

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI “F” BENCH: NEW DELHI**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER &
SHRI VIMAL KUMAR, JUDICIAL MEMBER**

ITA Nos.1951, 1952 & 1953/Del/2023

[Assessment Years : 2011-12, 2013-14 & 2015-16]

Munesh Tyagi Plot No.112, Radhey Shyam Vihar, Gali No.4 Phase-1 Muradnagar, Ghaziabad Uttar Pradesh-201206 PAN-AFFPT0875E	vs	DCIT Central Circle, Ghaziabad Uttar Pradesh-201001
APPELLANT		RESPONDENT

ITA No.2566/Del/2023

[Assessment Year : 2011-12]

ACIT Central Circle Ghaziabad Uttar Pradesh-201002	vs	Munesh Tyagi Plot No.112, Radhey Shyam Vihar, Gali No.4 Phase-1 Muradnagar, Ghaziabad Uttar Pradesh-201206 PAN-AFFPT0875E
APPELLANT		RESPONDENT
Appellant by	Shri Neelkanth, Advocate	
Respondent by	Ms. Anu Krishna Agarwal, CIT DR	
Date of Hearing	17.12.2024	
Date of Pronouncement	17.03.2025	

ORDER

PER PRADIP KUMAR KEDIA, AM :

The captioned appeals arise from the respective orders of the Commissioner of Income Tax (Appeals), Noida-3 [CIT(A)] in respective assessment orders passed by the Assessing Officer [AO] tabulated hereunder:

Sr. Nos.	ITA Nos.	CIT(A) Order dated	Assessment Order dated	Assessment Order passed under section
1.	1951/Del/2023 [AY 2011-12]	CIT(A), Noida-3 order dated 17.05.2023	29.12.2018	143(3)/153A of the Income Tax Act, 1961.
2.	1952/Del/2023 [AY 2013-14]	CIT(A), Noida-3 order dated 09.05.2023	-Do-	-Do-

3.	1953/Del/2023 [AY 2015-16]	CIT(A), Noida-3 order dated 09.05.2023	-Do-	-Do-
4.	2566/Del/2023 [AY 2011-12]	CIT(A), Noida-3 order dated 17.05.2023	-Do-	-Do-

The issues being common, interlinked and identical for various AYs in captioned appeals filed by the assessee and the Revenue, all these cases have been heard together and accordingly adjudicated by a common order.

ITA No.1951/Del/2023 [Assessment Year : 2011-12] (Assessee's appeal) & ITA No.2566/Del/2023 [Assessment Year : 2011-12] (Revenue's appeal)

2. As per the grounds of appeal, the assessee has challenged the order of the CIT(A) and the AO broadly on three points namely, (i) the additions made in the instant case under s. 153A r.w.s. 143(3) of the Act are not permissible in the absence of any incriminating documents found in the course of search and seizure operation; (ii) the approval granted under s. 153D of the Act by the Competent Authority to the assessment order framed under s. 153A of the Act did not confirm to the requirement of law and therefore, consequential assessment order is bad in law; and (iii) the additions made by the AO based on certain loose papers/diary was wrongly confirmed by the CIT(A) [albeit partially] by applying peak theory. While the AO has made an addition of INR 3,47,09,200/- based on certain entries as per seized diary/loose paper and another addition of INR 48,04,200/- towards purchase of property based on seized papers thus aggregating to INR 3,95,13,400/-, the CIT(A) has scaled down the additions but wrongly confirmed the aggregate additions to the extent of INR 1,52,40,000/- applying 'Peak Theory' and only granted partial relief to the extent of INR 2,47,73,400/- to the assessee.

3. Whereas the assessee is aggrieved by the additions confirmed to the extent of INR 1,52,40,000/-, the Revenue has also filed appeal against the relief granted by the CIT(A) to the extent of INR 2,47,73,400/- based on 'Peak Theory' applied by CIT(A).

