**<u>आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर</u>**

# IN THE INCOME TAX APPELLATE TRIBUNAL INDORE BENCH, INDORE

## BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER AND SHRI MANISH BORAD, ACCOUNTANT MEMBER

## ITA No.524/Ind/2013
## Assessment Year: 2010-11

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| ACIT-1(1) Bhopal | **<u>बनाम</u>**/ Vs. | Shri Sudeep Maheshwari E-2/178, Arera Colony, Bhopal |
| (Appellant) | | (Revenue ) |
| P.A. No.AAFPM4748J | | |

## ITA No.299/Ind/2017
## Assessment Year: 2008-09

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| Shri Sudeep Maheshwari E-2/178, Arera Colony, Bhopal | **<u>बनाम</u>**/ Vs. | ACIT-1(1) Bhopal |
| (Appellant) | | (Revenue ) |

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| Appellant by | Smt. Ashima Gupta, D.R. |
| Respondent by | Shri Ashish Goyal & Shri N.D. Patwa, A.Rs |
| **Date of Hearing:** | **15.01.2019** |
| **Date of Pronouncement:** | **13.02.2019** |

## आदेश / O R D E R

**PER KUL BHARAT, J.M:**

These two appeals in quantum and penalty proceedings by revenue and assessee respectively are pertaining to the assessment years 2010-11 & 2008-09. Both the appeals were taken up together and are being disposed of by way of consolidated order. First we take up revenue's appeal in ITA No.524/Ind/2013, where in the revenue has raised following grounds of appeal:

> *"On the facts and in the circumstances of the case, the CIT(A) has erred in*
>
> *1. Deleting the addition of Rs.2,25,00,000/- made by the A.O. on account of income surrendered by the Assessee as per statement recorded u/s 132(4) of Income Tax Act, 1961."*

2. The facts in brief are that a search action was carried out at the premises of the assessee. During the course of search, certain documents were seized. A statement of the assessee was recorded in which the assessee admitted and surrendered income on behalf of self and others. The A.O. therefore made addition of Rs.2,25,00,000/-. Against this,

the assessee preferred an appeal before Ld. CIT(A), who after considering submissions deleted the addition. Now the revenue is in appeal.

3. Ld. D.R. vehemently argued that Ld. CIT(A) was not justified in deleting the additions. Ld. D.R. relied upon the decision of the Hon'ble Delhi High Court in the case of Hans Towers (P) Ltd. Vs. CIT-V (2015) 56 taxmann.com 67 (Delhi).

4. On the contrary, Ld. Counsel for the assessee supported the order of the Ld. CIT(A) deleting the addition and relied upon various case laws and he also reiterated the submissions as made in the written synopsis.

5. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. The Ld. CIT(A) deleted the addition by observing as under:

*"7. The A.O. has placed his reliance on the decision of the Hon'ble High Court of Chattisgarh in ACIT Vs. Hukum Chand Jain & Ors. (2011) 337 ITR 238. I have carefully gone through the said decision, I find that in the said case during the course of search, cash, gold ornaments and certain loose papers were seized and assessee could not explain the recovery of cash and jewellery and in his statement under s. 132(4), he surrendered Rs.30 lakhs as his undisclosed income for the block period. I am of the considered opinion that the facts in the instant case are clearly distinguishable from the facts in the said decision of the Hon'ble High Court of Chhattisgarh in as much as in the instant case, no disproportionate asset has been brought on record."*

8. I find that the case of the appellant finds support from the following decisions:

a) M. NARAYANAN & BROS. vs. ASSISTANT COMMISSIONER OF INCOME TAX (2011) 243 CTR (Mad) 588 : (2011) 339 ITR 192 : (2011) 60 DTR 233

**Held:**

*"Income from undisclosed sources—Addition—Addition on the basis of statement recorded during search—Assessee offered Rs. 3 lakhs as unaccounted income on the first day of search at his premises and another sum of Rs. 4 lakhs on the second day of the search—However, in the course of assessment proceedings, assessee retracted the statement made on the second day offering the additional income of Rs. 4 lakhs—AO rejected the said plea and made assessment on the basis of both the confessional statements given by the assessee—Not justified—**Though the statement rendered at the time of search may be used in evidence in any proceedings that by itself cannot become the sole material to rest the assessment, more so when the assessee seeks to withdraw the same by producing material evidence in support of such retraction—It is always open to the person who has made the admission to show that the statement to offer income is incorrect—** Assessee has explained that the amount offered on the second day of the search was loans taken by him from relations who were already assessed on the said amount—Even otherwise, assessee's transactions relating to pawn broking pertained to earlier assessment years and had no relevance to the year under consideration—Thus, once the assessee had explained his statement as incorrect in the context of the material produced by him, the Tribunal was not justified in its conclusion that the statement made by the assessee clothed the assessment with legality—**That apart, the case of the assessee also stands supported by Circular No. F.No. 286/2/2003-IT (Inv.), dt. 10th March, 2003 wherein CBDT has given categorical directions to the Departmental officers that undue emphasis should not be placed on the recorded statements—**Therefore, CIT(A) was justified in accepting the assessee's case and deleting the addition of Rs. 4 lakhs."*

b) INCOME TAX OFFICER vs. VIJAY KUMAR KESAR (2010) 231 CTR (Chattisgarh) 165 : (2010) 327 ITR 497 : (2010) 36 DTR 13

