

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

**IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM
(through web-based video conferencing platform)**

श्री वी. दुर्गा राव, न्यायिक सदस्य एवं श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER**

**आयकर अपील सं./I.T.A.No.87/Viz/2020
(निर्धारण वर्ष/Assessment Year:2016-17)**

Assistant Commissioner of
Income Tax
Central Circle-1
Visakhapatnam

Vs. Shri Manchukonda Shyam
Prop : Manchukonda Shyam
Zaveri, D.No.10-1-27,
Near Sampath Vinayaka Temple
Asilmetta
Visakhapatnam
[PAN : AFQPM0217A]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

**Cross Objection No.14/Viz/2020
(Arising out of I.T.A. No.87/Viz/2020)
(निर्धारण वर्ष/Assessment Year:2016-17)**

Shri Manchukonda Shyam
Prop : Manchukonda Shyam
Zaveri, D.No.10-1-27,
Near Sampath Vinayaka Temple
Asilmetta, Visakhapatnam
[PAN : AFQPM0217A]

Vs. Assistant Commissioner of
Income Tax
Central Circle-1
Visakhapatnam

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

राजस्व की ओर से /Revenue by
निर्धारिती की ओर से / Assessee by

: Shri D.K.Sonowal, CIT, DR
: Shri G.V.N.Hari, AR

सुनवाई की तारीख / Date of Hearing
घोषणा की तारीख/Date of
Pronouncement

: 21.09.2020
: 23.09.2020

आदेश /ORDER

Per Shri D.S.Sunder Singh, Accountant Member :

This appeal is filed by the revenue against the order of the Commissioner of Income Tax (Appeals) [CIT(A)]-3, Visakhapatnam in Appeal No.279/2017-18/CIT(A)-3/VSP/2019-20 dated 31.10.2019 and cross objections are filed by the assessee in support of the order of the Ld.CIT(A).

2. Ground No.1 is related to the addition of Rs.1,05,00,000/- relating the cash payments stated to have been made by the assessee to Shri Lanka Anil Kumar. A search u/s 132 of the Income Tax Act, 1961 (in short 'Act') was conducted in the residential premises of the assessee on 24.11.2015 and simultaneously, search u/s 132 was also conducted in the residential premises of Shri Lanka Anil Kumar, employee in M/s Navaratna Estates and during the course of search, whatsapp messages were found on mobile phone of Shri Lanka Anil Kumar, Executive Director of M/s Navaratna Estates which was seized vide pages 31-34 of Annexure LAK/01. A statement was also recorded on 24.11.2015, u/s 132(4) of the Act, from Shri Anil Kumar who had stated that the messages contained on his mobile phone represent the conversation between himself and Shri Manchukonda

Shyam, the assessee. Further, he also stated that as recorded in whatsapp messages, the amounts mentioned represent cash loan taken from M/s Manchukonda Shyam Zaveri on those days for his business purpose. The amounts were noted in digits and the same represent lakhs. For the sake of clarity, we extract relevant part of the assessment order in page No.16 which reads as under :

"Pages 31 to 34 contains the data extracted from my mobile phone Whatsapp messages had with Sri Shyam Zaveri during the period 21.07.2014 to 24.11.2015

Q. 27. Please go through the specific entries from 19.05.2015 to 05.06.2015 wherein certain figures were found. Please go through the same once again and explain what it actual represents.

Ans: I have gone through the specific entries from 19.05.2015 to 05.06.2015, 07.06.2015 to 21.06.2015 and also on 21.11.2015. The entries are conversation regarding the amounts taken as cash loan from Sri Shyam Zaveri on those days for my business purposes. The figures mentioned therein are measured in lakhs but intentionally omitted to mention in lakhs in the messages received. The aggregate amount received from Sri Shyam Zaveri is Rs. 1.05 cores as appearing the messages extracted therein."

2.1. The Assessing Officer (AO) recorded the statement of the assessee also and the assessee replied that the said amounts were paid from M/s Navaratna Estates for incurring miscellaneous / petty cash expenses incurred during registration time. He further stated that the said amount was not in lakhs and the entire amount paid to him would be in the range of Rs.5000/- to 10000/- only. For the sake of clarity, we extract para No.5.2. of assessment order which reads as under :

"5.2. When asked about the above mentioned cash transactions, your answers to Q6-7 of statement dated 13.01.2016 recorded u/s 132(4) stated that the messages referred to the cash collected by Sri Lanka Anil Kumar in the range of Rs.5,000 to Rs. 10,000 for the purpose of meeting miscellaneous expenses during registration and other petty expenses of M/s Navaratna Estates. The statement recorded in Q 6-7 is reproduced as under:-

"Q6. I am now showing you page nos 31-34 of Annexure-LAK/01 which contains a bundle of loose papers found and seized during the course of search proceeding u/s 132 at the residence of Sri Lanka Anil Kumar. Please explain the same.

