

**IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR**

**BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER**

I.T.A. No. 93/Asr/2023
Assessment Year: 2017-18

Shri Raj Dev M/s Dev Raj Sales Corporation Old Grain Market Kotkapura 151204- Punjab	Vs.	The ITO Ward-1 Faridkot
PAN: AABHR 2262J		
Appellant		Respondent

Assessee by : Sh. Sudhir Sehgal, Advocate
Revenue by : Sh. Pardeep Kumar, Sr. DR
Date of Hearing : 13/06/2023
Date of Pronouncement : 10/07/2023

ORDER

Per Dr. M. L. Meena, AM:

This appeal has been filed by the assessee against the order of the Ld. CIT(A) National Faceless Appeal Centre (NFAC), Delhi dated 31/01/2023 for the Assessment Year 2017-18.

2. The assessee has raised the following grounds of appeal:

- “1. *Whether the Ld. CIT(A) has erred in confirming the addition made by Ld. AO at Rs. 28,50,000/-under the provisions of the Income Tax Act, 1961?.*
2. *Whether the CIT(A) & Ld. AO have erred in not considering the fact that the assess has received cash from agriculturists throughout the year?.*
3. *Whether CIT(A) has erred in concluding that not offering cross examination is not a fatal flaw wherein I violation of principal of Natural Justice?.*
4. *Whether the Ld. AO has erred in not considering the copies of accounts of agriculturists duly submitted during the course of proceedings?*
5. *Whether the Appellant craves leaves to add, amend and alter the grounds of appeal before the appeal is finally heard or disposed off?*

3. Brief facts of the case are that the Appellant is a HUF, running business under the name and style of M/s Dev Raj Sales Corporation. The appellant had failed to furnish return of income for A.Y.2017-18 either u/s 139 and also failed to furnish ITR in response to notice u/s 142(1) of the Act. The AO discussed that as per AIR data the appellant has deposited cash of Rs.28,50,000/- in his bank account during the demonetization period. In view of non-furnishing the Income Tax Return for A.Y.2017-18 in response to notice u/s 142(1) of the Act, and non-compliance, the AO completed assessment u/s 144 of the Act on 27.12.2019, with an addition

u/s 68 of the Act of Rs. 28,50,000/- as unexplained money and assessed the total income of the assessee at Rs. 28,50,000/- under section 68 r.w.s. 115BBE of the Act.

4. Aggrieved by the assessment order of the AO, the assessee filed appeal before the CIT(A) and the Worthy CIT(A) passed the appellate order dated 31.01.2023 u/s 250 of the Act wherein, the appeal of the assessee was dismissed by observing that the AO has given his clear finding that opening cash in hand did not exceed Rs 3,50,000 during the months starting from April to October. As on 01/10/2016 opening cash in hand was Rs 2,33,884 only. It was only in the month of October 2016 heavy cash was shown as received from the agriculturists out of old receivables and till November 2016 cash' in hand available has been shown as Rs 35,37,269 out of which cash deposited during 09/11/2016 to 31/12/2016 has been shown as 28,50,000. The abnormal increase as noted by the AO seems doubtful. The statement of Sh. Jagroop Singh, Sh. Malkiat Singh, Sh. Balvinder Singh and Sh. Kuldeep Singh were recorded u/s 131 of the IT Act 1961, in which they have stated that amount is still outstanding is a corroborative evidence and they have categorically denied making payments. The AO has not relied on their statements alone but has given

findings like abnormal increase in cash received in the month of October 2016. In any case they are witnesses of the assessee and not independent unrelated parties. Accordingly, the CIT (A) held that failure to provide cross examination is not a fatal flaw and the addition was sustained merely stating that the case laws relied upon by the assessee do not apply to the factual matrix of the case.

5. Being aggrieved with the order passed by the Worthy CIT(A), the assessee is in appeal before us. The Ld. Counsel submitted that the assessee is engaged in the business of Commission Agent and the same fact has been duly accepted by the Ld. AO as well as Worthy CIT-(A). The assessee has been engaged in such business from past many years and the return of income has been filed by the assessee for the said business. However, during the relevant year, the assessee incurred huge financial losses as a result of which, the total income of the assessee was below than the maximum exemption limit. Hence, for the relevant year, the assessee did not file its return of income. However, during the course of the assessment proceedings, the assessee duly submitted a copy of the draft computation of income for AY 2017-18(APB, page no. 27).

