IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "SMC-B", BANGALORE

Before Shri George George K, Judicial Member

ITA No.895/Bang/2019 : Asst.Year 2011-2012

Sri.D.V.Sadananda Gowda 15-22-1390/4, Kamala, 2nd Cross Lower Bendoor Mangalore – 575 002. **PAN : AGMPG0756F.**	v.	The Asst.Commissioner of Income-tax, Circle 1(3)(1) Bengaluru.
(Appellant)		(Respondent)

Appellant by : Sri.U.S.Yogesh Kumar, Advocate
Respondent by : Sri.Ganesh B.Ghale, Standing Counsel

Date of Hearing : 18.03.2021		**Date of Pronouncement : 30.03.2021**

O R D E R

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 25.02.2019. The relevant assessment year is 2011-2012.

2. Though several grounds are raised (in total 29 grounds), the learned AR confined his submission to the merits, namely, whether the CIT(A) has erred in confirming the addition of Rs.5,00,000 made by the Assessing Officer.

3. The brief facts of the case are as follow:

The assessee is an important public figure. For the assessment year 2011-2012, the return of income was filed on 31.07.2011 declaring total income of Rs.5,41,570. There was a search and seizure action u/s 132 of the I.T.Act in the corporate office of M/s.RNS Infrastructure Limited (in short "RNSIL") on 16.02.2012. During the course of search, certain incriminating materials were seized including deleted data

retrieved from seized computer server by using forensic tools. According to the A.O., the deleted data represents systemic and comprehensive day to day recordings including "sundry payments". This "sundry payment", according to the A.O., are made outside the books of account submitted along with return of income and one such recipients of the payment from RNSIL was the assessee. According to the A.O., there was reason to believe that an amount of Rs.1 crore chargeable to tax has escaped assessment within the meaning of section 147 of the I.T.Act. Hence, the assessment was reopened by issuance of notice u/s 148 of the I.T.Act. The assessment u/s 143(3) r.w.s. 147 of the I.T.Act was completed vide order dated 28.03.2016, wherein the A.O. held that RNSIL is a leading contractor, which had executed several Government contracts for building roads, bridges, canals etc. in the State of Karnataka. During the course of search and seizure, several incriminating material was unearthed pointing out unaccounted income being paid to public servants and bureaucrats. It was further held by the A.O. that jottings in the handwriting of Vice President, RNSIL, clearly shows that these payments were made outside the books of account and assessee was also beneficiaries of such payment. The assessment was concluded by making an addition of Rs.5 lakh, which according to the A.O., was received by the assessee from RNSIL during the course of relevant assessment year.

4. Aggrieved by the reassessment completed by making an addition of Rs.5 lakh, the assessee preferred appeal before the first appellate authority. Before the first appellate authority,

the assessee had raised various contentions including the issue of validity of reopening of assessment as well as on merits. It was contended that the statement of Vice President (Finance), RNSIL was relied on for making addition of Rs.5 lakh and despite specific request, the assessee was not granted an opportunity to cross-examine the witness. The CIT(A), during the course of appellate proceedings, directed the A.O. to provide all the copies of documents that was seized as well as an opportunity to cross examine VP (Finance), RNSIL. Accordingly, the A.O. as per the directions of the CIT(A), allowed the assessee's representative for inspection of incriminating material on the basis of which the assessment was completed and also provided an opportunity to cross examine the witness, whose statement has been relied on for making the addition of Rs.5 lakh. The VP (Finance), RNSIL during the cross-examination, stated that the statement recorded on 16.02.2012 was by force and he intimated the same to DDIT (Investigation) Bangalore as early as on 07.03.2012. The VP (Finance) RNSIL had also stated neither he nor RNSIL had made any payment to the assessee. The A.O. sent his report vide his letter dated 22.10.2018 and was forwarded by the concerned JCIT vide letter dated 25.10.2018. The CIT(A), however, rejected the contentions of the assessee and confirmed the addition of Rs.5 lakh made by the A.O. The CIT(A) held that mentioning of Rs.5 lakh in one set of reason for reopening and Rs.15 lakh in another is only a mistake and a typographical error. The CIT(A) further held that though the assessee was not specifically mentioned as recipient of sum of

Rs. 5 lakh from RNSIL, there is enough circumstantial evidence warranting addition of Rs.5 lakh.

5. Aggrieved by the order of the CIT(A), the assessee preferred an appeal to the Tribunal. The learned AR submitted that on identical facts arising out of the same search, the issue on merits was decided in favour of the assessee by the ITAT in the case of Shri D.S.Suresh v. ACIT in ITA Nos.462 & 463/Bang/2020 (order dated 22.02.2021). A copy of the order of the ITAT in the case of Shri D.S.Suresh v. ACIT (supra) is placed on record.

6. The learned Standing Counsel relied on the assessment order and the CIT(A)'s order.

7. I have heard rival submissions and perused the material on record. Admittedly, the addition of Rs.5 lakh has been made in the case of the assessee only on the basis of diary noting, statement of VP (Finance), RNSIL, and data retrieved by using forensic tools from seized computer server (data was deleted and the same was retrieved by using forensic tools). The assessee had contended that the details of seizure and the harsh value report were not available with the A.O. at the time of assessment. It was stated that the same was not made available to the assessee nor his representative. It was further submitted that the A.O. has not brought out any nexus between the payment of Rs.5 lakh with that of the assessee. One of the evidences which is purported against the assessee is an electronic record and the same is not collected in compliance with section 65-B of Indian Evidence Act r.w.s.

