as follows:-

Unexplained cash u/s 69A		Rs.17,08,250/-
Jewellery belonging to Smt. Kamla Agarwal		Rs.33,05,464/-
Jewellery belonging to Smt. Sudha Agarwal		Rs.31,17,694/-
Addition on account of undisclosed investments	Rs.16,00,000 (for 2000-01); Rs.16,50,000/- (for 2001-02); Rs.50,00,000/- (for 1996-97)	Rs.16,00,000/- Rs.16,50,000/- Rs.50,00,000/-
Addition on account of on account of seized material based on 2000-01		Rs.38,00,000/-
Addition on account of undisclosed income for FY 2000-01	Rs.40,500 (for FY 2000-01); Rs.13,620/- (for FY 2000-01); Rs.11,810 (for FY 2001-02)	Rs. 40,500/- Rs. 13,620/- Rs. 11,810/-
Addition on account of undisclosed investment		Rs.1,91,75,000/-
Addition as undisclosed investment		Rs.40,10,700/-
Addition as income		Rs. 55,184/-
Addition as undisclosed income		Rs.1,85,000/-
Addition as unexplained investment		Rs.8,00,000/-
Addition on account of income on sale of		Rs.3,00,000/-

agricultural land		
Addition based on undisclosed income seized on paghe 1 of HR12 and page 2 of HR-12	Rs.5,00,000/- & Rs.50,000/-	Rs.5,00,000/- Rs. 50,000/-
Addition based on seized material	Rs.10,00,000/- on the basis of page 12 of HR-12; Rs.1,50,000/- of page 4 of HR-12; Rs.14,50,000/- on the basis of page 5 of HR-12; Rs.50,000/- on the basis of page 2 of HR-12	Rs.10,00,000/- Rs. 1,50,000/- Rs.14,50,000/- Rs. 50,000/-
Addition based on seized material	Rs.1,75,000/- on the basis of page 6 of HBJ-1; Rs.92,313/- of page 1,4 & 5 of HPJ-1; Rs.3,44,488/- on the basis of seized cash book	Rs.1,75,000/- Rs. 92,313/- Rs.3,44,488/-
Addition based on seized papers	Rs.2,43,805/- on the basis of HBJ/2 Rs.57,750/- on the basis of seized paper HR/4 at page 33	Rs.2,43,805/- Rs. 57,750/-
Addition based on seized papers	Rs.1,95,962/- of HR/30 Rs.2,54,825/- of HR/1 Rs.1,01,963/- of JM/14 & 15 Rs.25,944/- of KKG/1 Rs.2,11,389/- on the basis of KKG/14 & 16	Rs.1,95,962/- Rs.2,54,825/- Rs.1,01,963/- Rs. 25,944/- Rs.2,11,389/-
Addition u/s 2(22)(e)		Rs.26,71,235/-
Addition on account of unexplained stock		Rs.7,89,645/-
Total undisclosed income for the block period 01.04.1995 to 24.09.2001		Rs.6,48,92,328/-

Being aggrieved, the assessee carried the matter before the CIT(Appeals).

3. The main contention of the assessee was that there was violation to the principle of natural justice and that the Assessing Officer has not given sufficient opportunity to the assessee for making submission with regard to the proposed additions. The Id. CIT(Appeals) in his impugned order partly confirmed the findings of the Assessing Officer. Aggrieved, the assessee is in appeal before the Tribunal.

4. We have heard the rival contentions at length. We have also considered the para-wise comments of the Assessing Officer on various issues. One of the main contentions of the assessee is that the addition was made on the basis of statement recorded under section 132(4) of the Act without any corroborative material. It was submitted that the statement was recorded under undue threat and coercion and hence the statement cannot be the basis for addition. The assessee for this proposition relied on the judgment of the Hon'ble Supreme Court in the case of B. Kishore Kumar -vs.- DCIT Chennai reported in [2015] 62 taxmann.com 215 (SC); Bannalal Jat Construction (P) Limited -vs.- ACIT [2019] 106 taxmann.com 128 (SC); CIT -vs.- St. Francis Clay Decor Tiles [2016] 70 taxmann.com 234 (Kerala)/385 ITR 624 (Kerala) ; and other case laws. We find force in this argument of the Id. Counsel for the assessee. The CBDT in its Instruction No. F. No. 286/2/2003-IT(In) dated 10.03.2003 has clearly laid down as follows:-

