

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI**

BEFORE SHRI.NARENDER KUMAR CHOUDHRY (JUDICIAL MEMBER)
AND
MISS. PADMAVATHY S.(ACCOUNTANT MEMBER)

I.T.A. No.3243/Mum/2023
(Assessment year : 2012-13)

Mayur Kanjibhai Shah 501, Trithal, N.S. Road No.4, JVPD Scheme, Vile Parle (West) Mumbai-400 056 PAN : AJBPS7282E	vs	Income Tax Officer-25(3)(1), Room No.233, Kautilya Bhavan C-41 to C-43, G Block, BKC, Bandra (East), Mumbai-400 051
APPELLANT		RESPONDENT

Present for the Assessee	Shri. Sanjay R Parikh Ld. Adv
Present for the Department	Shri. Ld. Sr.DR

Date of hearing	23/01/2024
Date of pronouncement	31/01/2024

ORDER

Per N.K. Choudhry (JM):

This appeal has been preferred by the Assessee, against the order dated 25/07/2023 impugned herein passed by the National Faceless Appeal Centre, Delhi (in short 'NFAC') /Ld. Commissioner') under section 250 of the Income-tax Act, 1961 (in short, 'the Act') for the A.Y. 2012-23.

2. In the instant case, the Assessee being a sole proprietor of a retail business of readymade ladies dress and fabrics, had shown its total income at Rs.5,05,980/- by filing its return of income on dated 28/09/2012 under section 139(1) of the Act, which was processed under section 143(1) of the Act on 15/04/2013.

3. Subsequently, on the information received from the DDIT-Tax Investigation Wing 5(4), Mumbai to the effect “ *that findings arose from search action under section 132 of the Act carried out in the case of M/s Evergreen Enterprises with an undisclosed activity of money lending and borrowing in unaccounted cash loan and interest thereon. As per the information received, the Assessee has lent cash loan of Rs.3,25,00,000/- in the financial year 2011-12. The information available was carefully perused. On the basis of aforesaid information available with the AO coupled with the fact that no scrutiny assessment was completed for the A.Y. 2012-13*”, the Assessing Officer formed the reason to believe that income chargeable to tax as indicated above to the tune of Rs.3,25,00,000/- had escaped assessment within the meaning of section 147 of the Act, as the Assessee has failed to disclose fully and truly all material facts in the year under consideration by furnishing his return of income for A.Y. 2012-13. The Assessing Officer consequently issued the notice under section 148 of the Act.

4. During the assessment proceedings, the Assessee filed reconciliation of income and TDS statement as on 31/03/2012, audited balance-sheet of the proprietorship concern M/s Ella, bank account statements, etc. Further, the Assessee vide letter dated 13/09/2019 also stated that we did not lend any cash loan of Rs.3,25,00,000/- to M/s Evergreen Enterprises / Shri Nilesh Bharani during the financial year 2011-12 relevant to A.Y. 2012-13. The Assessee also requested

to provide the copy of documents / evidence on which he wanted to cross examine M/s Evergreen Enterprises / Shri Nilesh Bharani.

5. The Assessing Officer, though considered the denial/claim of the Assessee, however, not found acceptable and observed Shri Nilesh Bharani of M/s Evergreen Enterprises has given statement under section 132(4) of the Act to the effect that he was in the business of lending / borrowing money in cash (unaccounted and undisclosed business). Further, in the course of search, a diary has also been seized wherein inter-alia following entries have been recorded in code words, which reads as under:-

- i) Code 'E/11/N'-
- ii) Name as per Ledger 'NENSIBHI ELLA'
- iii) Coded Amount (In `000) – 32500
- iv) Contact person 'NANCYBHAI –
- v) F.Y. 2011-12"

6. The Assessing Officer ultimately, on the basis of statement of Shri Nilesh Bharani, and without giving any opportunity of cross examination to the Assessee and by considering the aforesaid entries in the diary seized during the course of search, made the addition of Rs.3,25,000,00/- under section 69A of the Act. Further, the AO also added an amount of rs.39,00,000/- on account of alleged interest paid @12% p.a. on the amount of Rs.3,25,00,000/-.

7. The Assessee being aggrieved challenged the aforesaid additions as well as reopening of the case before the Ld. Commissioner, who, by impugned order not only affirmed the reopening of the case under section 147 / 148 of the Act but also affirmed the additions on merit, by reproducing the assessment order in entirety and concluding as under:-

“On the other hand, the appellant has not much to offer with regard to the merits of the case. He has delved mostly on the technical aspects, questioning the reopening, the issue of cross examination etc.

As stated above, this has already been handled above by the AO. The appellant has not provided the AO with material fit enough not to treat the cash loan as unexplained money. He has not provided me with enough substance either.

In such circumstances, I find no reason to interfere with the order of the AO.”

8. The Assessee being aggrieved is in appeal before us and contended against the impugned order, whereas the Ld. DR duly supported the orders passed by the authorities below.

9. Heard the parties and perused the material available on record and given thoughtful consideration to the rival claims of the parties and peculiar facts and circumstances of the case. It is very much clear from the impugned order that the same is an un-reasonable order and passed in cryptic manner, therefore, on this aspect itself, the impugned order is liable to be set aside. However still we want to go to the merits of the case.

We observe that the Assessing Officer made the additions mainly on the ground that Shri Nilesh Bharani in his statement recorded under section 132(4) of the Act has admitted that he was in the business of lending / borrowing money in cash (unaccounted and undisclosed business). Further, in the course of search, a diary has been seized wherein inter-alia following entries have been recorded and the Assessee’s name is also appearing in the same diary in coded word. For clarity ready reference, we are again reproducing the entries relied upon by the Assessing Officer:-

- i) Code 'E/11/N'-
- ii) Name as per Ledger 'NENSIBHI ELLA'
- iii) Coded Amount (in '000) – 32500
- iv) Contact person 'NANCYBHAI –
- v) F.Y. 2011-12

10. It is an admitted fact that the Assessing Officer has not entertained the Assessee's request for cross examination of Shri Nilesh Bharani / M/s Evergreen Enterprises and also it is a fact that Shri Nilesh Bharani subsequently retracted his statement. Therefore, his statement made earlier become doubtful as claimed by the Assessee and cannot be relied as substantive evidence. Even otherwise, we have failed to understand that how the name as mentioned in the said diary, as 'NENSIBHI ELLA' can be attributed to the Assessee's name. Further, how the coded amount of Rs.32,500 can be construed as Rs.3,25,000,00/-. Further, how the Assessee is connected with the said narration of entries written in diary. Further, as per Assessee's claim, the mobile number noted in said diary is even otherwise do not belong to the Assessee and the Assessing Officer also failed to verify the owner of the said number to connect with the Assessee.

11. We by giving thoughtful consideration to specific facts and circumstances of the case, are of the considered view, that retracted statement of Shri Nilesh Bharani/ M/s Evergreen Enterprises who otherwise neither named nor specified the role and also not connected the Assessee specifically and the aforesaid facts/entries made in the diary as noted above by us, in fact, is not at all substantive material to make and sustain the addition as done by the authorities below in this case and, therefore, we are inclined to delete the addition. Consequently, the addition under consideration stands deleted.

12. In the result, appeal filed by the Assessee stands allowed.

Order pronounced in the open court on 31/01/**2024**.

(MISS. PADMAVATHY S.)	(NARENDER KUMAR CHOUDHRY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Pavanan

प्रतिलिपि अग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

Asstt. Registrar,
ITAT, Mumbai