4. We have heard the rival submissions from the respective sides and perused the assessment order and the first appellate order. The material

referred to and relied upon in the course of hearing as well as case laws cited have been carefully perused.

5. A search and seizure operation was carried out under s. 132 of the Act on 03.11.2016 at the premises of the assessee connected to VVIP & SSG Group of cases. In consequence of search, notice under s. 153A was issued and served upon the assessee and the assessment proceedings under s. 153A was set in motion. In pursuance of notice issued under s. 153A, the assessee declared total income at INR 2,36,280/-.

6. While framing the assessment, the AO *inter-alia* observed that during the search and seizure operation carried under s. 132 of the Act, certain incriminating documents in the form of a small diary and other papers found and seized from the premises of the assessee. Page 7 of Annexure A-8 contains hand-written reference to purchase of 200 sq. yard plot. The AO concluded that the assessee has made unexplained investment by way of purchase of plot from one Mr. Pintu for INR 30 Lakhs and also incurred expenditure of INR 18,04,200/- thereon resulting in overall investment of INR 48,04,200/-. The AO thus invoked the provision of s. 69 of the Act and made an addition of INR 48,04,200/- towards various entries purportedly recorded in relation to purchase of plot.

6.1. The AO also took cognizance of Annexure A-4 of small diary on which certain date-wise hand-written entries towards payments made to different parties were found. The entries so found were aggregated and additions of INR 3,47,09,200/- were made under s. 69C of the Act holding such entries to be unexplained payments.

6.2. The assessee filed detailed submissions before the CIT(A) as reproduced in para 6.2 of the first appellate order to counter the additions so made. The CIT(A) however referred to the provision of s. 132(4A) and s. 292C of the Act to hold that the entries found recorded in the diary/loose papers seized from the premises of the assessee are presumed to be belonging to the assessee and therefore, the assessee cannot take a contrary stand to what was found recorded in the diary. The CIT(A) however entertained a view that having regard to several entries showing receipts as well as payments, the concept of 'Peak

Credit Theory' shall come into play. The doctrine of 'Peak Credit Theory' was thus applied whereby the additions to the extent of INR 1,52,40,000/- was endorsed as against the aggregate addition of INR 3,95,13,400/- carried by the AO.

6.3. Dis-satisfied and aggrieved by the partial relief extended by the CIT(A), the assessee has preferred appeal before the Tribunal. Likewise, the Revenue has also knocked the door of the Tribunal against the part relief granted by CIT(A).

7. At the time of hearing, Ld. Counsel reiterated the submissions made before the lower authorities and strongly contended that while the diary/loose papers might have been found and seized from the premises of the assessee, the entries recorded in such loose papers do not belong to or pertain to the assessee at all and is devoid of any corroboration.

7.1. The Ld. Counsel broadly pointed out that the assessee being a 'Mukhiya' of the community at Muradnagar, Ghaziabad, the residents who intend to go through transactions of any nature, may be in agriculture land, other land, loan transaction etc. would approach the 'Mukhiya' [assessee herein] to get the transaction notified by the assessee for the sake of security and evidence in the hour of need. The diary/loose papers found are only random jotting made by office person but have no meaning or connection with the income or the funds of the assessee. No weight thus could be given to such rough entries which are neither in the writing of the assessee nor these entries are supported by any corroborative evidence/documents despite extensive search at the premises of the assessee.

7.2. The Ld. Counsel asserted that the additions towards alleged unexplained investment and unexplained expenditure were made by the AO solely on the basis of the entries found recorded in the diary/loose papers without an *iota* of corroborative evidences. The Ld. Counsel asserted that the Revenue authorities have mis-interpreted and mis-applied the provision of s. 132(4A), s. 292C, s. 153A, s. 69, s. 69C and other provisions of the Act. It was contended that the legal position expounded by the judicial precedents have not been applied in correct perspective while making the addition. The Ld. Counsel emphasizes that being 'Mukhiya' of the community, a large number of people keep coming

