

IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA no. 222/Nag./2015
(Assessment Year : 2006-07)

Income Tax Officer, Ward 3(5), Room No. 518, 5 th Floor, MECL Building, Near T. V. Tower, Nagpur-06	 Appellant
v/s		
M/s. Progressive Carriers, 16, Mall Road, Kamptee, Nagpur-441 002 PAN: AABFP 5520 H	 Respondent

Assessee by : Shri Gitesh Kkumar
Revenue by : Shri K. P. Dewani

Date of Hearing – 08.05.2018

Date of Order – 11.06.2018

ORDER

PER SHAMIM YAHYA, A.M.

This appeal by the Revenue is directed against the order of the Id. Commissioner of Income Tax (Appeals)-2, Nagpur dated 09.04.2015 and pertains to assessment year 2006-07.

2. The grounds of appeal read as under:

1. On the facts and circumstances of the case, the Id. CIT(A) erred in deleting the addition of Rs.53,00,000/- on account of undisclosed investment in the sand ghat.
2. On the facts and circumstances of the case, the Ld. CIT(A) erred in restricting the addition of Rs.10,00,000/- on account of the income earned from the undisclosed investment to only Rs.1,91,890/-.

3. Brief facts of the case are as under:

The assessment in this case was reopened by issue of notice u/s 148 in view of certain enquiries conducted by the DDIT(Inv.) Unit-II, Nagpur. It is noted by the

Assessing Officer that in pursuance to tax evasion petition in the case of Shri Afzal Ansari (then partner of the assessee firm), the DDIT(Inv.) carried out certain enquiries and forwarded the report to the Assessing Officer for necessary action. The Assessing Officer noted during the course of assessment proceedings that the DDIT(Inv.) had recorded the statement of Shri Afzal Ansari wherein he admitted investment of Rs.53 lacs for acquisition of a sand block in the name of Shri Prashant Umathe. The Assessing Officer further noted that the assessee was asked to furnish the details of the said transaction of Rs.53 lacs which was not recorded in the books of accounts wherein the assessee produced the copies of cheques/DDs and subsequently disclosed an amount of Rs.53 lacs in lieu of unaccounted payment made to Shri Prashant Umathe for acquiring said sand ghat. The assessee also "disclosed an amount of Rs.10 lacs being income earned on the above investment which been offered for tax.

4. In view of the above information, the Assessing Officer reopened the assessment by issue of notice u/s 148 and the facts contained in the report of the DDIT(Inv.), Nagpur were brought to the knowledge of the assessee and he was asked to explain as to why the said amount of Rs. 63 lacs should not be brought to tax in the case of the assessee. The assessee filed its return of income u/s 147 without offering the said amount of Rs.63 lacs and has filed a return showing income of Rs.5,04,250/-. Detailed submissions were filed by the assessee to justify its income offered to tax and same are reproduced by the Assessing Officer on pages 3, 4 & 5 of the assessment order. The gist of the statements of the assessee before the Assessing Officer can be summarized as under:-

- 1) That trading advances were given to sand ghat owners in the form of DDs in the name of Collector, Nagpur to obtain concessional price for subsequent purchases.

2) That it was categorically submitted before the DDIT(Inv.) (subsequent to the recording of the statement) himself that the assessee had prepared demand drafts amounting to Rs. 33,45,386/- were issued to the Collector, Nagpur and were prepared from the regular books of accounts of the appellant and also appeared in the books of accounts and that it was only the income arising from such turnover was not reflected in the regular books.

3) That it is evident from question No. 13 is that the income arising out of advance/cost of purchase of Rs. 53 lacs had been offered for tax and that there was no question of taxing the amount which was given from the regular bank account and reflected in the books of accounts.

4) That the appellant never admitted that demand drafts amounting to Rs. 53 lacs were prepared by them and there was admission only in respect of Rs. 53 lacs turnover. That since the appellant never gave demand draft amounting to Rs. 53 lacs, there was no question of it being taxed on the said amount and that whatever demand drafts have been given, the same are duly accounted for in the books of accounts.

5) All books of accounts and bank statements are evidences which were available for verification.

5. The Assessing Officer considered the submission of assessee but did not accept the same. He noted that while the assessee had disclosed an amount of Rs.63 lacs before the DDIT(Inv.), the assessee had filed its return of income u/s 147 without offering the said amount of Rs.63 lacs and has filed a return of Rs.5,04,2507- only (as against original return filed on 30.07.2007 showing income at Rs.64,249/-). The Assessing Officer further noted that the expenses in this case were itself unaccounted and that the DDIT(Inv.) has therefore rightly asked the assessee to offer the undisclosed income. He noted that Shri Umathe is not a man of means and further noted as under :-

"If an assessee in his written submission states that, in question No. 13 it was income arising out of advance/cost of purchases at Rs.53 lacs has been offered to tax and not total amount of Rs. 53 lacs. Then why does the DDIT(Inv.) states in

the letter that Rs. 53 lacs has been disclosed in view of unaccounted payment and Rs. 10 lacs voluntarily disclosed by the assessee' for A.Y. 2006-07."

6. The Assessing Officer further concluded as under:-

"The DDIT(Inv) has rightly observed after conducting discreet enquiry that the assessee has declared Rs.63 lacs (Rs.53 lacs from unaccounted payments to purchase the sand ghat and Rs.10 lacs voluntarily) as undisclosed income. Thus on going through the above discussion and after considering the facts of the assessee it is clear that assessee has paid Rs. 53 lacs as unaccounted payment for the purchase of sand ghat. It is immaterial and incorrect to say that Progressive Carrier has not paid Rs. 53 lacs as unaccounted payments. Mr. Afzal Ansari in his recorded statement has specifically stated that total Rs. 63 lacs will be disclosed as an additional income including Rs. 10 lacs voluntarily and agreed to pay taxes thereon. Thus Rs. 63 lacs is considered as additional income of the assessee and added to total income of the assessee."

7. Thus the Assessing Officer on the basis of the above logic came to the conclusion that an amount of Rs.63 lacs is required treated as additional income of the assessee and has added the same to the income.

8. Upon the assessee's appeal, as regards the addition of Rs.53 lacs, the Id. Commissioner of Income Tax (Appeals) deleted the addition by holding as under:

6. I have considered the facts of the case and the submissions of the appellant. There is substantial force in the submissions made. On perusal of the material on record, it can be concluded that the addition of Rs. 53 lacs has been made by the Ld. AO solely on the basis of the admission of the appellant before the DDIT(Inv.) and is not backed by any evidence whatsoever. As a matter of fact, it is difficult to understand the basis of the quantification of the said figure of Rs. 53 lacs as nothing has been brought on record by the Ld. AO to substantiate / quantify the said amount.

6.1 It is important to note that the statements of the appellant were recorded by the DDIT (Inv.) on 21.01.2013 and 11.02.2013 and subsequently vide its letter dated Nil filed before the DDIT (Inv.) itself, (subsequent to the recording of statement) it was clarified by the appellant that certain gross receipts had not been included in the turnover declared and that it had prepared some demand drafts in favour of the Collector, Nagpur which were reflected in its books of accounts and that repayment of the said amount was made by way of sand purchased by the appellant from Shri Umathe. The appellant further clarified before the DDIT(Inv.) that there were certain gross receipts which they failed to include in the return of income and that therefore they were offering the receipts amounting to Rs. 55 lacs which were not included in the return of income for the year under consideration.

It was again reiterated that the demand drafts had been prepared towards business transactions and were reflected in the books of accounts and that there was no undisclosed investment with regard to the same. Thus the appellant had retracted the statement made by its ex partner almost immediately after the statement recorded by the DDIT (Inv.) on 21.01.2013 and 11.02.2013. This fact of retraction from the statement made before the DDIT (Inv.) is duly mentioned in submission of the appellant before the Id. AO during assessment proceedings and finds mention in the first paragraph of the appellant's submission before the Ld. AO which is reproduced on page 3 of the assessment order.