F. No. 286/2/2003-IT (Inv)

*GOVERNMENT OF INDIA
MINISTRY OF FINANCE & COMPANY AFFAIRS
DEPARTMENT OF REVENUE
CENTRAL BOARD OF DIRECT TAXES
Room No. 254/North Block, New Delhi, the 10th March, 2003*

*To
All Chief Commissioners of Income Tax, (Cadre Contra)
&
All Directors General of Income Tax Inv.*

Sir

Subject : Confession of additional Income during the course of search & seizure and survey operation -regarding

Instances have come to the notice of the Board where assesseees have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assesseees while filing returns of income. In these circumstances, on confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Departments. Similarly, while recording statement during the course of search it seizures and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.

Further, in respect of pending assessment proceedings also, assessing officers should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders

Yours faithfully,

Sd/-

(S. R. Mahapatra]

Under Secretary (Inv. II)

Thus addition can be made only based on material in the possession of the Assessing Officer are not on contents of any statement which is not corroborated with evidence.

5. We take up the additions on merits:-

Ground No. 1 is general in nature.

Ground No. 2 is in respect of an addition of Rs.17,08,250/- being unexplained cash found at the time of search, the Assessing Officer has relied on the order of the CIT(Appeals) and has submitted that the statement recorded under section 132(4) is impeachable evidence and has further repeated the observations of the Assessing Officer in the assessment order.

In reply, the assessee referred page 3, last para of the assessment order and explained that the Assessing Officer relied on the statement of Mrs Sudha Agarwal, who is the wife of the assessee, for supporting this evidence. There was no statement of the assessee. Hence the report of the AO is contrary to the facts. Further, the AO has not denied the sources explained by assessee but has simply relied on the assessment order

without examining the facts stated in the written submissions which he should have examined and commented upon.

6. We examine the facts stated by the assessee. The assessee's submission was that the amount of Rs.11,00,000/- belonged to a Company Rameshwara Nursing Home Pvt. Limited, the cash book of which was seized during the course of search. The Assessing Officer's finding is that this explanation cannot be accepted at the time of search, the assessee had withdrawn Rs.26,17,235/- from the said company and could not prove where the amount was lying and hence the A.O. doubts the claim of the assessee. The assessee further submits that a separate addition of Rs.3,00,000/- was made against agreement for sale of property at Bikaner being agricultural land, but no credit was given for this cash balance when cash in hand was being computed. The Assessing Officer did not controvert the submissions of the assessee but has relied on the statement recorded under section 132(4) at the time of search. The Assessing Officer missed to see that the said statement was that of Smt. Sudha Agarwal, wife of the assessee and not that of the assessee. The facts demonstrated with evidence find during search are against the facts stated in the statement by Smt. Sudha Agarwal. The statement recorded under section 132(4) cannot be the sole basis of addition, unless corroborative evidence is found. When books are seized, the contents in the books of account have to be accepted as prima facie correct unless contrary evidence is found. The entries in the books of M/s. Rameshwara Nursing Home Pvt. Limited have to be accepted as true. When the books found during search state that Rs.11,00,000/- was the cash balance in the books, it has to be accepted as a correct fact. Thus this amount of Rs.11,00,000/- cannot be considered unexplained cash. Agreement for sale of property was found during the course of search and this shown that a sum of Rs.3,00,000/- as received by the assessee in cash. Credit should be given for this amount as this amount is not unexplained cash. Thus Rs.14,00,000/- of addition from out of the total addition of

Rs.17,08,250/- is hereby deleted as this is explained cash in hand found during the course of search.

In the result, this ground is partly allowed.

7. Ground No. 3 is in respect of jewellery found. The Assessing Officer in his report has relied on the order of the CIT(Appeals) that item wise tally was not made and weight wise jewellery items are not reconciled and hence explanation of the assessee cannot be accepted. The Assessing Officer further states that jewellery to extent of Rs.31,17,694/- was accepted by the assessee as undisclosed.

