

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकर अपील सं./ITA No.83/SRT/2022

Assessment Year: (2016-17)

(Hybrid Hearing)

The ACIT, Central Circle-3, Surat	Vs.	Shri Pankaj Khandelwala, B-505, Sukan Residency, Vesu, Surat - 395007
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: CXLPK5115Q		
(Appellant)		(Respondent)

Appellant by	Shri Ashish Pophare, CIT-DR
Respondent by	Shri Tushar P. Hemani, Sr. Advocate with Shri Parimalsinh B. Parmar, Advocate
Date of Hearing	21/11/2023
Date of Pronouncement	23/11/2023

आदेश / ORDER

PER DR. A. L. SAINI, AM:

Captioned appeal filed by the Revenue, pertaining to Assessment Year (AY) 2016-17, is directed against the order passed by the Learned Commissioner of Income Tax (Appeals)-4, Surat [in short “the ld. CIT(A)”], in Appeal No.CIT(A),Surat-4/10460/2017-18, dated 11.01.2021, which in turn arises out of an assessment order passed by Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”), dated 29.12.2017.

2. The grounds of appeal raised by the Revenue are as follows:

“[i] Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the addition of Rs.6,97,62,157/- made by the assessing officer on account of unexplained cash credit by taking the peak amount of the total transactions shown in the incriminating documents to Rs.34,84,812/-, by observing that the transactions reflected in the incriminating documents were actually pertaining to the brokerage business of the assessee and accordingly estimating brokerage income of Rs.34,84,812/- being 1% of the gross receipts of Rs.34,84,81,157/-.

[ii] Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that the incriminating documents in the form of cash book and pocket diary were found and seized from the possession of the assessee and he was unable to produce any evidence to substantiate his claim that he was only engaged in the brokerage business of real estate transactions and thereby erred in restricting the addition made by Assessing Officer which is based on such incriminating documents and was in keeping with the provisions of section 292C of the I.T. Act.

[iii] Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that incriminating documents in the form of cash book and pocket diary were found and seized from the possession of the assessee were containing details of several transactions like loan, chit funds, receipts/payments of cash against sale/purchase of cash book, purchase and sale of plots and land etc, which were in the nature of receipts and payments and not in the nature of receipt of brokerage.

[iv] Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that the assessee has failed to explain or submit any documentary evidences to substantiate that he was engaged in brokerage business of real estate transactions and the entries reflected in the incriminating documents were pertaining to the said business.

[v] Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in treating the total amount of receipts as appearing in the incriminating documents found and seized during the course of search as pertaining to the brokerage business of the assessee without appreciating the fact that the assessee has failed to provide the details of such entries or the name of the persons/parties for whom the transactions were carried or from whom such payments were received.

[vi] It is, therefore, prayed that the order the Ld. CIT(A)-4, Surat may be set aside and that of the assessing officer may be restored to the above extent.

[vii] The assessee craves leave to add, alter, amend and/or withdraw any ground(s) of appeal either before or during the course of hearing or the appeal.”

3. Brief facts *qua* the issue are that the assessee has filed his return of income u/s 139 of the Income-Tax Act, 1961, for A.Y. 2016-17, on 30.09.2016, declaring his income at Rs.5,97,250/-. Thereafter, a search action u/s132 of the Act was carried out on 04.09.2015, in the case of M/s Param Properties of Surat. During the course of search action,

several incriminating documents and evidences were seized from the premises of M/s Param Properties, which contain entries pertaining to and information contained therein related to assessee. The notice u/s 143 (2) of the Act issued on 03.09.2017, which was duly served upon the assessee. Thereafter, notice u/s 142(l) of the Act along with questionnaire was issued to the assessee. During the year under consideration, the assessee has derived income from other sources and salary income. A search action u/s 132 of the I.T. Act was carried out in the case of Param Group. During the course of search action u/s 132 of the Act, carried out in the case of M/s Param Properties of Surat on 04.09.2015, seizure of various incriminating evidences possessed by it, corresponding to facilitation of unaccounted cash transactions of its clients, financiers, other brokers and builders as also earning of income of varying nature and unaccounted investments made by it was found. During the course of initial survey proceedings and the subsequent search proceedings in the case of M/s Param Properties, Shri Pankaj Khandelwal was present at the premises and he was found to be in possession of several incriminating documents and evidences proving huge unaccounted cash transactions. Such documents and evidences were seized and the same are inventorised at Annexure: A to the Panchnama. In the statement recorded on oath u/s 131 of the Act, on 04.09.2015, it was stated by Shri Pankaj Khandelwal that he is working as a real estate broker. However, during the course of search, he has identified and owned up the documents seized from his possession. In the said statement, he had also decoded the figures written in the seized documents. However, in the said statement, he failed to explain the details in respect of the contents of certain seized documents. Accordingly, during the post search period, summons u/s 131 of the Act was issued to him, which was duly served upon him. However, he

