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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA 271/2019

THE PR. COMMISSIONER
OF INCOME TAX, CENTRAL -3

..... Appellant

Through: Mr. Abhishek Maratha, Sr. Standing
Counsel for Revenue.

versus

SH. TRILOK CHAND CHOUDHARY

..... Respondent

Through: Mr. Ved Jain, Mr. Nischay Kantoor
and Ms. Richa Mishra, Advocates.

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Date of Decision: 27th October, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

1. The present appeal has been filed by Revenue under Section 260A of the Income Tax Act, 1961, (the 'Act') against the order dated 20th September, 2018, passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 5871/Del/2017, for Assessment Year ('AY') 2012-13.

2. The Return of Income ('ITR') was initially filed by the Respondent Assessee on 31st March, 2014, declaring an income of Rs. 7.28 crores. Thereafter, a search and seizure operation under Section 132 of the Act was carried out on 11th September, 2013, and 17th September, 2013, in the case of AKN Group. The case of the Assessee was also covered in the search and

certain documents related to investments in properties were found and seized from the office premises of the Assessee. A Memorandum Of Understanding dated 14th December, 2011 ('MOU') marked as Annexure A-11 between one Shri Devender Kumar ('Devender') and M/s Newage Infrabuilders P. Ltd. ('Newage Infra') pertaining to investment in property in village Harchandpur, Gurgaon was seized from the premises of the Assessee. Devender made a payment of Rs. 20 crores cash for the purchase of land at village Harchandpur from Smt. Saroj Sharma and others ('Saroj'). The MOU led to the addition of Rs. 20 crores in the hands of the Assessee under Section 68 of the Act which has been deleted by the ITAT in its impugned order, and the said deletion is a subject matter of challenge in the present appeal.

3. Learned senior standing counsel for the Revenue states that the ITAT failed to consider that the MOU executed between Devender and Newage Infra was found at the premises of the Assessee. The non-traceability of Newage Infra and its directors, the filing of the police complaint and court cases against Smt. Saroj Sharma ('Saroj') in the name of the individuals is attributable to the Assessee as well as Devender and not the companies who are stated to have provided the cash. He states that the Assessing Officer ('AO') correctly added the cash of Rs. 20 crores received by Devender to the income of the Assessee under Section 68 of the Act.

4. He further states that the ITAT failed to consider that Devender in his second statement recorded before the Investigation Wing on 11th March, 2016 had admitted that he had signed the seized MOU on the direction of the Assessee in lieu of commission income. He submits that in his second statement, Devender stated that cash transaction of Rs. 20 crores took place

at the office of the Assessee, in the presence of the Assessee and the cash was handed over to the parties in this office. He states that a perusal of the second statement of Devender shows that Devender was a mere pawn acting under the instructions of the Assessee and in fact Devender was not even aware of the name of Newage Infra. He states that the ITAT failed to consider that the Assessee had failed to cross-examine Devender despite an opportunity provided to him in this regard. He lastly states that since the identity, genuineness and creditworthiness of Newage Infra is doubtful and considering the contents of the second statement of Devender, it is apparent that the said company Newage Infra is a company used by the Assessee as a conduit for his unaccounted cash.

5. We have heard the learned counsel for the parties. Having perused the paper book, the facts of the case relevant for deciding the present appeal are as follows:

5.1. During the course of post search investigation, Devender was summoned by the Investigation Wing under Section 131 of the Act to examine him and verify the seized documents and his statement was recorded on 18th October, 2013. In his statement, Devender admitted that he had received a sum of Rs. 20 crores in cash from Newage Infra as per the MOU for purchase of land at village Harchandpur, District Gurgaon, from Saroj. He further stated that he had entered into two separate agreements to sell with Saroj and paid the sum of Rs. 20 crores received from Newage Infra to Saroj. He has further stated in his statement that the said land could not be transferred to Newage Infra because Saroj sold the land to some other person.

5.2. The Assessing Officer ('AO') issued notices under Section 131 of the

Act to the company Newage Infra to verify the said statement, however, the summons was received back unserved and the inspectors deputed to serve the summons reported that the company could not be found at the given address. Notices issued under Section 153A read with Section 153C of the Act to Newage Infra also remained unserved. Similarly, the notices issued by the AO to the directors of Newage Infra remain unserved and the inspectors reported that no such person was found at the address.