**Held:**

Income from undisclosed sources—Addition under s. 69—Addition on the basis of statement recorded during survey—Assessee surrendered the cash and value of excess stock found during survey for taxation but did not offer any such amount in his return—**He produced his updated books of account and other primary**

**records during the assessment proceedings to explain the cash and stock found at the time of survey but the AO rejected the same solely on the ground that the assessee had made confessional statement during the survey proceedings and surrendered income from undisclosed sources in the form of cash and excess stock and such primary evidence was produced after considerable period**—On appeal, CIT(A) accepted the explanation offered by the assessee and the books of account produced by him as the entries in the books were supported by primary evidence—CIT(A) also accepted the explanation that the statements were made by the assessee without understanding the import of the same as he was under stress due to the death of his daughter—Order passed by CIT(A) has been confirmed by the Tribunal—Findings recorded by both the authorities cannot be termed perverse or contrary to record—**Confession made by the assessee during survey proceedings is not conclusive and it is open to the assessee to establish that the same was not true and correct by filing cogent evidence—Additions rightly deleted.**

c) COMMISSIONER OF INCOME TAX vs. SHRI RAMDAS MOTOR TRANSPORT (2000) 163 CTR (AP) 403 : (1999) 238 ITR 177 (AP) : (1999) 102 TAXMAN 300 (AP)

**Held**

Reference—Question of law—Evidentiary value of statement recorded under s. 132(4)—**Department could not find any unaccounted money, article or thing or incriminating document either at the premises of the company or at the residence of managing director or other directors and therefore question of examining them by the authorised officer during the course of search and recording any statement from them by invoking the powers under s. 132(4), does not arise—Tribunal holding that the statement of managing director recorded patently under s. 132(4) does not have any evidentiary value—Finding of the Tribunal is based on well settled principle—No question of law arises**—In view of above, adjudication of the question whether such statement falls under Expln. to s. 132(2) and whether the Explanation has got any retrospective effect has become purely academic

A plain reading of sub-s. (4) of s. 132 shows that the authorised officer during the course of raid is empowered to examine any person if he is found to be in possession or control of any undisclosed books of account, documents, money or other valuable articles or things, elicit information from such person with regard to such account books or money which are in his possession and can record a statement to the effect. Under this provision, such statements can be used in evidence in any subsequent proceeding initiated against such person under the Act.

Thus, question of examining any person by the authorised officer arises only when he found such person to be in possession of any undisclosed money or books of account. But, in this case, it is admitted by the Revenue that on the dates of search, the Department was not able to find any unaccounted money, unaccounted bullion nor any other valuable articles or things, nor any unaccounted documents nor any such incriminating material either from the premises of the company or from the residential houses of the managing director and other directors. **In such a case, when the managing director or any other persons were found to be not in possession of any incriminating material, question of examining them by the authorised officer during the course of search and recording any statement from them by invoking the powers under s. 132(4), does not arise. Therefore, the statement of the managing director of the assessee, recorded patently under s. 132(4), does not have any evidentiary value.** This provision embedded in sub-s. (4) is obviously based on the well established rule of evidence that mere confessional statement without there being any documentary proof shall not be used in evidence against the person who made such statement. The finding of the Tribunal was based on the well-settled principle. There is no question of law in this issue. The Tribunal recorded a finding of fact to the effect that the statement of the managing director or that of other partners have no evidentiary value as they are not supported by any documentary proof. In the light of the finding that the statements have got no evidentiary value, adjudication of the question whether such statement falls under the Explanation to sub-s. (2) of s. 132 and if so, whether or not such Explanation has got any retrospective effect, absolutely serves no useful purpose and that such an attempt would be a futile exercise. Because, even if it is to be held on reference that the statement falls under the Explanation and the Explanation has got retrospective effect, such statement does not improve the case to the Revenue in the light of the finding of fact recorded by the Tribunal. Therefore, the question became purely academic and it does not deserve reference.

d) KAILASHBEN MANHARLAL CHOKSHI vs. COMMISSIONER OF INCOME TAX (2008) 220 CTR (Guj) 138 : (2010) 328 ITR 411 : (2008) 174 TAXMAN466 : (2008) 14 DTR 257