In reply the assessee submitted that the weight of the jewellery both for gold and diamonds which was declared to the Department prior to search was more than the jewellery found during the search. This claim was not disputed by the Assessing Officer. The Id. Counsel for the assessee submitted that when weight and value-wise jewellery found was less than the weight-wise and value-wise jewellery disclosed to the department much prior to the date of search, addition cannot be made on the ground that there is excess jewellery, simply because description of the items did not tally. For this proposition, CBDT Circular and judgments were cited by the Id. Counsel for the assessee. This is adversely commented upon by the Assessing Officer. On the statement u/s 132(4), it is submitted by the Id. Counsel for the assessee that the same was rebuttable, as has been held in various judgments cited.

8. On examination of the facts on record, we find that the jewellery was found during the course of search from Smt. Kamla Agarwal is stated in the valuation report, copy of which is at page 18-44 of the paper book. The weight of this jewellery is 8225 grms, copy of which is at page 45-49 of the paper book. The assessee had disclosed jewellery in his wealth tax return filed on 04.03.1998, the copy of which is placed at pages 78 to 91 of the paper book. The jewellery of Sudha Agarwal, wife of the assessee,

was disclosed in the wealth tax return filed on 14.07.2000, copy of which is placed at pages 98 to 101 of the paper book. Similarly in the case of Shri Prabhu Shankar Agarwal, HUF, valuation report is at page 97 of the paper book and wealth tax return was filed on 04.03.1999, copy of which is at paper book pages 92 to 96. The break-up of jewellery is as follows:-

(i)	Kamla Devi Agarwala (mother)	Valuation was placed at pages 18-49. Copy of wealth tax return filed on 04.03.1998 at pages 78 to 91 of the paper book
(ii)	Smt. Sudha Agarwal (wife of the assessee)	Valuation report was placed at pages 65 to 74 of the paper book. Copy of wealth tax return filed on 14.07.2000 at pages 98 to 101 of the paper book
(iii)	Sri Prabhu Shankar Agarwal, HUF	Valuation report was placed at page 97 of the paper book and wealth tax return filed on 04.03.1999, copy of which placed at pages 92 to 96 of the paper book.

As already stated all the wealth tax returns have been filed prior to the date of search. The assessee has submitted the reconciliation statement of the items of jewellery found during the search and the items of jewellery as per the disclosure made in the wealth tax return.

9. A perusal of the facts demonstrates that the jewellery declared to the Department, prior to the date of search, is more than that of the jewellery found during the course of search. The Assessing Officer as well as the Id. CIT(Appeals) was of the view that the addition is sustainable as the assessee could not tally, item-wise, the jewellery found at the time of search, with the jewellery declared by the family members in their wealth tax returns. Item-wise tally of jewellery, in our humble opinion, is not required to be done when the total jewellery found weight-wise and value-wise is less than the jewellery declared by the assessee in the wealth tax return. It cannot be said that the assessee had undisclosed jewellery under these facts and circumstances, especially when the declared jewellery in weight and value as per wealth tax return is much

more than the jewellery in weight and value found during the course of search. It is common knowledge that the description of jewellery need not tally 100%, since the assessee's do change and modify the shape and type of the jewellery from time to time for various reasons. Thus in our view the addition on account of unexplained investment in jewellery cannot be sustained. We delete the same.

10. Ground No. 4 is against the Assessing Officer's view, that the assessee at page 25 of PS 1, recorded the word 'MA', which is a Code. This code of deciphered and addition made.

The submission of the assessee was that the AO has simply relied on the assessment order and the order of CIT(A) without examining the written submissions and negating the submissions made. The fact is that the loan was given by Kamla Devi Agarwal. The papers stood in her name and hence the presumption u/s 292C(1(ii)) is that the loan was given by her. Therefore, Smt. Kamala Devi should have been examined when she has filed the confirmation that the loan was given by her. The AO has erroneously relied on the judgment of Nova Promoter which relates to share capital introduced and not to loans given. This is not the undisclosed investment of the assessee and hence has to be deleted.

11. On Ground No. 5, the view of the AO was that peak theory cannot be allowed since the assessee was not maintaining the books of account and he relied on the order of the CIT(Appeals).