- 5.3. During the course of the assessment proceedings, the Assessee submitted before the AO that Devender is an independent person and not related to the Assessee.
- 5.4. The Assessee stated before the AO that he had entered into a separate agreement for purchase of land at village Harchandpur from Saroj on behalf of a distinct company Megatech Realtors Pvt. Ltd. ('Megatech') and had separately paid Rs. 10 crores to Saroj. However, the said transaction is independent, distinct and unrelated with the transaction undertaken by Devender on behalf of Newage Infra.
- 5.5. Though the statement of Devender had been recorded by the Investigation Wing on 18th October, 2013, before the Assistant Director of Income Tax ('ADIT') (Inv.), the AO summoned Devender under Section 131 of the Act and recorded afresh a statement on 11th March, 2016. Devender contradicted himself in his second statement recorded before the AO when compared to his earlier statement dated 18th October, 2013, and stated that the MOU was signed by him at the direction of the Assessee and no cash was received by him from

Newage Infra. He also denied any knowledge with respect to the entity Newage Infra.

- 5.6. The AO relying on the second statement of Devender recorded on 11th March, 2016 issued a notice to the Assessee on 18th March, 2016, to show cause as to why the cash amount involved in the transaction of Rs. 20 crores should not be added to the income of the Assessee. The Assessee filed his reply and stated that the transaction on behalf of Newage Infra undertaken by Devender with Saroj and the payment of Rs. 20 crores have no concern with the Assessee. He stated that pursuant to the MOU, Devender entered into an agreement for purchase of land with Saroj. When the transaction was denied by Saroj, Devender filed a police complaint against Saroj before the Economic Offences Wing of Delhi Police as well as at Gurgaon. The Assessee submitted that there was no justification with the AO to make an addition of Rs. 20 crores under Section 68 of the Act as the transaction undertaken as per the terms of MOU was not concerned with the Assessee. However, the AO, did not accept the explanation of the Assessee and made an addition of Rs. 20 crores on account of the said MOU.
- 5.7. The Assessee filed an appeal against the assessment order before the Commissioner of Income Tax (Appeals) ['CIT(A)'] challenging the aforesaid addition of Rs. 20 crores made on account of the MOU executed by Devender with Newage Infra. During the appellate proceedings, the Assessee filed additional evidences vide letter dated 12th October, 2016, in the form of affidavit of Devender, retracting from his statement dated 11th March, 2016 made before the AO.

However, the CIT(A) dismissed the appeal and confirmed the addition made by the AO.

- 5.8. Aggrieved by the order of the CIT(A), the Assessee filed an appeal before the ITAT, *inter alia*, challenging the order of the CIT(A) confirming the aforesaid addition of 20 crores under Section 68 of the Act. The ITAT in the impugned order after considering the documents on record has returned a finding of the fact that the MOU was executed between Devender and Newage Infra and the Assessee herein is not even remotely connected to MOU. Thus, the ITAT held that the addition of Rs. 20 crores in the hands of the Assessee is wholly unjustified and thereby directed the deletion of the said amount. The relevant finding of the ITAT is at paragraph 14 of the impugned order, which reads as under: -

“14.

The AO ignored all these above material evidences on record and merely relied upon the later statement of Sh. Devender Kumar recorded on 11.03.2016 at the assessment stage in which Sh. Devender Kumar has stated that he has signed the agreement in question at the instance of the assessee. However, he has admitted that he has purchased land from Smt. Saroj Sharma and others on the basis of the agreement to sell. In this statement also he has stated that police complaint was prepared at the instance of assessee. From this statement, it appears that the AO deliberately recorded this statement without any justification against the statement recorded by the investigation wing immediately after search on 18.10.2013. Sh. Devender Kumar tried to contradict the contents of MOU and the agreement to sell without any justification. The AO has not explained as to what was necessity to record statement of Sh. Devender Kumar subsequently, at the fag end of the assessment proceedings. The statement would also show that AO put the words in the mouth of Sh. Devender Kumar so as to

