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

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Decision delivered on: 27.07.2023

+ **ITA 37/2019**

THE PR. COMMISSIONER OF INCOME
TAX -CENTRAL-3

..... Appellant

Through: Mr Abhishek Maratha, Sr Standing
Counsel with Mr Akshat Singh,
Standing Counsel.

versus

ARN INFRASTRUCTURE LTD. Respondent

Through: Mr Ruchesh Sinha and Ms Nivedita,
Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

1. This appeal concerns Assessment Year (AY) 2009-10.
2. *Via* this appeal, the appellant/revenue seeks to assail the order dated 30.10.2017 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].
3. In order to adjudicate the appeal, the following broad facts are required to be noticed.
- 3.1 The respondent/assessee is a developer and builder. In the course of its business, it undertook various projects in different cities, and locations in the National Capital Region of Delhi [in short, "NCR Delhi"]



3.2 For this purpose, it entered into various agreements, including an agreement dated 30.06.2006 with a company going by the name Real Gain Estates (P) Ltd. [in short, “Real Gain”].

4. Real Gain acted as the respondent/assessee’s sole and exclusive agent for booking and selling commercial shops and flats, which were the subject matter of construction projects undertaken by the respondent/assessee. For its efforts, Real Gain was to receive brokerage at the rate of 6.5%.

5. Evidently, a survey was carried out *qua* the respondent/assessee on 20.11.2008. During the survey, the officers of the appellant/revenue impounded several documents.

5.1 Consequently, in the course of the survey, the officers of the appellant/revenue recorded the statement of the directors of the respondent/assessee.

6. One of the directors, i.e., Mr Krishan Kumar, gave a statement which led to addition of Rs.10 crores to the taxable income of the respondent/assessee.

6.1 The record shows that this statement was taken on oath.

7. The record also discloses that it is this statement, as noticed above, sans any corroborative evidence, which forms the basis of the addition.

8. Mr Akshat Singh, learned standing counsel, who appears on behalf of the appellant/revenue, says that the statement disclosed that consideration was received by the respondent/assessee in cash and, therefore, was rightly added to the taxable income of the respondent/assessee.

9. The record would show that the Assessing Officer (AO) has framed the assessment order dated 27.12.2011 based on the survey report. The



survey report has been extracted, in extenso, in the said assessment order. This is evident upon perusal of paragraph 6 of the assessment order.

10. The respondent/assessee, being aggrieved by the aforementioned assessment order, preferred an appeal with the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"].

11. The CIT(A), after detailed examination, *via* order dated 13.12.2012 deleted the additions made by the AO. It is against this order that an appeal has been preferred by the appellant/revenue with the Tribunal.

12. The Tribunal, however, affirmed the view taken by the CIT(A).

13. Mr Singh says that the order passed by the Tribunal is erroneous for the following reasons:

- (i) First, the addition was made on the basis of a survey report.
- (ii) Second, the addition of Rs.10 crores was predicated on the statement of the directors, i.e., Mr Krishan Kumar and Mr Nitin Rekhan, which was made voluntarily.

(iii) Third, the statement of directors was taken on oath.

14. On the other hand, Mr Ruchesh Sinha, who appears on behalf of the respondent/assessee, says that since the statements were recorded during the course of the survey, the concerned officers did not have the power to record the same on oath.

15. Mr Sinha also submits that since the survey report was not furnished to the respondent/assessee, the AO could not have relied upon the same.

16. In sum, it is the submission of Mr Sinha that the addition cannot be sustained, in view of the fact that it is based solely on the statement recorded under Section 133A of the Income Tax Act [in short, "Act"], which is not



supported by any corroborative material.

16.1 In support of this submission, Mr Sinha has relied upon a judgment rendered by the Division Bench of the Madras High Court in ***CIT v. S. Khader Khan Son***, (2008) 300 ITR 157 (Mad.).

17. Mr Sinha says that the said judgment was carried in appeal to the Supreme Court, which was dismissed after hearing the opposing sides.

18. We have heard learned counsel for the parties and perused the record.

19. According to us, what clearly emerges from the record is that the addition of Rs.10 crores to the taxable income of the respondent/assessee was made purely on the basis of the statement made by its directors.

20. Although the statements appear to have been categorized as voluntary, what emerges is that these statements were made to “buy peace of mind”. Thus, Rs.10 crores was surrendered by the directors during survey, which was added to the taxable income of the respondent/assessee.

21. Furthermore, concededly, while filing its return, the respondent/assessee did not include the amount in issue, i.e., Rs.10 crores which, according to the AO, had remained unexplained.

22. It is also not in dispute that the respondent/assessee was not furnished with a copy of the survey report. This is an aspect which the Tribunal has noted in the impugned order.

23. Concededly, the directors were not confronted with the contents of the survey report.

24. Given this position, the Tribunal, in our view, quite correctly has concluded that since there was no corroborative material available for making addition, the assessment order, *qua* this aspect, could not be



sustained.

25. As observed by the Madras High Court in *S. Khader Khan Son's* case, there is a qualitative difference between the statement recorded under Section 133A and Section 132(4) of the Act.

26. The statement recorded under Section 133A of the Act has no evidentiary value, since the officer concerned is not authorized to administer oath and record a sworn statement. This is in contradiction with the statement recorded under Section 132(4) of the Act, which is recorded on oath by an officer who is vested with necessary powers.

27. Given this position and the fact that no corroborative evidence was found to support the addition, we are not inclined to interfere with the impugned order passed by the Tribunal.

28. According to us, no substantial question of law arises for our consideration.

29. The appeal is, accordingly, closed.

30. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

JULY 27, 2023

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