6.2 Even during the course of assessment proceedings, the appellant reiterated the same submissions and explained that three demand drafts were drawn on the Centurion Bank of Punjab amounting to Rs. 33,45,386/- and that these were routine business transactions towards advance/cost of purchase given to Shri Umathe and were 'paid directly to Collector and later adjusted towards sand purchase. It was also stated that these transactions are duly reflected in the bank accounts and it was only the income arising out of the said turnover which was not reflected in the original return of income.

6.3 It is also important to note that the appellant produced its bank Statements before the Ld. AO to clearly establish the fact that the said amount of Rs.33,45,386/- (demand drafts issued) was out of known sources of income and are explained. During the course of appellate proceedings also the appellant has again enclosed the said bank statements and it is seen that the date-wise details of demand drafts prepared are as under :

Sr. No.	Date	Amount
1.	24/12/2005	10,00,000/-
2.	30/12/2005	15,00,000/-
3.	06/03/2006	8,45,000/-

6.4 Further the appellant has furnished details to explain the source of funds to issue the three drafts. In respect of first two demand drafts evidence by way of sanction letters of loan taken from Kotak Mahindra Bank has been submitted and in respect of hird entry, the source of the same has been explained by way of refund of Rs. 22,92,876/- received by the appellant from the Income Tax Department. Thus, proper evidences to explain the source of the said demand drafts amounting to Rs. 33.45 lacs has been produced by the appellant before the Ld. AO by way documents and the bank statements and by no stretch of imagination can same be stated to be unexplained investment.

6.5 Thus the entire assessment is based on the statement of Shri Afzal Ansari who deposed before the DDIT(Inv.) on 11.02.2013. It is important to note that he has rot been a partner in the said firm since the last several years. Complete details were not available with the said ex-partner due to the passage of time. In this context much credibility can not be attributed to his statement to the DDIT(Inv.) that the advance given was to the tune of Rs. 53 lacs when in fact the actual advance given as per the appellant is only Rs. 33.45 lacs. In any case, the Ld. AO has failed to bring on record any independent evidence to establish that the sum advanced was in fact Rs. 53 lacs as per the statement recorded and not Rs. 33.45 lacs as per the bank statement.

6.6 Thus the appellant has consistently maintained that it had made no unexplained investment amounting to Rs. 53 lacs and that there was no credible evidence available to the department to substantiate the unaccounted payment of Rs. 53 lacs. The appellant has further consistently mentioned that it has made payment of Rs. 33,45,386/- by way of demand drafts which are duly reflected in its bank accounts. At no point has the Ld. AO been able to rebut the above assertions of the appellant. Further at no point has the Ld. AO been able to bring on record any evidence to substantiate as to how the said figure of Rs. 53 lacs was arrived at and what is the nature of evidence underlying the said quantification of Rs. 53 lacs.

6.7 It is also a fact that the appellant has consistently mentioned before the DDIT(Inv.) (by way of letter) and the Ld. AO (during assessment proceedings) that it had omitted to include turnover amounting to Rs. 55 lacs in its return of income which has now been duly incorporated and the profit arising therefrom has been offered to tax. In the return of income that the appellant filed in response to 148 notice, the estimated turnover has been taken at Rs.59 lacs and it can be seen that the A.O. has accepted the turnover in the profit & loss account and in view of the same there is no justification of adding a further amount of Rs.53 lacs to the income of the appellant.

6.8 Attention is also invited to the CBDT's Circular bearing No. 286/2/2003/IT dated 10.03.2003 wherein it has been specifically stated that while recording statements -o attempt should be made to obtain confession of undisclosed income and that such remissions are retracted in subsequent proceedings since the same are not backed by credible evidence. It is further stressed in the circular that the emphasis should be on gathering evidence and to strictly avoid obtaining admission of undisclosed income under undue influence. As can be seen in the case above, no independent evidence other than the statement has been brought on record to make out a case that the said amount of Rs. 53 lacs was unaccounted payment made by the appellant. Also, the Ld. AO has not been able to rebut the credible evidence brought on record by the appellant by way of its books of account and the bank statement showing the said transaction of Rs. 33,45,386/-.

6.9 Taking into consideration the above facts, the said addition of Rs. 53 lacs, is held to be not based on any credible evidence on record and is unsustainable and hence the same is hereby deleted.

9. As regards the addition of Rs.10 lacs, the Ld. Commissioner of Income Tax (Appeals) granted part relief by holding as under:

7. The Ld. AO has further added an amount of Rs. 10 lacs in view of the appellants statement before the DDIT(Inv.) being income earned on account of advance/cost of purchase of Rs. 53 lacs being not offered in the return of income. As stated above, the Ld. AO subsequently clarified the issue to the DDIT(Inv.) and has subsequently mentioned before the Ld. AO that only income arising out of the said turnover had not been reflected in its books of accounts and had consequently offered Rs. 4,40,000/- additional net profit on the additional turnover of Rs. 59

lacs. During the 'course of appellate proceedings it has been further explained that the said figure of additional turnover is an estimate and the appellant has no exact details of the same and the additional income has been offered @ 7.4% of the turnover which is reasonable as compared to 9.6% as shown in the original return of income. It is further submitted that the above estimate should be accepted in the given set of facts.

7.1 I have considered the facts of the case and the submissions of the appellant. The appellant had submitted the net profit percentage for the period 2005-06 to 2008-09 which is reproduced hereunder :

Asstt. Year	Turnover	Net Profit	Net profit as % of turnover
2005-06	73,02,832	3,18,853	4.37%
2006-07	32,74,419	3,15,784	9.64%
2007-08	38,95,461	5,05,191	12.96%
2008-09	37,90,546	6,01,710	15.87%

7.2 As stated above, the income is offered @ 7.4% which is less than 9.6% as shown in the original return of income. Thus there is no basis with the appellant for showing the net profit at such a low percentage. Also it can be seen that the net profit percentage in subsequent years is 12.96% and 15.87%. Considering the above facts, it would be appropriate to estimate the net profit for the year under consideration at 10.7% (which is the average of the net profit percentage for the above four years). The same comes to Rs.6,31,890/- as against Rs.4,40,000/- shown by the appellant and hence addition to the extent of Rs.1,91,890 is hereby confirmed and the appellant gets a relief to the extent of Rs.8,08,110/-.

10. Against above the order, the Revenue is in appeal before us.
11. We have heard both the counsel and perused the records. Learned departmental representative relied upon the order's of the assessing officer.
12. Per Contra, the learned counsel of the assessee supported the order of the Id. Commissioner of Income Tax (Appeals). Furthermore he summarized his submissions as under:

A) The Investigation Wing of the Department had conducted inquiry against Afzal Ansari ex-partner of firm and his employee sometime in January/February 2013 and had obtained statement from him wherein he had offered Rs.63 lacs as income. On the date of recording of statement he was not partner of firm. No record was available with him or firm on account of passage of time.

B) Before Investigation Wing letter was submitted that certain gross receipts are omitted and it was also stated that assessee firm has no undisclosed investment. It was submitted that advance was given about Rs.25 lacs and not Rs.55 lacs. (P- 20 & 21)

C) Investigation Wing or record of A.O. has no evidence that assessee has made investment of Rs.53 lacs and same remains unexplained. Entire assessment/addition is based on statement which is retracted being contrary to evidence on record.

D) The assessee firm is engaged in the business of trading of sand. In case of assessee regular return of income was filed on 30/07/2007 declaring income at Rs.64,250/-. Assessee had submitted return in response to notice u/s 148 declaring income at Rs.5,04,250/- . The additional income of Rs.4,40,000/- was declared in return in response to notice u/s 148 on estimated turnover of Rs.59.20 lacs.

E) Shri Afzal Ansari was partner of firm during the Asstt. Year 2006-07 and he retired from partnership) from 11/06/2008 as is evident from the partnership deed dated 11/06/2008 . (P- 45 - 49) [Vol.-I]

F) In the month of January 2013 Shri Afzal Ansari was examined by Deputy Director of Investigation, Nagpur when he was not the partner of firm. In the statement obtained from him it has been stated that the transaction of trading of Rs.53 lacs has not been considered in the original return of firm. At the suggestion of Dy. Director the sum of Rs.53 lacs was agreed to be considered for the purpose of Income Tax Act, 1961 Tax. As he was not partner of firm at the time of recording of statement he is third party as far assessee firm is concerned. No existing partners were examined. Enquiry was essentially against Shri Afzal Ansari.

G) In assessment proceeding before A.O. the details as to investment made for purchase of sand having been flown from regular bank account was demonstrated. The source of deposit in the bank account being loan from bank and refund from Income Tax Department were also placed on record to substantiate purchases are from the funds available in the regular bank account and is not undisclosed investment. Such facts were not disputed by A.O. or found to be incorrect.

(P-30 - 34)[Vol.-I]

H) There is no evidence on record to substantiate that assessee has unexplained investment of Rs.53 lacs. Assessee had clearly submitted before A.O. that actual investment made for purchase of sand as per books of account is Rs.33.45 lacs and assessee has not given trade advance to the tune of Rs.53 lacs. In spite of specific averment before A.O. no evidence has been brought on record by A.O. to show that the assessee has made investment of Rs.53 lacs which remained unexplained. The addition correctly deleted by Hon'ble CIT(A) for detailed reasons given in the appellate order.

I) It is settled proposition of law that no addition can be made on the basis of mere statement more so when statement made has been retracted.

J) Reliance on:

i) Hon'ble Gujarat High Court order in Tax Appeal No. 1437 of 2007 in the case of Chetnaben J. Shah L/H of Jagdishchandra K. Shah vide order dated 14/07/2016.

- (P-1-14) (9, 11,12, 13, 14)[Vol.-II]
ii) (2013) 257 CTR 0159 (Jharkhand) Shree Ganesh Trading Co. vs. CIT (P-15-18) (17, 18)[Vol.-II]
iii) (2015) 370 ITR 0671 (AP)
Gajjam Chinna Yellappa vs. ITO (P-19-22)(21,22)[Vol.-II]
iv) (2014) 369 ITR 0171 (AP)
CIT vs. Naresh Kumar Agarwal (P-23-28)(27,28)[Vol.-II]
v) (2008) 5 DTR 0166 (Ahd.) DCIT vs. Pramukh Builders (P-29-46)(30)[Vol.-II]
vi) F. N0.286/2/2003-IT (Inv.) dated 10/03/2003. (P-47-48)(47)[Vol.-II]
vii) F. N0.286/98/2013-IT (Inv.-II) dated 18/12/2014. (P-49-50)(49)[Vol.-II]

K) A.O. has accepted income as shown in return in response to notice u/s 148. A.O. has accepted the income declared on estimated basis at Rs.4,40,000/-on estimated turnover of Rs.59.40 lacs without inviting any adverse observation. On the basis of aforesaid factual position further addition of Rs.53 lacs on account of investment in the absence of any evidence on record and Rs. 10 lacs as estimated profit is unjustified and unsustainable.

L) The addition made by A.O. is not represented by any unexplained investment/expenditure brought on record. Addition made by A.O. is thus unjustified and unsustainable.

M) The income determined in past Asstt. Year has been considered by Hon'ble CIT(A) to adopt the average net profit on estimated turnover to sustain addition at Rs.1.92 lacs at the hands of assessee. Approach of CIT(A) is fair and reasonable and does not call for any interference.

N) The only basis for making addition by A.O. is the statement obtained by Investigation Wing of the Department from Shri Afzal Ansari in the year 2013 when he was not partner in the assessee firm. The statement was obtained almost 6 years after the transaction without any record being available with department and assessee.

O) The statement has been obtained in the year 2013 and transactions sought to be verified are pertaining to the year ending 31/03/2006 which is almost more than 6 years back. The partner of assessee firm is uneducated and does not have complete record and therefore has given statement as desired by Deputy Director of Investigation. The same is evident from the tone and tenure of the statement recorded and also the fact that statement recorded is in two parts with the gap of almost more than 20 days. A.O. has not examined the existing partners of the assessee firm and has proceeded to rely on the statement of Shri Afzal Ansari given at the time when he was not partner of the firm. The statement given by Afzal Ansari is no valid legal evidence on the basis of which alone income can be assessed to tax at the hands of assessee.

13. Upon careful consideration, as regards the addition of Rs.53 lacs, we find that the same has been done suddenly on the basis of admission of ex-partner of the firm before the Investigation Wing that sum of Rs.53 lacs was paid being unaccounted payment for the purchase of sand ghat. No corroborative material whatsoever in this regard has been brought on record by the Revenue. The examination of the books of account has shown that a sum of Rs.33,45,386/- was paid for acquisition of the sand ghat. The admission of payment by the ex-partner was not accepted by the other partners. In such circumstances *de hors* any corroborative material, the statements of the ex-partner cannot be said to be a conclusive evidence of the firm having made a payment of Rs.53 lacs through undisclosed means for acquisition of sand ghat. The sum paid for the said acquisition of Rs.33,45,386/- remains duly shown in the books of account. In these circumstances, in our considered opinion, there is no infirmity in the order of the Id. CIT(A). Furthermore, it has been held by the Hon'ble Apex Court in the case of *CIT vs. S. Khader Khan Son* [2013] 352 ITR 480 (SC) that *de hors* the corroborative material merely on the basis of the statement obtained, the addition cannot be made. This is particularly more evident in this case that the statement has been obtained from an ex-partner of the firm who is no longer partner in the firm for the last many years. The Id. CIT(A) has relied upon the CBDT Circular No. 286/2003/IT dated 10.03.2003 which states that efforts should be made by revenue official to obtain credible evidence and obtaining admission *de hors* evidence should be avoided. In our considered opinion, the reliance by the Id. Commissioner of Income Tax (Appeals) on this CBDT Circular is germane and supports the deletion of addition of Rs.53 lacs.

14. As regards the addition of Rs.10 lacs, we find that this was also found on admission by the ex-partner. The assessee has subsequently offered Rs.4,40,000/- being additional net profit on the additional turnover of Rs.59 lacs. The Id. Commissioner of Income Tax (Appeals) has applied the profit rate of assessment year 2006-07 and held that the profit accordingly comes to Rs.6,31,890/-, as against Rs.4,40,000/- shown by the assessee. Hence, he restricted the addition to the extent of Rs.1,91,890/- and granted relief to the assessee to the extent of Rs.8,08,110/-. We find that this addition is also solely based upon the admission by the ex-partner de hors any credible evidence. Accordingly, on the same basis, as applied by us in deleting the addition of Rs.53 lacs above, in our considered opinion, the addition by the Assessing Officer here also is not sustainable. Accordingly, we do not find any infirmity in the order of the Id. Commissioner of Income Tax (Appeals) accordingly, we uphold the same.

15. In the result, the appeal filed by the Revenue stands dismissed.

Order pronounced in the open Court on 11.06.2018.

Sd/-
RAM LAL NEGI
JUDICIAL MEMBER

Sd/-
SHAMIM YAHYA
ACCOUNTANT MEMBER

NAGPUR, DATED: 11.06.2018
Roshani, Sr. PS

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Nagpur City concerned;*
- (5) *The DR, ITAT, Nagpur;*
- (6) *Guard file.*

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ITAT, Nagpur

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