he may contradict his earlier statement recorded by the investigation wing. No question was put to him as to why the documents were prepared in his name, if he was not party to the agreement to sell or MOU. The entire material on record clearly support the statement of Sh. Devender Kumar recorded by the investigation wing on 18.10.2013. The statement of Sh. Devender Kumar recorded by AO on 11.03.2016 is not corroborated by any evidence or material on record. Thus, there was no justification for the AO or CIT(A) to rely upon subsequent statement of Sh. Devender Kumar dated 11.03.2016. It may also be noted here that the assessee filed letter dated 12.10.2016 before Ld. CIT(A) supported by affidavit of Sh. Devender Kumar (PB 166 – 176) in which he has affirmed his statement made to the investigation wing on 18.10.2013. It is also stated in the affidavit that subsequently notice u/s 153C dated, 08.02.2016 was issued to him by Ms. Preeti Singh, ACIT, Central Circle-26, New Delhi and she told him that huge liability to the extent of Rs. 20 crores would fall on him, if he strict to his original statement made before investigation wing on 18.10.2013. He has, therefore, disowned his statement recorded before AO on 11.03.2016. In this affidavit also he has confirmed all the transactions recorded in his name on behalf of M/s Newage Infrabuilders P. Ltd. The Ld. CIT(A) without any justification ignored the affidavit of Sh. Devender Kumar. Though in this case Ld. CIT(A) called for the remand report from the AO, copy of which is filed at page 256 of the PB dated 04.05.2017 but the AO has not rebutted the explanation of the assessee above. Therefore, contents of the affidavit shall have to be read in the evidence in favour of the assessee. It appears that the authorities below merely on the basis of subsequent statement of Sh. Devender Kumar and that the Directors of M/s Newage Infrabuilders P. Ltd. have not been produced for examination before AO confirmed the addition against the assessee. It is admitted fact that during the course of search no cash was found or seized. There is no recovery of any incriminating material against the assessee to connect him with addition of Rs. 20 crores. Even if the Directors of M/s Newage Infrabuilders P. Ltd. were not produced for examination before AO, the entire material on record clearly justify explanation of the assessee that assessee had not dealt with amount of Rs. 20 crores.

The contents of the document speak against the Revenue-Department. The presumption against the assessee that the document belong to him have been rebutted by the above material on record including the seized material found during the course of search which is corroborated by statement of Sh. Devender Kumar recorded on 18.10.2013 in ADIT(Inv.). Sh. Devender Kumar has taken action against Smt. Saroj Sharma etc., therefore, there was no justification to make addition of Rs. 20 crores against the assessee. Whatever reasons have been given by the authorities below for making addition against the assessee are irrelevant on the face of the evidences brought on record. Therefore, the decisions relied upon by the Ld. DR would not support case of the Revenue. In view of the above discussion, we are of the view that addition of Rs. 20 crores against the assessee is wholly unjustified. We, accordingly, set aside the orders of the authorities below and delete the addition of Rs. 20 crores.”

6. The ITAT considered the following documents to conclude that the statement of Devender recorded on 18th October, 2013, before the Investigation Wing was duly corroborated from the record. The corroborative evidence considered by the ITAT is as follows:
 - 6.1. The MOU dated 14th December, 2011, executed between Devender and Newage Infra.
 - 6.2. Assessment Order passed against Devender under Section 153A read with Section 153C of the Act making an addition of Rs. 20 crores resulting in protective addition.
 - 6.3. The agreement to sell dated 17th December, 2011 executed between Saroj and Devender for the purchase of land at village Harchandpur.
 - 6.4. The receipt of Rs. 10 crores executed by Saroj, in favour of the purchasers vide separate receipt dated 17th December, 2011.
 - 6.5. The statements of Devender recorded on 18th October, 2013 and 11th

March, 2016 respectively.