failed to comply with the summons. During the course of scrutiny proceedings summons were issued to Sh. Pankaj Khandelwal on 2/3/2017 to appear on 10/3/2017. In the statement recorded on oath u/s 131, shri Pankaj Khandelwal was confronted with all the seized documents. The books and documents seized included a cash book, which was inventorised as Annexure A-1. The said cash book is written for the period from 01.08.2015 to 27.08.2015 and contains numerous entries of huge cash transactions related to loans, chit funds, receipt of cash amounts against sale of shops in markets, payment of cash against purchase of shop etc. The assessing officer noted that cash book shows receipt of cash amounts from several other persons, who are clients of the assessee. Apart from the cash book, the seized materials contain pocket diaries in respect of purchase / sale / resale of several shops and plots of land. During the course of statement, he was confronted each and every seized document related to and belonging to him and page wise explanation was sought for. The assessing officer noted that in his statement, he did not properly explain the content of seized documents. Instead he stated in respect of entire seized document as inventorised as Annexure: A that these pages contains day to day rough notings and jottings to show off to others. These are self-made fake notings to show off to other persons, as if he is doing well in business and to get further business. He further added that he had prepared various fake diaries to show off people that he had lot of customers and as if he is doing well in real estate business. In nutshell, the assessee had flatly denied having actual transactions in seized documents. On all the documents Shri Pankaj took the stand of telling the diaries and cash book to be fakely written and transactions to be false.

4. During the course of assessment proceedings, the assessee, vide notice u/s 142(1) of the Act dated 03.10.2017, the assessing officer asked the assessee to explain the content of seized documents and transactions reflected therein. The various other details were also asked to be furnished from the side of the assessee. In response of notice u/s 142(1), the assessee has submitted only regular details but again reiterated that he had prepared various fake diaries to show off people that he had lot of customers and as if he is doing well in real estate business. Accordingly, the assessee vide letter dated 12.12.2017 was once again asked to explain the transactions reflecting in the seized material and was also show caused as to why in absence of proper & satisfactory explanation, transactions reflecting in the seized material should not be treated as unexplained cash receipts and payment and should not to be added to his total income. The show cause notice was reproduced by the assessing officer in the assessment order, vide page No.6. In response to show cause notice the assessee submitted detailed reply before assessing officer stating that he is working as a broker and received dalali only.

5. However, the assessing officer did not consider the reply of the assessee in respect of dalali income and made addition on different footing stating that the income and profits therein imbedded can only be added and brought to tax. In respect thereof the assessing officer adopted peak theory, whereby, the income and the expenditure is duly considered and peak credit is brought to tax and was worked out for the year under consideration and then added to the total income of the Assessee for A.Y. 2016-17, to the tune of Rs. 6,97,62,157/-.

6. Aggrieved by the order of Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A), who has partly

deleted the addition made by the Assessing Officer. The Id CIT(A) observed that during the course of search and during the post search investigation, no assets or investments made by the assessee were found. Even the entries in the diary and in the cash flow statement no other details as regard to whom the payments are made and for what purpose the payments are made are found. Similarly, for receipts as well there are no other details found. In some cases, some unit numbers and name of the project in short are written said details do not have any clarity. Therefore, on the basis of the evidences found during the course of search one can conclude that the transactions in question are the transactions entered by the assessee as a broker. Considering these facts, the Id CIT(A) restricted the addition of Rs.34,84,812/- (i.e. 1% of total gross receipts of Rs.34,84,81,157/-).