In reply, the submission of assessee was that the reliance on the finding of the CIT(A) was not proper when the appeal is against the order of CIT(A). Further that the AO should have examined the written submission on the issue of peak. He submitted that peak theory was wrongly rejected on the ground that books were not maintained when the date of each receipt and withdrawal was available in the seized documents, based on which the peak could have been easily worked out. We agree with these submissions. The peak credit can be worked out

when the dates of credit and withdrawals/debits are available. It is well settled that only the peak credit can be considered as unexplained investment. The A.O. is directed to work out the peak credit in this case base on the dates available on record. Hence, we set aside this issue to the file of the ld. A.O. for computation of peak credit.

12. On Ground No. 6, the view of the AO was that the assessee was not maintaining the books of accounts and relied on the order of AO. In reply, the assessee submits is that the AO should have examined the evidences in his possession and come to a logical conclusion based on these evidences. There is a violation of the principles of natural justice in this case as the evidence available with the A.O. was not examined. This needs to be done. Hence we set aside this issue to the file of the A.O. for fresh adjudication.

13. Ground No. 7, as per the AO, ample opportunity was given to the assessee but the assessee failed to prove his case and cooperative with the A.O. as held in para 2 of the assessment order.

The assessee stated that it is not correct that ample opportunity was given and on the other hand vide page 3 para 1 of the assessment order it is clearly stated that the assessee's representative appeared from time to time and filed all the details called for.

There is nothing in page 15 to show that ample opportunity was given to the assessee before additions were made under different heads. Moreover, assessment on peak basis is well accepted by the judiciary and hence the addition should be restricted to the peak credit only. The A.O. has to examine this issue and dispose of the claim in accordance with law. Hence we set aside the issue to the file of the A.O.

14. On Ground No. 8, as per the AO, it is for the assessee to point out that, the amount was duly included in the books of account.

The assessee pleaded that the AO ignored the paper book filed where at page 11, the interest income was disclosed. It was submitted that these facts were not properly verified by the Assessing Officer. This is violation of the principles of natural justice. The A.O. is directed to verify the facts and de novo dispose off this issue.

15. On Ground No. 9, as per the AO, it was for the assessee to prove that his submissions are correct with evidence and has relied on the order of the AO and CIT(A).

The assessee submits that the AO has not denied the facts stated in written submission. He should have verified this fact but did not do so. Not doing so is violation of the principles of natural justice. Hence we set aside this issue to the file of the A.O. with a direction to examine the evidence.

16. Ground No. 10, the AO says that the submission could not be considered due to lack of evidence and as this argument was not made before DDIT.

The assessee's case is that the AO made the addition on the basis of evidence found at the time of search and therefore it cannot be said that there was lack of evidence. Further the claim is not to be made before the DDIT, as such claims can be made only in the assessment proceedings and thereafter in the appellate proceedings. He submits that the Assessing Officer should have examined the evidences in his possession which he failed to do. This is violation of the principles of natural justice and hence we set aside the issue to the file of the A.O. for fresh adjudication.

17. Ground No. 11, on facts the payment was made by Rameshwar Nursing Home. The AO has not examined the accounts of Rameshwar Nursing Home where that payment had been shown.

The AO did not deny the fact that the payment was made by Rameshwar Nursing Home. He should have examined the nature of the

payment. Even if the same was not shown by Rameshwar Nursing Home in its books of account, addition cannot be made in the hands of the assessee. The addition, if any, could be made only in the hands of the said Nursing Home. Hence we delete this addition in the hands of the assessee.

18. On Ground No. 12, the AO has relied on the assessment order in his comments and has further commented that it was for the assessee to show that it was a double addition.

The Assessing Officer has not denied that the submission made was not correct. The A.O. has not examined the submissions and evidences in the paper book which did show that the addition was doubly made. The A.O. should have given the assessee an opportunity in the remand proceedings to point out as to how this was a double addition. This is violation of the principles of natural justice. Hence we set aside this matter to the file of the A.O. for fresh verification and adjudication.

19. On Ground No.13, as per the AO, filing of an affidavit without evidence is not enough compliance and further the entire receipt of sales was treated as income.

When an affidavit was filed, the AO should have examined the contents as well as the deponent before rejecting the affidavit, as has been held in the case of Mehta Parekh and Co. reported in 30 ITR 181. Similarly the AO cannot add the entire sale consideration as income and only Net profit can be added. The AO has not allowed an opportunity to assessee to explain this issue. This is violation of the principles of natural justice. Hence we set aside this issue to the file of the A.O. for fresh adjudication in accordance with law.

20. Ground No. 14 is an addition of the entire sales consideration as income.

The assessee submits that the sales were part of the cash book which could have been explained if an opportunity was allowed and that

further the AO could have added only the net profit on the sale as income and not the entire sale. This requires fresh verification de-novo in accordance with law. If the sale is not unrecorded sale, no addition can be made. Hence we set aside this issue to the file of the A.O. for de novo adjudication.

21. On Ground No. 15, as per the AO, the assessee could not provide any proof that the difference was explained.

The AO had the cash book with him, which was duly seized, wherein the cash balance was much more than the said difference, but the AO ignored the same. Apart from that there was credit in the cash book on account of sales but the sale proceeds were separately considered and credit was separately added. The AO in his report has not examined the submissions made by the assessee to determine the correct facts but he simply relied on the AO as well as CIT(A)'s order. This is violation of principles of natural justice. We set aside this issue to the file of the A.O. for verification and fresh adjudication.

22. Regarding Ground No. 16, the AO has simply relied on the findings in the assessment order and the order of the CIT(A).

The AO has not examined the submissions made by the assessee as well as the cash book seized during search. He should have examined the balance sheet of Rameshwar Nursing Home if there was any payment to the assessee to justify the addition under section 2(22)(e). Without such payment it cannot be said that section 2(22)(e) of the Act is attracted.

23. The assessee's plea is that he has never withdrawn any amount from the Nursing Home, the books of which were seized. It is clear from the cash book and the balance-sheet of M/s. Rameshwara Nursing Home that there was no loan or advance given to the assessee. This submission of the assessee has not been controverted by the Assessing Officer. Since there is no loan taken by the assessee from Rameshwara Nursing Home

Pvt. Ltd., as per the books of account and documents seized during search, there can be no addition under section 2(22)(e) of the Act. Hence we delete this addition and allow this ground of the assessee.

24. Regarding Ground No. 17, the AO has simply relied on the AO's order and CIT(A)'s order.

The AO has not examined the evidences and submissions made even though specific comments were asked for. This is violation of principles of natural justice. Hence we set aside this issue to the file of the A.O. for fresh adjudication.

25. Regarding Grounds No. 18 & 19, the AO has relied on CIT(A)'s order and has further commented that when the assessee has disputed each and every addition, he cannot claim the peak credit, which as per the A.O. is contradictory.

The AO should have examined the claim of peak credit. When the same amount is rotated on different dates and when the A.O. himself is making separate addition for each and every addition, then telescoping of income has to be granted. Thus we set aside this issue to the A.O. with a direction that telescoping benefit be granted to the assessee.

26. Ground No. 19 is against an alleged double addition. The AO has simply relied on the order of CIT(A). The facts were available in the paper book and it was specifically shown that it was a double addition. This claim should have been examined by the AO. This is also violation of principles of natural justice. Hence we set aside this issue to the file of the A.O. for fresh adjudication in accordance with law.

27. The assessee further claims that property at Bikaner belonged to various persons and it was not the exclusive property of the assessee. The Assessing Officer has made the entire addition in the hands of the assessee. Such addition cannot be made only in the hands of the assessee

if the property belongs to a number of persons. This issue also requires re-adjudication. For this purpose, this issue is also remanded back to the Assessing Officer with a specific direction that the contention of the assessee has to be examined with the evidence on record and the assessment be completed do novo in accordance with law.

28. In the result, the appeal of the assessee is allowed in part.

Order pronounced in the open Court on January 5th , 2021.

Sd/-
(Satbeer Singh Godara)
Judicial Member

Sd/-
(J. Sudhakar Reddy)
Accountant Member

Kolkata, the 5th day of January, 2021

- Copies to :*
- (1) Shri Prabhu Shankar Agarwal,
P-420, Kazi Nazrul Islam Sarani,
VIP Main Road, Kolkata-700052**
 - (2) Deputy Commissioner of Income Tax,
Central Circle-4(1), Kolkata,
Aayakar Bhawan Poorva,
101, Shantipally, Near Ruby Hospital, Kolkata-700107**
 - (3) Commissioner of Income Tax (Appeals)-21, Kolkata**
 - (4) Commissioner of Income Tax- ,**
 - (5) The Departmental Representative**
 - (6) Guard File**

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.