to him on daily basis for his attention and resolution of their problems and proposed purchase/sale in contemplation by them. The loose papers/diary showing the entries detected in the search plausibly may relate to any of such persons visiting the premises of the assessee. The entries in the loose papers/diary are totally unrelated to the assessee and no corroboration of such entries has been found at the premises of the assessee either. It was alleged that the action of the AO was wrongly triggered based on such dumb papers/diary containing scribbling, rough/vague entries without any corroboration. It was pointed out that the assessee has neither purchased any plot from one Mr. Pintu as alleged nor any document was found as shown in the entries reflected in the loose papers/diary. The AO has made additions as an *ipse dixit* and in arbitrary manner disregarding the absence of corroboration and also ignoring overwhelming social obligations of the assessee where large number of people keep visiting him on daily basis. The Ld. Counsel thus essentially contended that entries in loose papers/diary do not belong to him at all and mere non-speaking documents of such type would not give rise to such additions.

7.3. The Ld. Counsel submitted that the CIT(A) brushed aside such contention of the assessee that entries found in the loose paper/diary do not belong to him solely because such loose papers/diary were seized from the premises of the assessee. The CIT(A) has wrongly quantified the additions based on 'Peak Theory' rather than granting complete relief from unsupported additions made by AO.

7.4. The Ld. Counsel broadly pointed out that;

- (i) the entries found recorded has no relation to the assessee, name of the assessee is not mentioned against such entries, scribbings and same are not in the handwriting of the assessee;
- (ii) the entries found in the loose papers/diary are without corroborative material or evidence or supported by any evidence found in the course of search proceedings;
- (iii) the entries in loose papers/diary entries were never confronted to the assessee under s. 132(4) of the Act at the time of search;

(iv) the statutory presumption available under s. 132(4A) r.w.s 292C of the Act is not conclusive but a rebuttable presumption and thus does not give license to Revenue authorities to make arbitrary addition towards fictional income.

7.5. The Ld. Counsel for the assessee relied upon host of judicial pronouncements:-

- [a] *CIT vs Shadiram Ganga Prasad, S.P.Kanodia & Smt. Premlata Kanodia 2010 SCC Online All 3548 (All.High Court);*
- [b] *P.R.Metrani vs CIT, Bangalore [2007] 1 SCC 789;*
- [c] *Pushkar Narain Sarraf vs CIT 1990 SCC Online All 825;*
- [d] *CIT, Delhi (Central)-II vs D.K.Gupta [ITA No.1126/2008] vide order dated 26.09.2008 (Delhi High Court);*
- [e] *Neeraj Goel vs ACIT 2019 SCC Online ITAT 66 vide order dated 28.02.2019;*
- [f] *CCBI vs V.C.Shukla and Ors. (1998) 3 SCC 410; and*
- [g] *Common Cause and Ors. Vs Union of India and Ors. (2017) 11 SCC 731.*

7.6. Based on the elucidation of Legal position by the judicial dicta, the Ld. Counsel contended that the statutory presumption contemplated under s. 132(4A) r.w.s. 292C of the Act are not absolute but rebuttable. Such presumptions are not available to the Revenue authorities in the peculiar facts of the present case. The Ld. Counsel also contended that statutory presumptions are limited in its scope, besides being rebuttable. The Ld. Counsel further submitted that in the absence of any corroborative material mere entries found cannot be said to be pertaining to or belonging to the assessee. The assessee has rebutted statutory presumption by its denial which is further re-enforced by absence of any corroborative material etc. The Revenue has also failed to discharge its onus which shifted on to it. While placing overwhelming reliance on innocuous entries made by the AO, no enquiry has been made at any stage either to find out as to whether such entries have actually materialized or are merely a make believe, insofar as present assessee is concerned. The additions made based on some inchoate entries allegedly found in the search on the strength of statutory presumptions

under s. 132(4A) r.w.s 292C of the Act dehors the peculiar circumstances, are wholly unjustified.