7. Aggrieved by the order of the Id. CIT(A), the Revenue is in appeal before us.

8. The Ld. CIT-DR for the Revenue, argued that the assessing officer has considered Shri Pankaj Khandelwal as an investor himself who primarily dealt in cash investment in real estate and cash loans etc. The Id DR further stated that even if assumed that the transactions were done by the assessee, both receipts and payment transactions to be considered, as both are from the same seized materials and assumed as done from receipt as per the daily cash flow statement and peak theory be adopted, as the whole cash book incorporating both receipts and payments of the assessee are found during the course of search action. Therefore, Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

9. On the other hand, Ld. Counsel for the assessee, Shri Tushar P. Hemani, Sr. Advocate vehemently submitted that the assessee was into real estate brokerage activities and the details contained in the seized documents are related to the brokerage activities. Therefore, it is reasonable and logical that only brokerage income need to be brought to tax on the total turnover. The seized documents which have been considered in other years by the Assessing Officer are clearly shown the rate of commission in the real estate brokerage earned by the assessee @ 1% on purchase/sale/resale of flats/shops/plots. The Id Counsel further stated that the assessee" is merely a "real estate broker"; and assessee categorically stated in statement recorded on oath u/s 131 of the Act on 04-09-2015 (i.e. during the course of "search action" itself) that he was working as a "real estate broker " (Pg.3, Para 5 of Assessment Order) The assessing officer himself has also observed that the cash book seized during search shows receipt of cash amounts from several other persons who are "clients " of "assessee " (Pg.4 of Asst. Order). The Id Counsel further pointed out that not a single property, as per the seized material, was found registered or even otherwise to be owned or purchased or sold by the assessee. All persons named in diary and allegedly transacted with assessee have denied having entered into any such transaction in response to section 133(6) notice. There is no corroborative evidence whatsoever in support of the allegation as to any cash receipts or cash payments, as reflected in the cash book. Based on these facts, the Id Counsel relied on the following judgments:

- (i) *CIT vs. Maulikkumar K. shah - 307 ITR 137 (Guj);*
- (ii) *Common Cause vs. UOI - 394 ITR 220 (SC);*
- (iii) *TTO vs. Bharat A. Mehta - 60 taxmann.com 1 (Guj);*

Thus, Id Counsel stated that in absence of any corroborative material, the impugned addition made merely on the basis of "entries "recorded in seized material is not justified.

10. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the Id. CIT(A) and other material brought on record. We note that a search action u/s 132 of the Act was carried out on 04-09-2015 in the case of "M/s Param Properties of Swat" (i.e. a third party) during the course of which, "assessee" was present at such premises and was found to be in possession of some documents reflecting certain cash transactions. The assessing officer took the view that such cash transactions reflected in such seized material were related to the assessee. Eventually, the assessing officer made an addition of Rs.6,97,62,157/- being the "peak" worked out based on such transactions. On appeal, the Id CIT(A) restricted the addition of Rs.34,84,812/- (i.e. 1% of total gross receipts of Rs.34,84,81,157/-).

11. We have examined the above facts of the assessee independently and we note that assessing officer had issued notices u/s 133(6) of the Act to some persons, whose names appeared in the seized material, and in response thereto, two persons furnished reply wherein they categorically stated that they have not carried out any transaction with the assessee (Pgs.38 to 39 P/B r.w. Pg.5 of CIT(A)'s order). This strengthens the stand of the assessee that transactions reflected in the seized material are not actual transactions but are merely fake noting. Even from the "seized material (Pgs.40-43 of P/B), it is forthcoming that the assessee is merely a "real estate broker "and not an "investor".

Thus, the assessee categorically pleaded that during the course of "statements" during "search" as well as "post-search proceedings" and so also during the course of "assessment proceedings" that assessee is merely a "real estate broker" and "transactions appearing in the seized material are fake transactions". We note that assessing officer has not brought on record any concrete evidence even remotely demonstrate that the assessee is an "investor" and has actually entered into the transactions reflected in the seized material on his own. Rather, assessing officer has brushed aside all the above stated aspects and made addition in respect of "peak" of transactions reflected in the seized material. Prior to making addition in respect of "peak" of transactions reflected in the seized material, assessing officer was duty bound to bring on record some cogent material to even demonstrate that assessee is an investor and the transactions reflected in the seized material had actually been carried out by the assessee, which the Assessing Officer has failed to do so.