**Held**

Income from undisclosed sources—Addition—Addition on the basis of retracted statement under s. 132(4)—Statement under s. 132(4) recorded at midnight on the date of search—Same retracted by assessee after two months on the ground that it was recorded under coercion and duress—Explanation in the form of affidavit also furnished—AO did not consider the explanation on the ground that retraction was made after a delay of two months and made addition on the basis of statement under

s. 132(4)—Not justified in the facts and circumstances of the case—It is too much to give any credit to a statement recorded at midnight when a person may not be in a position to make any correct or conscious disclosure—**Further, viewed in the light of evidence furnished along with affidavit, there was proper explanation in respect of all the items on which disclosure was sought to be made ruling out all reasons for making addition of Rs. 4 lacs on the basis of alleged disclosure on account of bungalow—No evidence is brought on record by the Revenue in support of said disclosure—As regards gold jewellery, in the light of CBDT instructions, any middle class Indian family may be having jewellery and gold ornaments to the extent of 25 tolas—As regards undisclosed investment in furniture, detailed source of investment with due confirmation from the party concerned was filed—None of the authorities below considered this explanation of the assessee—Addition of Rs. 1 lac on account of unaccounted cash confirmed and addition of Rs. 6 lacs deleted.**

9. Looking to the facts and circumstances of the case as also decisions cited above, the enhancement to the income merely on the basis of statement u/s 132(4) cannot be sustained, particularly, when the appellant had himself surrendered sum of Rs. 69,59,000/- and Rs. 75,00,000/- in A.Y 2008-09 and 2009-10 respectively. **The addition is, therefore, deleted.**

**The appellant gets relief of Rs.2,25,00,000/-**

The other ground being consequential in nature, hence, not dealt separately.

**In the result, the appeal is allowed.**

6. It is the case of the assessee that during the course of search & seizure, no incriminating material or undisclosed income or investments were found. It is stated that the assessee was under mental pressure and tired. Therefore, to buy peace of mind, he accepted and declared Rs.3 crores

in personal name. It is also stated that the case laws as relied by the A.O. are not applicable on the facts of the present case. The assessee has relied on the decision of the Hon'ble Supreme Court rendered in the case of Pullangode Rubber Produce Co. Ltd. 91 ITR 18 (SC), wherein the Hon'ble Court has held that admission cannot be said that it is conclusive. Retraction from admission was permissible in law and it was open to the person who made the admission to show that it was incorrect. However, reliance is placed on the judgement of the Hon'ble Gujarat High Court rendered in the case of CIT Vs. Chandrakumar Jethmal Kochar (2015) 55 Taxmann.com 292 (Gujarat), wherein it has been held that merely on the basis of admission that few benami concerns were being run by assessee, assessee could not be basis for making the assessee liable for tax and the assessee retracted from such admission and revenue could not furnish any

corroborative evidence in support of such evidence. It was further urged by the assessee that admission should be based upon certain corroborative evidences. In the absence of corroborative evidences, the admission is merely a hollow statement. We have given our thoughtful consideration to the rival contentions of the parties. It is undisputed fact that the statement recorded u/s 132(4) of the Act has a better evidentiary value but it is also a settled position of law that the addition cannot be sustained merely on the basis of the statement. There has to be some material corroborating the contents of the statement. In the case in hand, revenue could not point out as what was the material before the A.O., which supported the contents of the statement. In the absence of such material, coupled with the fact that it is recorded by the Ld. CIT(A) that the assessee himself had surrendered a sum of Rs.69,59,000/- and Rs.75,00,000/- in A.Y. 2008-09 and 2009-10

respectively. The A.O. failed to co-relate the disclosures made in the statement with the incriminating material gathered during the search. Therefore, no inference is called for in the finding of the Ld. CIT(A) and is hereby affirmed. Ground raised by the revenue is dismissed.

7. In the result, the appeal filed by the revenue is dismissed.

8. Now we take up appeal of the assessee in ITA No.299/Ind/2017. The assessee has raised following grounds of appeal:

1. That on the facts and in the circumstances of the case, the learned CIT (Appeals) erred in confirming the penalty of Rs. 24,00,000/- imposed u/s 271(1)(c) of the Act without considering the explanation offered by the assessee and without considering the fact that during the course of search no incriminating documents and valuables were found and the surrender was made by the assessee in the return filed u/s 153 A suo-moto only to purchase the peace of mind and to avoid future litigation by settling the issue by way of cooperating the department.

Thus, the order passed by learned CIT(Appeals) confirming the penalty of Rs. 24,00,000/- u/s 271(1) (C ) is unjust, unfair and bad in law and thus, deserves to be quashed.

2. That the appellant craves, leave to add, to urge, to alter or to amend any of the grounds of appeal on or before the date of hearing.

9. The assessee has taken a legal plea that the notice initiating the penalty is bad in law. Therefore, the proceedings initiating penalty are vitiated. Ld. Counsel for the assessee has drawn our attention to the notice. Notices are enclosed along with synopsis. For the sake of clarity, contents of the written synopsis are reproduced as under:

**SUBMISSIONS**

1. **Notice is not empty formality:-**
The Notice dated 23.12.2011 was issued to the appellant to show cause as to why penalty should not be levied, another show cause notice dated 02.03.2015 was issued.(Refer Pg. no.... annexed along with this synopsis.)
Reliance is placed on ***jurisdictional High court in case of Kulwant Singh Bhatia ITA no. 9-14 of 2018,*** wherein it was held that *"274 is not mere empty formality but it has a definite purpose to make the assessee aware of the exact charges against him and the case, which is required to meet out. A clear notice not only a statutory requirement but even for the purpose of principle of 'audi alteram partem' which requires that no one should be condemned unheard, a notice in clear term specifying the clear charges against an assessee is required to be given by an Assessing Officer before imposing a penalty.* In the instance case, the penalty proceedings were initiated without specifying any particulars or specific charge against the assessee in either the assessment order or even the penalty notice. It is important to point out that both the charge for "concealment of income" **and also** "furnishing of inaccurate particulars" was made in the assessment orders in all these cases"

2. **The Charge is not specific, the Penalty order says that** – " I am satisfied that the assessee has ***concealed her particulars of income and also furnished inaccurate particulars of income*** within the meaning of section 271(1)(c) of the Act...."
Reliance is placed on the Supreme Court Judgement in case of ***Dilip N. Shroff (2007) 291 ITR 519 (SC).*** In which it was held that *section 271(1)(c)is in two parts, the first part refers to concealment of income, the second part refers to furnishing of inaccurate particulars thereof.*

*"Before, thus, a penalty can be imposed, the entirety of the circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee had consciously concealed the particulars of his income or had furnished inaccurate particulars thereof."*
*"Concealment of income' and 'furnishing of inaccurate particulars' are different. Both concealment and furnishing inaccurate particulars refer to deliberate act on the part of the assessee. A mere omission or negligence would not constitute a deliberate act of suppressio veri or suggestio falsi. Although it may not be very accurate or apt but suppressio veri would amount to concealment, suggestio falsi would amount to furnishing of inaccurate particulars."*
And also ***CIT V/s. Manjunatha Cotton Ginning Factory***

*"As the provisions have to be held to be strictly construed, notices issued under Section 274 should satisfy the grounds, which he has to meet specifically. Otherwise, principle of natural justice is offended if the show cause notice is vague.*

**On Merits**

**3.** Reliance is placed on the judgement of ***Ajay Traders 2016] 179 TTJ 51 (Jaipur - Trib.)*** in which it was held that *"it was undisputed fact that during the course of search, no incriminating documents were found and seized. The assessee surrendered the additional income under section 132(4) at Rs.15 lacs and requested not to impose penalty under section 271(1)(c). The Assessing Officer imposed the penalty by invoking the Explanation 5A to section 271(1)(c). For imposing the penalty under Explanation 5A on the basis of statement recorded during the course of search, it is necessary to be found incriminating documents and is to be considered at the time of assessment framed under section 153A.* ***As no incriminating documents were found*** *during the course of search, therefore, Explanation 5A to section 271(1)(c) is not applicable. Accordingly, the penalty was to be deleted."*

Thus it is prayed that in view of the above submissions and judicial pronouncements, the penalty u/s 271(1)(c ) may please be deleted.

**Submitted.**

10. Ld. D.R. opposed the submissions and submitted that the penalty proceedings have been validly initiated.

11. We have heard the rival submissions, perused the materials available on records and gone through the orders of the authorities below. We find that the notices issued by the A.O. are contrary to the laws laid down by the Hon'ble

jurisdictional High Court in the case of PCIT-I Vs. Kulwant Singh Bhatia in ITA No.9 of 2018 (M.P.) dated 9.5.2018.

12. Ld. D.R. could not controvert the fact that notice issued by the A.O. for initiating penalty proceedings u/s 271(1)(c) of the Act does not assign any reason for initiating the penalty. Hence, it can be inferred that no specific charge is made for initiating the penalty. In the absence of the specific charge, the proceedings initiated for imposing penalty are vitiated in the light of the judgement of the Hon'ble jurisdictional High Court. We therefore, quash the penalty order being bad in law.

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

*Order was pronounced in the open court on 13 .02.2019.*

| Sd/- | Sd/- |
|---|---|
| (MANISH BORAD) | (KUL BHARAT) |
| ACCOUNTANT MEMBER | JUDICIALMEMBER |

Indore; दिनांक Dated : 13/02/2019

*VG/SPS*

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order