2(1)(t) of Information Technology Act and section 132(iib) of the I.T.Act. Any electronic record can only be considered as a piece of evidence which shall be as per section 65-B of the Indian Evidence Act and on complying the conditions enumerated u/s 65B(4) of the Indian Evidence Act. The above said principle has been settled by the Hon'ble Supreme Court in the case of (Anver P.V. v. P.K.Basheer and Ors. reported in (2014) 10 SCC 473. The diary noting, the statement of VP (Finance), RNSIL has not pointed out any payment to the assessee. The statement recorded on 16.02.2012 (date of search) was retracted by the VP (Finance) RNSIL on 07.03.2012 itself. The CIT(A) during the course of appellate proceedings had directed the A.O. to grant an opportunity of cross examination of VP (Finance) RNSIL and inspect the incriminating material. The VP (Finance) RNSIL during the course of cross examination had outrightly denied making any payment by him or RNSIL to the assessee. It was further submitted by him that the statement recorded on 16.02.2012 was under duress and he had taken up the matter with the DDIT (Investigation) Bangalore in his letter dated 07.03.2012. This fact is also admitted by the JCIT in her covering letter to the CIT(A) dated 25.10.2018, which is extracted below:-

> *"The AO's report which is self explanatory is forwarded herewith. It is also submitted that in the statement recorded on 16/02/2012 during search, Sh.Sunil Sahasrabudhe has only explained / given details about some material found during search and has not made any specific admission. As such the claim that the same is obtained by force is not tenable. In that statement, what he had deposed is the fact that the expenditure under the head "sundry" is unaccounted and as no question on the break up details of sundry expenditure was asked, the*

possibility of the name of the appellant appearing in any of the answers does not arise. ***(emphasis supplied)***

PADMAMEENAKSHI
Joint.Commissioner of Income-tax
Range-1(3), Bengaluru."

7.1 From the aforesaid facts, it is very clear that there is no nexus between any payment made by RNSIL to that of the assessee. There is no mentioned anywhere that the assessee was the recipient of the payment, the alleged quantum of payment, the date, the month or the year of the alleged payment. There were two sets of reasons for reopening the assessment, one with Rs.15 lakh and another with Rs.5 lakh. In the impugned assessment order, the A.O. at page 2 had stated that there is reason to believe that the amount of Rs.1 crore chargeable to tax for assessment year 2009-2010 have escaped assessment, while the impugned order relates to the assessment year 2011-2012. All these facts point to a situation that the addition has been made merely on surmises, conjectures and without any valid evidences.

7.2 On identical facts arising out of the same search case, the Tribunal in the case of D.S. Suresh v. ACIT (supra) had held that the addition of Rs.10 lakh for assessment year 2009-2010 and Rs.49 for the assessment year 2011-2012 is to be deleted. The Tribunal held that there is no material / evidence for making such addition. The relevant finding of the Tribunal reads as follow:-

"13. We have heard the rival contentions, perused and carefully considered the material on record. In the present case, the addition is based on the diary jottings found during the course of

search action in the case of RNSIL on 16.02.2012. We have carefully gone through the diary jottings recorded earlier part of this order. It contains the entry No.5 – MLA Tarikere Rs.27 lakhs upto 31.07.2010. However, it does not specify date on which it was paid or who has paid. It is not possible to any person to say conclusively that it is relating to these assessment years being the absence of date of payment. Further it is only diary jottings not supported by corroborated material or any independent evidence. In other words, there should be a material on record to show that there is an undisclosed income on the basis of material on hand with the Assessing Officer and guess work is not possible. The Assessing Officer shall have the basis for assuming that there was a payment by RNSIL to the assessee which was not disclosed to the Department. The unsubstantiated diary jottings cannot be considered as a conclusive evidence to make any evidence towards undisclosed escaped income. It was held by the Hon'ble Supreme Court in the case of CBI Vs. V.C. Shukla 3 SCC 410 that "file containing loose sheets or papers are not books" and hence entry therein are not admissible u/s. 34 of the Evidence Act, 1872. In the present case, the seized material having certain entries are found, regarding amount which was presumed thus are illegal payments to the persons mentioned therein. These entries are unsubstantiated. On that basis one cannot reach to the conclusion that figures mentioned therein are the undisclosed payments in these assessment years under consideration to the present assessee. In our opinion, the documents relied on by the Assessing Officer for making addition in these assessment years was dumb document and lead nowhere since these diary jottings are not supported by any corroborative material or evidence to show that the information made by lower authorities is correct. Further unsigned document in the form of diary jottings cannot be relied upon for making or sustaining the addition. In the present case, more so, the Managing Director of RNSIL made a categoric statement in his letter that no payments were made to the assessee in the F.Y. 2008-09 to F.Y. 2010-11. Further even if the Assessing Officer wants to rely on the diary jottings to make an assessment or relying on the statement of any third party, the same is required to be furnished to the assessee and if the assessee wants to cross examine any of the parties whose statements were relied on by the Assessing Officer, the same is to be provided to the assessee In the present case, the assessee is having grievance for not furnishing the seized material to the assessee and there was no question of providing an opportunity of cross examining of the parties whose statements are relied on

by the Assessing Officer while completing the assessment. In these circumstances, we are not in a position to uphold the addition sustained by the CIT(Appeals). The circumstances surrounding the case are not strong enough to justify the rejection of the assessee's plea of asking the copies of seized material and providing an opportunity of cross examination of the parties concerned. In view of above, we set aside the order of the lower authorities and allow the ground taken by the assessee in their appeals for both the assessment years under consideration."

7.3 In view of the aforesaid facts and the order of the Tribunal in the case of D.S.Suresh v. ACIT (supra), which is identical to the facts of the instant case, I delete the addition of Rs.5 lakh made by the Income Tax Authorities. It is ordered accordingly.

8. In the result, the appeal filed by the assessee is allowed.

Order pronounced on this 30th day of March, 2021.

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 30th March, 2021.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT(A)-3, Bangalore.
4. The Pr.CIT-1, Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore