

**IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH (SMC), JODHPUR**

BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER

ITA No. 573/Jodh/2018
(ASSESSMENT YEAR-2009-10)

Mukesh Choudhary, C/o- Surendra Chopra, 67, Manak, Sec. 7, Extn., New Power House Road, Jodhpur.	Vs	Income Tax Officer, Ward-2(1), Jodhpur.
(Appellant)		(Respondent)
PAN: ADBPC 8539 J		

Assessee By	Shri Surendra Chopra (CA)
Revenue By	Shri Abhimanyu Singh Yadav JCIT-DR
Date of hearing	16/03/2020
Date of Pronouncement	19/03/2020

ORDER

PER: R.C. SHARMA, AM

This is an appeal filed by the assessee against the order of the CIT(A)-1, Jodhpur dated 28/09/2018 for the A.Y. 2009-10 in the matter of order passed u/s 143(3)/147 of the Income-tax Act, 1961 [hereinafter referred to as 'the Act', for short].

2. In this appeal the assessee is aggrieved by confirming the addition of Rs. 5,83,320/- made by the A.O. on account of on money payment for purchase of plot.

3. At the outset, the Ld. AR of the assessee placed on record various decisions of the Coordinate Bench wherein exactly similar issue was decided by the Tribunal in assessee's favour.

4. I have considered the rival contentions and carefully gone through the orders of the authorities below and found from the record that the assessee is a salaried employee. The AO received information which indicated that the during the year under consideration, the assessee had purchased a plot measuring 291.66 sq. feet in the residential project "Revenue Residency" (Nizi Khatedar Residential scheme) at village Bharatsingh, Jaishinghpur- Muhana Road, Bhankrota, Teh. Sanganer, Jaipur. This residential scheme was developed and sold by one Shri Madan Mohan Gupta in FY 2008-09 relevant to AY 2009-10 in whose case search and seizure operation were carried out on 23-05-2013. During the course of search and seizure, statement of Sh. Madan Mohan Gupta were recorded wherein he had accepted and honoured on-money receipt on sale of plots in Revenue Residency scheme which was Rs.

3150/- per sq. feet as per the seized papers. As per the assessment order, the name of the assessee was also appearing in the list of such purchasers for aforesaid plots, who allegedly had given Rs. 3150/- per sq. feet as on-money i.e. Rs.9,44,429/- (291.66 sq. feet x Rs. 3150/- + 25,700/- for boundary wall) to Shri Madan Mohan Gupta for purchase of the said plot. The assessee did not disclose such alleged investment of on-money paid by him, therefore, the AO issued notice u/s. 148 of the Act on 30.03.2016. The assessee stated that he had not paid extra amount (on-money) towards purchase of plot. However, the AO was not convinced with the assessee's reply and various assertions made in the reply filed in response to notice issued. By the impugned order, the Id. CIT(A) confirmed the action of the AO, against which the assessee is in further appeal before the Tribunal.

5. The Id. AR placed on record a decision of the Coordinate Bench in the case of Shri Deva Ram Suthar Vs ITO in ITA No. 342/Jodh/2018 order dated 27/12/2018 wherein under similar facts and circumstances, the addition made on account of alleged on-money paid on purchase of plot was deleted by the Tribunal after having the following observation:

"8. In the assessment order, the AO alleged that the assessee has paid to the seller Shri Madan Mohan Gupta on money of Rs. 4,66,660/- for the purchase of plot No. 84 having total area of 233.33 Sq. yards.

9. *In reply to the same, assessee submitted as under:*

- “a. That the allegation of Id. AO is baseless and imaginary and not maintainable.*
- b. The Id. AO has relied upon the statement of Shri Madan Mohan Gupta recorded by the I.T. Authorities on 23/05/2013 during the course of search. But from reading the reply given by Shri Madan Mohan Gupta in the statement, it is clearly conveyed that Shri Madan Mohan Gupta sold the land for Rs. 1150/- per Sq. Yard and the appellant paid as purchase consideration to the seller Madan Mohan Gupta a sum of Rs. 2,71,000/-.*
- c. That the entire fabric being woven against the appellant for treating the alleged payment of on money go around the statement of Shri Madan Mohan Gupta. It is submitted that after thought statement carry no weight under the law and they are against the spirit of natural justice because they have no evidence value.*
- d. That except the above statement of Shri Madan Mohan Gupta there was no supporting evidence available with the Id. AO which could corroborate that on money of Rs. 4,66,660/- was paid by the appellant to Shri Madan Mohan Gupta.*
- e. That while making the allegation that Id. AO has relied upon the statement of Shri Madan Mohan Gupta course of search proceedings.*

10. *Assessee also asked before the AO to provide opportunity for the cross examination of the person on whose statement addition was made. However, no such opportunity was provided neither by the AO nor by the CIT(A). Thus, without affording cross examination, the AO has made addition on the basis of statement of Shri Madan Mohan Gupta u/s 69 being unexplained investment and added the same in assessee's income. However, there was no corroborative material available with*

the AO for making addition. As per our considered view, not providing opportunity of cross examination amount to violation of principle of natural justice, a serious flaw which makes the order null and void.