Ans. It represent the cash collected by Sri Lanka Anil Kumar in the range of Rs. 5,000/-to Rs. 10,0001- for the purpose of meeting miscellaneous expenses during registration and other petty expenses of M/s Navaratna Estates.

Q7. In his statement u/s 132(4) of the I.T.Act, 1961 Sri Lanka Anil Kumar submitted that the above pages contain data extracted from his mobile phone's Whatsapp messages. The specific entries i.e messages from 19.05.2015 to 05.06.2015, 07.06.2015 to 21.06.2015 and also 21.11.2015 represent the conversation regarding the amount taken as cash loans from Sri Shyarn Zaveri on those days for business purposes. He further stated that the figure mentioned are measured in lakhs but were intentionally omitted to mention lakhs in the messages. The aggregate amount received from Sri Shyam Zaveri is Rs.1.05 croers. Please explain.

Ans. The above amount only reflects the amount paid from Navaratna Estates for incurring miscellaneous expenses during registration and petty cash expenses."

2.2. Subsequently, the AO issued show cause notice and in response to show cause notice, the assessee submitted his explanation and denied having lent any amount to Shri Lanka Anil Kumar. Since the dates of payments were mentioned in whatsapp messages and Shri Lanka Anil Kumar has confirmed that the said amounts were taken as loan from the assessee in a statement recorded u/s 132(4) on 13.01.2016, the AO did not believe the contention of the assessee that the amounts were given out of

M/s Navaratna Estates towards miscellaneous and petty cash expenses. On the strength of the statement given by Sri Lanka Anil Kumar u/s 132(4), the AO viewed that the assessee has not discharged the burden of proof to establish that the amounts were not given by him as advance to Shri Lanka Anil Kumar. Since the assessee could not produce any corroborative evidence to disprove the statement of Shri L.Anil Kumar, the AO treated the sum of Rs.1,05,00,000/- as undisclosed income in the hands of the assessee and added back to the income of the assessee.

3. Against the order of the AO, the assessee went on appeal before the CIT(A) and argued that the AO made the addition purely on guess work and on the basis of third party statement without giving opportunity of cross examining the witness. He further submitted that Shri Anil Kumar is an employee in Navaratna Estates and advisor of quality control of villas, project, while the assessee is a partner in Navaratna Estates. Due to duress and pressure, Shri Anil Kumar had stated that the whatsapp messages were relating to the advances received by him. The Ld.CIT(A) considered the explanation of the assessee and found that except whatsapp messages, there was no other evidence found by the department to support the statement of Anil Kumar to believe that the assessee has given advances to

Shri Lanka Anil Kumar. Therefore following various decisions mentioned in the CIT(A) order, the Ld.CIT(A) deleted the addition and allowed the appeal of the assessee.

4. Against which the department is in appeal before us. During the appeal hearing, supporting the order of the AO, the Ld.DR submitted that a search u/s 132 was conducted in the residential premises of Shri Lanka Anil Kumar as well as in the case of the assessee. During the course of search, whatsapp messages were found in the mobile phone of Shri Lanka Anil Kumar, establishing the receipt of monies to the extent of Rs.1.05 crores in abbreviated figures, i.e. in thousands. When questioned u/s 132(4), Shri Anil Kumar, stated that the amounts mentioned in the whatsapp messages were lakhs and also accepted that he had received the sums from the assessee as a loan for his business purpose. The Ld.DR further argued that since, Shri Anil Kumar has given statement u/s 132(4), the notings in mobile phone whatsapp messages constitute valid evidence and the same cannot be simply brushed aside. Since the statement is supported by the messages in mobile phone, the same required to be held as amounts advanced by the assessee to Shri Anil Kumar and accordingly

argued that the Ld.CIT(A) erred in deleting the addition. Hence, requested to set aside the order of the Ld.CIT(A) and restore the assessment order.