12. We note that during the appellate proceedings, the assessee stated before Id CIT(A) that he (assessee) was present at the premises of M/s Param Properties on 04.09.2015 i.e. on the date of search and the documents/diaries were found from his possession. The assessee stated that during the course of search i.e. on 04.09.2015, his statement was recorded u/s 131 of the Act, in which he stated that he is engaged in the activities of real estate brokerage. He is of 24 years of age and just started real estate brokerage activities. The assessee reiterated these facts that he is into real estate brokerage before the Assessing Officer when his statement was recorded u/s 131 of the Act. We note that the Assessing Officer himself has mentioned in the assessment order that these diaries contain details of money received and paid in

cash to various persons. In such situations, making additions of total amount of transaction is not justified.

13. The Id Counsel for the assessee also pointed out before the Bench that there are several pages in the seized material which has been discussed while passing the assessment order for other years, it is clearly mentioned the word "Dalali" on these papers. The Id Counsel stated that the additions made by the Assessing Officer considering the peak value of the transactions as income of the assessee is not justified. We note that Id CIT(A) after considering these facts, observed that during the course of search and during the post search investigation, no assets or investments made by the assessee were found. Even the entries in the diary and in the cash flow statement no other details as regard to whom the payments are made and for what purpose the payments are made are found. Similarly, for receipts as well there are no other details found. In some cases, some unit numbers and name of the project in short are written and said details do not have any clarity. Therefore, Id CIT(A) noted that on the basis of the evidences found during the course of search one can conclude that the transactions in question are the transactions entered by the assessee as a broker as there is no likelihood that the assessee could have invested in so many real estate transactions. Further, the word written as "Dalali" on most of the pages go to show that the assessee is a real estate broker and is in regular business of purchase and sale of real estate for his clients.

14. The assessee has submitted during the course of statement u/s 131 of the Act, at the first stage or examination during the course of search on 04.09.2015 that he (assessee) is into the real estate brokerage activities. The same facts were reiterated by him before the Assessing Officer during the course of assessment proceedings in the statement

recorded u/s 131 of the Act. Even the Assessing Officer himself has mentioned in the assessment order in para 5 that these documents seized containing the details of cash receipts and payment on booking/sale/resale of flats/shops/plots. Therefore, Id CIT(A) held that the assessee was into real estate brokerage activities and the details contained in the seized documents are related to his brokerage activities. Therefore, Id CIT(A) also held that it is reasonable and logical that only brokerage income need to be brought to tax on the total turnover. The seized documents which have been considered in other years by the Assessing Officer are clearly shown the rate of commission in the real estate brokerage earned by the assessee @ 1% on purchase/sale/resale of flats/shops/plots. The Id CIT(A) also noted that his predecessor has also accepted the contention for the earlier assessment years of the Assessee that he (assessee) is a real estate broker and thus, he restricted the addition to the tune of 1% of the total gross transactions for A.Y.2010-11, 2011-12, 2013-14, 2014-15 & 2015-16. The assessing officer while making the additions has taken the peak credit of the transactions of the receipts and payment and made the additions of such peak credit u/s 68 of the Act. But once, it is decided that the brokerage income only has to be brought to tax, it has to be on the total transactions or total turnover of the assessee. As per the assessing officer, the total turnover of the assessee is Rs.34,84,81,157/-.

15. During the appellate proceedings, the assessee submitted before Id CIT(A) that there were repetitive transactions in the seized documents; some relief may be given in the rate of brokerage. However, the assessee has not been able to conclusively prove which are the repetitive transactions. Hence, the said contention of the

assessee was not accepted by Id. CIT(A). Considering the fact of the case and the nature of transactions, the Id CIT(A) held that the addition of Rs.34,84,812/- (i.e. 1% of total gross receipts of Rs.34,84,81,157/-) should be confirmed and balance addition was deleted by Id CIT(A). This way, Id CIT(A) allowed the appeal of the assessee partly. We have gone through the above findings of Id CIT(A) and noted that there is no any infirmity in the conclusion reached by the Id CIT(A). That being so, we decline to interfere with the order of Id. CIT(A) in deleting the aforesaid additions. His order on this addition is, therefore, upheld and the grounds of appeal of the Revenue are dismissed.

16. In the result, appeal filed by the Revenue is dismissed.

Order is pronounced on 23/11/2023 in the open court.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

सुरत /Surat

दिनांक/ Date: 23/11/2023

SAMANTA

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

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Assistant Registrar/Sr. PS/PS
ITAT, Surat