- 6.6. The application dated 6th April, 2012 filed by Devender before the Sub Registrar, Sohna requesting not to register any sale deed for the land of Saroj.
- 6.7. The Complaint dated 4th June, 2012 filed by Devender against Saroj before the Deputy Commissioner of Police, New Delhi for cheating and criminal breach of trust.
- 6.8. The Complaint filed before the Commissioner of Police, Gurgaon against Saroj for cheating.
- 6.9. A copy of the suit for specific performance filed before the Court of Civil Judge, Gurgaon.
- 6.10. Letter of the Assessee dated 12th October, 2013 along with affidavit of Devender retracting from his statement dated 11th March, 2016 made before the AO.
7. The ITAT on perusal of these documents on record held that the MOU recovered during the search pertains to Devender and not the Assessee. The presumption against the Assessee that the document belong to him have been rebutted by the aforesaid materials which were placed on record before the ITAT, including the seized material found during the course of search which is corroborated by the statement of Devender, recorded on 18th October, 2013 before the ADIT(Inv.). The MOU is duly attested by the notary. The terms of the MOU record that Devender is responsible to acquire land at Harchandpur from Saroj and hand over the same to Newage Infra. The MOU records that Newage Infra has paid consideration of Rs. 20 crores in cash to Devender for the purchase of the land at Harchandpur. The Assessee is not named in MOU, either as a party

or as a witness. No cash was found or seized during the search conducted on the premises owned by the Assessee.

8. The ITAT also noted that since the evidence on record duly substantiated the stand taken by Devender in his first statement recorded before the investigation wing on 18th October, 2013, there was no occasion for the AO to record a fresh statement on 11th March, 2016. Devender, in his first statement recorded on 18th October, 2013 confirmed that he had executed the MOU with Newage Infra. He also confirmed the receipt of Rs. 20 crores in cash for the purchase of land in village Harchandpur from Saroj. Devender affirmed that he had paid Rs. 20 crores to Saroj vide two agreements to sell, one of them was recovered during the course of search and he agreed to supply the second agreement to the Investigation Wing. Devender confirmed that he agreed to undertake the said transaction for a commission of Rs. 50,000 per acre from Newage Infra. He stated that after Saroj resiled from the agreement to sell, he filed a civil suit against Saroj and there is a stay order granted in favour of Devender. In his statement, Devender explained that since the Assessee herein has also entered into a separate transaction for a purchase of land with Saroj and she has similarly resiled from the agreement with Assessee, therefore Devender and the Assessee herein were jointly prosecuting their cases filed against Saroj and it was in this background that the MOU recovered from the assessee were found at the premises.

9. The ITAT held that the second statement recorded on 11th March, 2016, is not corroborated by any evidence or material on record and therefore, the AO or CIT(A) could not have relied upon the second statement. The ITAT also noted that the affidavit of Devender filed before

the CIT(A) retracting his second statement dated 11th March, 2016, was not considered by the CIT(A) and therefore it had committed an error.

10. The learned senior standing counsel for the Appellant has not disputed the aforesaid facts forming the basis of the finding of the ITAT that the Assessee herein has no concern with the MOU executed between Devender and Newage Infra.

11. We are of the view that the facts and the law have been properly and correctly assessed by the ITAT. In view of the finding of fact by the ITAT, there is no infirmity in the impugned order of the ITAT deleting the addition of Rs. 20 crores under Section 68 of the Act against the Assessee. Therefore, we are of the considered view that there is no substantial question of law raised in the present appeal. The Supreme Court in the case of **Ram Kumar Aggarwal & Anr. vs. Thawar Das (through LRs), (1999) 7 SCC 303** has reiterated that under Section 100 of CPC, the jurisdiction of the High Court to interfere with the orders passed by the Courts below is confined to hearing on substantial question of law and interference with finding of the fact is not warranted if it involves re-appreciation of evidence. Thus, we see no merit in the appeal and it is accordingly dismissed.

12. We may clarify that the AO had also made a further addition of Rs. 10 crores in the hands of the Assessee on the basis of a distinct MOU dated 14th December, 2011, executed between the Assessee and M/s Megatech. The said addition was confirmed by the CIT(A). The ITAT has set aside the said addition and restored the issue to the file of the AO for a fresh determination. The transaction undertaken by the Assessee on behalf of Megatech is a subject matter of a separate addition of Rs. 10 crores which is not impugned in the present appeal. Though grounds have been urged in the

present appeal regarding the said addition, no questions of law were raised by the Appellant on the same and no arguments were advanced. Therefore, the controversy pertaining to the said addition of Rs. 10 crores have not been examined by us and the said issue will be determined by the AO in the remand proceedings in accordance with law.

MANMEET PRITAM SINGH ARORA, J

MANMOHAN, J

OCTOBER 27, 2022
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