5. Per contra, the Ld.AR submitted that Shri Lanka Anil Kumar, is an employee of M/s Navaratna Estates, where, the assessee is partner of the firm. To meet the miscellaneous and petty cash expenses, M/s Navaratna Estates has given the sums within the range of Rs.5,000/- to Rs.10,000/- to Shri Lanka Anil Kumar. He further stated that assessee has not given any such amount to Shri Anil Kumar as loans. Subsequently, Shri Lanka Anil Kumar also has retracted from the statement and submitted that no such cash loans were received by him. A survey u/s 133A was conducted in Navaratna Estates and as discussed earlier search was conducted in the residence of the assessee, but no such evidence was found indicating any amounts advanced by the assessee to Shri Lanka Anil Kumar. Extrapolating messages found in whatsapp in lakhs instead of actual and making addition in the hands of the assessee without any corroborating evidence is unreasonable and unjustified. Ld.AR further argued that since the assessee has not given any amounts as advance to Shri Lanka Anil Kumar and there was no evidence found during the course of search to prove the contention of the department, merely on the third party statement there is no case for

making the addition and hence, argued that there is no reason to interfere with the order of the Ld.CIT(A) and requested to uphold the order of the Ld.CIT(A).

6. We have heard both the parties, gone through the orders of the authorities below. Shri Lanka Anil Kumar is an employee of M/s Navaratna Estates Ltd. A search u/s 132 was conducted in the residence of Shri Lanka Anil Kumar and certain sums were found in whatsapp messages in digits. When asked to explain, Shri Anil Kumar stated that the amounts were written in thousands represent lakhs and the total sum of Rs.1,05,00,000/- was taken as loan from the assessee in cash for his business purposes. When confronted with the assessee, he explained that the amounts mentioned in thousands are correct and the total amount would be in the range of Rs.5,000/- and Rs.10,000/- given to Shri Anil Kumar to meet the petty cash or miscellaneous expenses from M/s Navaratna Estates during registration of properties. A search u/s 132 was conducted in the case of Shri Lanka Anil Kumar as well as the assessee and the survey u/s 133A was conducted in the case of M/s Navaratna Estates. No evidence was found by the department either in the premises of the assessee or in the premises of M/s Navaratna Estates, having given loan to Sri Anil Kumar to the extent of

Rs.1,05,00,000/-. In the search proceedings in the residence of Shri Anil Kumar also, no evidence with regard to unaccounted investment or expenditure representing the loan supposed to be taken from the assessee was found. Merely on the basis of the statement given by Shri Lanka Anil Kumar, which was subsequently retracted, the AO made the addition on the presumption that the assessee had advanced the sums to Shri Lanka Anil Kumar without bringing any evidence on record. The AO has neither given opportunity to the assessee to cross examine the third party nor disproved the explanation given by the assessee. As found from the order of the AO Sri Lanka Anil Kumar is an employee of M/s Navaratna Estates and drawing the salary of Rs.25000/- per month. He explained that the sums mentioned in the whatsapp messages were related to the amounts given to Sri Lanka Anil Kumar in the range of Rs.5,000/- to Rs.10,000/- to meet the petty cash and miscellaneous expenses. No evidence was found with regard to the investment made by Shri Anil Kumar in his own business out of the loans stated to have given by the assessee. In the above facts and circumstances there is no reason to disbelieve the statement given by the assessee that the payments were given for meeting petty cash or miscellaneous expenses. The Ld.CIT(A) following the decisions of Hon'ble Jurisdictional High Court as well as this Tribunal held that on the basis of

notings and loose sheets found from third parties and the statement of third parties, the additions cannot be made without having corroborative / independent evidences. For the sake of clarity and convenience, we extract relevant part of the order of Ld.CIT(A) in para No.6.2 of page No.13 which reads as under :

“6.2. I have considered the assessment order and submissions of the appellant. It is seen that the addition made by the AO is solely based on the social media (whatsapp) messages exchanged between the appellant and Mr. Anil Kumar, an employee of M/s Navaratna Estates. A statement u/s.132 recorded from Mr. L, Anil Kumar during the course of Search during which Mr. L. Anil Kumar was questioned and he explained the nature and 'details of messages exchanged by him with the appellant. The messages contain details of transactions in digits. Those were explained to be in lakhs of rupees and the transaction was loans advanced by the appellant to Mr.L. Anil Kumar whereas the appellant explained the same to be in thousands of rupees which were given for miscellaneous expenses. Mr.L. Anil Kumar also took similar stand in his assessment proceedings and said that the statement given during Search was under duress. The AO has not brought on record any evidences as to utility of such amount nor any other corroborative evidence to support the findings. Such evidences(Messages) without any supporting/corroborative along with admission of third person cannot be, basis for AO to come to conclusion and make addition in the assessment order. The law on the issue is laid down by the jurisdictional High Court, and followed by ITAT consistently in the following cases.