6. The Ld. AR argued that while framing the assessment in the case of the assessee, the Ld. AO has relied upon the statement of some persons, however, no opportunity of cross examination has been provided to the assessee. Moreover, it is also stated that in the entire assessment proceedings, the Ld. AO has never mentioned about the statements of such persons being such statement recorded or to be used as an evidence against the assessee. Therefore, all such statements have been recorded by the Ld. AO at the back of the assessee. Since, such statements were never confronted to the assessee and hence, can not be used as an evidence. In this regard, he placed reliance on the following judgments:

- Hon'ble Jurisdictional High Court in the case of Panchvati Motors (P.) Ltd. Vs Assistant Commissioner of Income tax, Circle -1, Bathinda [2013] 39 taxmann.com 185 (Punjab & Haryana), **in which it is held that:**

“Section 143, read with section 147, of the Income-tax Act, 1961 - Assessment - Addition of income [Opportunity of hearing] - Assessee Sales Tax authority held that there was sale of spare parts of cars to assessee by car manufacturer but same was not recorded in books - Said information was supplied to Assessing Officer – Assessing Officer initiated reassessment proceedings and made addition to assessee's income - On appeal, Tribunal found that Sales Tax Appellate Tribunal had set aside order of Sales Tax authority - Further, no authenticated document providing information was collected from car manufacturer, nor was same furnished to assessee or assessee was given opportunity of cross-examining officer who made statement relating to sale in question - Tribunal remitted matter to Assessing Officer for granting an opportunity to assessee to cross-examine officer who made statement relating to sale of cars and to comply with principles of natural justice - Whether order of Tribunal was just and proper - Held,

yes [Para 5] [In favour of assessee]”

- Hon'ble Delhi Tribunal in the case of Amitabh Bansal vs Income Tax Officer, Ward 46(4), New Delhi [2019] 102 taxmann.com 229 (Delhi - Trib.), **has held that:**

“i. Section 68, read with sections 2(12A) and 44AA of the Income-tax Act, “1961 - Cash credit (Share sale proceeds) - Assessment year 2015-16 - Whether mere bank statement which is issued by bank to its client/accountholder cannot be elevated to status of books maintained by assessee within meaning of section 2(12A) and section 44AA - Held, yes - Whether further, credit in bank account simply or any other raw information available to Assessing Officer cannot be loosely called as books of account under section 68 - Held, yes - Whether, invocation of section 68 sans valid and proper books of account of assessee is invalid - Held, yes [Paras 6.2, 6.4 and 8][In favour of assessee]

ii. Section 143 of the Income-tax Act, 1961 - Assessment (Cross examination) - Assessment year 2015-16 - Whether where Page 16 of 17 revenue strongly relies on statements of certain persons to implicate an assessee, principles of cross-examination have to be invariably followed if truth and justice need to be found out - Held, yes - Whether not providing opportunity to cross-examine is violative of principles of natural justice - Held, yes [Paras 8.6 and 9][In favour of assessee]”

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In this case the assessee was not allowed to cross-examine the witness and, therefore, it was held that statement could not be made use of for drawing the adverse inference against the assessee.

The Hon'ble APEX Court in the case of ANDAMAN TIMBER INDUSTRIES **Vs.** COMMISSIONER OF CENTRAL EXCISE IN [2015] 281 CTR 214(SC), wherein it has been stated as under:

“The Hon'ble Apex Court has held in this case that denial to the assessee of the right to cross-examine the witness whose statement was made the basis of the impugned order is a serious flaw which renders the order a nullity in as much as it amounted to violation of the principles of natural justice because of which the assessee was adversely affected.”

7. Per contra, the Ld. DR strongly supported the impugned order.

8. We have heard the rival contentions, perused the material on record, impugned order, written submission and case law cited. Admittedly, the statement of Sh Jagroop Singh, Sh Malkiat Singh, Sh Balvinder Singh and Sh Kuldeep Singh were recorded by the AO u/s 131 of the IT Act 1961, in the back of the appellant assessee and used against him without granting an opportunity of cross examination of these witnesses in ex-parte Assessment order u/s 144 of the Act. In our view, the observation of the CIT(A) that failure to provide cross examination is not a fatal flaw as they are witnesses of the assessee and not independent unrelated parties while sustaining the addition is in gross violation of principles of natural justice.

9. The Hon'ble Apex Court in the case of "ANDAMAN TIMBER INDUSTRIES", (Supra) has observed that denial to the assessee of the right to cross-examine the witness whose statement was made the basis of the impugned order is a serious flaw which renders the order a nullity in as much as it amounted to violation of the principles of natural justice because of which the assessee was adversely affected.

10. In view of the principles of natural justice, we consider it deem fit to restore back the matter to the file of the Ld. AO to pass *de novo* assessment Order afresh after granting opportunity of cross examination of the three witnesses Sh Jagroop Singh, Sh Malkiat Singh, Sh Balvinder Singh and Sh Kuldeep Singh whose statements were recorded u/s 131 of the IT Act 1961, before being used as a corroborative evidence for drawing adverse inference against the appellant assessee. The AO is directed to considering the written submission and evidences filed on record and may be filed before him during the fresh proceedings after granting sufficient opportunity of being heard to the assessee. No doubt, the assessee shall cooperate in the fresh assessment proceedings before the AO.

11. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 10.07.2023

Sd/-
(Anikesh Banerjee)
Judicial Member

Sd/-
(Dr. M. L. Meena)
Accountant Member

A.G/DOC*

Copy of the order forwarded to:

- (1) The Appellant
- (2) The Respondent
- (3) The CIT
- (4) The CIT (Appeals)
- (5) The DR, I.T.A.T.

True Copy
By Order