11. *For this purpose, reliance can be placed on the decision of Hon'ble Supreme Court in the case of Andaman Timber Industries 281 CTR 241 wherein it was held that not allowing assessee to cross examine witnesses by adjudicating authority though statements of those witnesses were made as basis of impugned order, amounted in serious flaw which made impugned order nullity as it amounted to violation of principles of natural justice. The precise observation of the Hon'ble Supreme Court was as under:-*

"Not allowing the appellant to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the appellant. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the appellant. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. Appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods

were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above.

12. Reliance can also be placed on the decision of Bombay High Court in the case of *Ashish International* in ITA No. 4299/Mum/2009 dated 22/02/2011, wherein Court held as under:

“The question raised in this appeal is, whether the Tribunal was justified in deleting the addition on account of bogus purchases allegedly made by the assessee from M/s. Thakkar Agro Industrial Chem Supplies P. Ltd. According to the revenue, the Director of M/s. Thakkar Agro Industrial Chem Supplies P. Ltd. in his statement had stated that there were no sales / purchases but the transactions were only accommodation bills not involving any transactions. The Tribunal has recorded a finding of fact that the assessee had disputed the correctness of the above statement and admittedly the assessee was not given opportunity to cross examine the concerned Director of M/s. Thakkar Agro Industrial Chem Supplies P. Ltd. who had made the above statement. The appellate authority had sought remand report and even at that stage the genuineness of the statement has not been established by allowing cross examination of the person whose statement was relied upon by the revenue. In these circumstances, the decision of the Tribunal being based on the fact, no substantial question of law can be said to arise from the order of the Tribunal. The appeal is dismissed with no order as to costs.”

13. Reliance is also placed on the decision of Bombay High Court in the case of *H.R. Mehta* in its order dated 07/07/2017. The Hon'ble High Court held as under:-

“The assessee is bound to be provided with the material used against him apart from being permitted to cross examine the deponents. The denial of such opportunity goes to root of the matter and strikes at the very foundation of the assessment order and renders it vulnerable.”

14. *Applying proposition of law laid down by Hon’ble Supreme Court and High Court as discussed above, I do not find any merit for the addition made by AO merely on the basis of statement, when there is no corroborative material with AO suggesting the alleged addition, without allowing assessee an opportunity to cross examine the person on whose statement addition was made. Accordingly, AO is directed to delete the addition so made.*
15. *Before parting with the matter, I observe that Ld. AR had placed on record order of ITAT Jaipur Bench in the case of Navrattan Kothari vs ACIT in ITA No. 425/JP/2017 in which proceedings initiated u/s 148 was quashed. However, the facts of this case are entirely distinguishable from the facts of instant case, in so far as in the case of Navratan Kothari (supra) reopening of assessment after four years of assessment framed u/s 143(3)/153 was quashed, whereas in the instant case, no assessment was framed u/s 143(3) and only return was processed u/s 143(1). Accordingly, it is not going to help the assessee in any manner.*
16. *In the result appeal of assessee is allowed in terms indicated hereinabove.”*

6. I have gone through the orders of the authorities below as well as order of the Tribunal in the case of Shri Deva Ram Suthar Vs ITO (supra) wherein under similar facts and

circumstances, the Tribunal have deleted the addition made on account of alleged payment of on-money. Similar view has been taken by the various Benches of the Tribunal as placed on record. The Id DR also fairly conceded that the issue is covered by the various orders of the Tribunal in favour of the assessee. No order of the Tribunal or the Hon'ble High Court on this issue which is against the assessee was placed before us so as to persuade us to deviate from the findings recorded by the Tribunal consistently in various orders as placed on record by the Id. AR. Respectfully following the same, I do not find any merit in the addition so made by the A.O.. Hence, I direct the A.O. to delete the same.

7. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 19th March, 2020.

Sd/-
[R.C. SHARMA]
Accountant Member

Dated : 19/03/2020

*Ranjan

Copy to :

1. The Appellant
2. The Respondent

3. The CIT
4. The CIT(A)
5. The DR
6. Guard File (ITA No. 573/Jodh/2018)

Assistant Registrar
Jodhpur Bench