- i) K. V. Lakshmi Savitri Devi Vs ACT 148 ITJ 517 (Hyd).*
- ii) K. V. Lakshmi Savjtri Devi Vs ACIT ITTA 563 of 2017 (AP)(HC)*
- iii) Jawahar Bhai Atmaram Hathiwala Vs ITO 128 ITJ 36 (Ahd)*
- iv) DCIT Vs B. Vijaya Kumar ITA No.930 & 931 of 2009 (Hyd).*
- v) CIT Vs R. Nalini Devi ITTA 232 of 2013 (A. P)*
- vi) CIT Vs P. V Kalyana Sundaran (2007) 294 ITR 49 vii)i. Venkata Rama Sai Developers Vs DCIT ITA 453/Vizag/2012.*
- viii) P.Venkateshwar Rao Vs DCIT ITA 25/825/Vizag/2012*

The ratio laid down is that solely on the basis evidences such as notings in loose sheets found with third parties and the statement of third

parties, additions cannot be made without corroborative evidences and independent enquiries. Applying the above ratio to the facts of the case, it is held that the addition made is not warranted, the same is deleted."

6.1. No evidence was found by the department to establish that assessee has given loans to Shri Lanka Anil Kumar during the course of search and no evidence was found regarding utilization of purported advances by Shri Lanka Anil Kumar. Shri Anil Kumar also subsequently retracted from the statement and clarified that he has not received any cash loans from the assessee. Addition was made merely on the basis of whatsapp messages and the statement recorded from section 132(4) from Shri Lanka Anil Kumar which was subsequently retracted. Therefore we are of the view that the addition made by the AO is unsustainable and the Ld.CIT(A) rightly deleted the addition. Accordingly, we do not see any reason to interfere with the order of the Ld.CIT(A) and the same is upheld. The appeal of the revenue on this ground is dismissed.

7. Ground No.2 is related to the disallowance of exemption claimed u/s 10(38) for an amount of Rs.1,57,76,500/- on account of sale of shares of M/s Tuni Textiles Mills Limited. During the appeal hearing, the Ld.Counsel submitted that this was double addition which was deleted by the Ld.CIT(A) in corrigendum order dated 14.12.2019. He further submitted

that the assessee had received only the amount of Rs.1,57,56,500/-, but never received the sum of Rs.1,87,60,000/-. Since the addition is made twice, the Ld.AR submitted that no interference is called for in the order of the Ld.CIT(A).The Ld.DR relied on the Assessment order.

8. We have gone through the orders of the lower authorities and find that the AO made the addition of Rs.1,87,60,000/- as discussed in para No.13 and 13.3 of the assessment order. The entire addition represent the shares sold in respect of Jaisukh Dealers Limited. Further addition of Rs.1,57,76,700/- was separately made in respect of sale of shares of Tuni Textiles Mills Limited. The department's contention was that the assessee has sold the shares of Jaisukh Dealers Ltd. as well as Tuni Textiles Mills Ltd. Therefore, made the addition of Rs.1,87,60,000/- and Rs.1,57,56,500/-. The assessee's submission is that he had sold the shares of Jaisukh Dealers Ltd and claimed exemption u/s 10(38) but wrongly mentioned the sale of shares of Tuni Textiles. The Ld.CIT(A) also agreed with the contention of the assessee and observed that that there was no sale of shares in respect of Tuni Textiles Mills Ltd. by the assessee. The total amount received by the assessee was Rs.1,57,56,500/- made on account of the transaction in respect of Jaisukh Dealers Limited which was taxed including the

commission amounting to Rs.1,87,60,000/-. Therefore, considering the rectification petition of the assessee, the Ld.CIT(A) passed corrigendum order deleting the addition of Rs.1,57,56,500/-. For the sake of clarity and convenience, we extract para No.3 and 3.1 of Ld.CIT(A) Corrigendum Order dt.14.12.2019 which reads as under :

“3. The submission of the appellant against addition of Rs.1,57,76,500/- is as following:

(i) First and foremost; the appellant submits that the appellant received during the year only a sum of Rs.1,57,56,500 that was credited in the bank accounts. The other amount of Rs.1,87,60,000 is never received by the appellant. The appellant sold during the relevant previous year 5,12,500 shares of Jaisukh Dealers Limited and received a sum of Rs.1,57,76,500 from the share broker through whom the shares were sold

(ii) The appellant did not own any shares of Tuni Textiles Mills Limited at any point of time and as such there was no occasion to sell the shares of Tuni Textile Mills limited. By mistake the exemption u/s 10(38) was claimed in respect of sale proceeds of shares of Tuni Textiles Mills Limited. Except for the inadvertent claim of the appellant in the return of income, there are no evidences to show that the sale proceeds of Rs.1,57,76,500 deposited in the bank account were towards sale proceeds of shares of Tuni Textile Mills Limited. In support of the above, the appellant submits consolidated statement of holding of shares as on 31.03.2014 which shows that there were no holding of Tuni Textile Mills Ltd. shares (copy submitted at page No.61 to 65). In view of the above, the appellant prays the learned CIT(A) to kindly delete the addition of Rs.1,57,56,600/-.”

3.1 The above specific submissions of the appellant were not adjudicated. On consideration of the facts as mentioned above it is seen that the entire statement of the appellant recorded during the Search and the material brought on record show that the appellant has dealt in the shares of M/s Jaisukh Dealers Ltd and not in the shares of M/s.Tuni Textiles Ltd. The investments of the appellant as on 31.03.2014 does not include shares of M/s.Tuni Textiles Ltd but only incirns the shares of M/s.Jaisukh Dealers Ltd. The amounts received (sale proceeds) by the appellant of Rs. 157,76,500/- in his bank account are on sale of share of M/s Jaisukh Dealers Ltd. In view of the above and in absence of any material except inadvertent mention in the return,

showing appellant's transaction in M/s Tuni Textiles Ltd., the addition of Rs.1,57,76,500/- made on account of above alleged transaction is not warranted and the same is liable to be deleted, The ground no.7be treated as allowed. The order dt.31.10.2019 is modified to that extent. The application for rectification is disposed off with above direction. The same is to be treated as part of order dt.31.10.2019."

During the appeal hearing, the Ld.DR did not bring any evidence to controvert the submission of the assessee with regard to sale of shares in respect of Tuni Textiles Ltd. No evidence was also brought on record to show that the assessee had received the money over and above the sum of Rs.1,57,76,500/-. Therefore, the addition made by the AO relating to Rs.1,57,76,500/- appeared to be double addition and the same is unwarranted as observed by the Ld.CIT(A) in his corrigendum dated 14.12.2019. Accordingly, we do not see any reason to interfere with the order of the Ld.CIT(A) and the same is upheld. The appeal of the revenue is dismissed.

9. Ground No.3 is general in nature and does not require any specific adjudication.

10. The assessee filed cross objections in support of the order of the Ld.CIT(A). Since the departmental appeal is dismissed, the cross objections filed by the assessee becomes infructuous, hence dismissed.

11. In the result, appeal of the revenue as well as the cross objections of the assessee are dismissed.

Order pronounced in the open court on 23rd September, 2020.

Sd/-

(वी.दुर्गा राव)

(V. DURGA RAO)

न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य/ACCOUNTANT MEMBER

दिनांक /Dated : 23.09.2020

L.Rama, SPS

Sd/-

(डि.एस. सुन्दर सिंह)

(D.S. SUNDER SINGH)

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. राजस्व/The Revenue – Assistant Commissioner of Income Tax, Central Circle-1, Visakhapatnam
2. निर्धारिती/ The Assessee– Shri Manchukonda Shyam, Prop : Manchukonda Shyam Zaveri, D.No.10-1-27, Near Sampath Vinayaka Temple, Asilmetta Visakhapatnam
3. The Pr.Commissioner of Income Tax (Central), Visakhapatnam
4. The Commissioner of Income Tax (Appeals)-3, Visakhapatnam
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/DR, ITAT, Visakhapatnam
- 6.गार्डफ़ाईल / Guard file

आदेशानुसार / BY ORDER

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Sr. Private Secretary
 ITAT, Visakhapatnam