7.7. The Ld. Counsel also submitted that despite the allegation of cash receipts and cash payments as per the so-called entries, no unaccounted cash was found from the premises of the assessee *per se*. Such facts also support the non-existence of such entries on behalf of the assessee.

7.8. The Ld. Counsel next submitted that the 'Peak Theory' has been wrongly applied by the CIT(A) instead of complete relief. Such action is driven by the presumption that the entries of receipts and payment did exist but the payments have been consummated out of receipts and vica-versa calling for application of 'Peak Theory'. The Ld. Counsel submitted that both the authorities have thus mis-directed themselves in law.

8. Per contra, the Ld.CIT DR for the Revenue strongly relied upon the assessment order. The Ld.CIT DR submitted that formidable evidence in the form of diary/loose papers showing entries were found from the premises of the assessee and therefore statutory presumption under s. 132(4A) r.w.s 292C gets triggered and a simplicitor denial by the assessee that the diary/loose papers/receipts do not belong to the assessee, is not sufficient *per se* to shift the onus on the Revenue. It was be unrealistic and illogical to assume that entries found in the diary/loose paper etc. from the premises of the assessee do not belong to him. The Ld.CIT DR thus contends that the onus squarely lies on the assessee to rebut the presumptions available to the Revenue where he has miserably failed.

8.1. The Ld.CIT DR pointed that as regards unexplained investment in plot, the AO has scanned the relevant page No.7 of the Annexure (A-8) which vouches for purchase of plot by the assessee from Mr. Pintu for INR 30 lakhs and further expenses incurred to the tune of INR 18,04,200/-. The overall unrecorded payment thus made at INR 48,04,200/- was rightly treated by the AO as unexplained investment under s. 69 of the Act. Likewise the entries found recorded in diary showing payment of different amounts aggregating to INR 3,47,09,200/- has been brought to tax under s. 69C by the AO in the absence of any cogent explanation.

8.2. The Ld.CIT DR thus contended that the CIT(A) was incorrect in granting partial relief to the assessee applying 'Peak Theory' rather making separate additions on both counts.

9. As noted in the preceding paras, the additions made by the AO towards unaccounted investment on purchase of plot and unexplained payments based on entries found recorded in the diary etc. is in controversy. As a corollary thereto, legal questions towards extent of presumptions available under s. 132(4) r.w.s. 292C of the Act also arises.

9.1. As per the case records, it is the case of the assessee that he is holding the capacity of a 'Mukhiya' in his village and a large number of people routinely keep visiting his premises on regular basis to discuss their problems and seek their support and resolution. The transactions proposed to be carried out by them are informed to the assessee 'Mukhiya' for his support and guidance and to keep him in confidence. In this peculiar background, the entries in the loose paper found recorded requires to be seen with greater degree of caution and circumspection.

9.2. The assessee states to have denied the entries in the loose paper to be relatable to the assessee. In a customary query put in the course of hearing by the Bench, it emerges that no queries in relation to impugned entries were raised by the authorized officer under s. 132(4) of the Act.

9.3. It may pertinent to observe that standard of proof for rebutting presumption is that of preponderance of probabilities and not beyond reasonable doubt. Whereas s. 132(4) attaches evidentiary value, in the absence of any enquiry and in the absence of any corroborative evidences, the persuasive burden lay upon the assessee is on a far lower pedestal.

9.4. In this backdrop, it is the key plank of the assessee that he has all along taken an unequivocal stand that he is not aware of nature of such entries which are not in the hand writing of the assessee. The entries contained in the loose paper/diary have neither been given effect nor any material shown found in the course of search which may be seen attributable to such entries. The assessee cannot plausibly offer an explanation on the entries not carried out or executed by him. The assessee has thus disassociated himself from the entries recorded

in the diary etc. completely. In a testament to its bonafides, it is pleaded on behalf of the assessee that despite being in the cusp of a fragile situation of search, nothing incriminating in the form of unaccounted cash or jewellery or other material could be confronted to the assessee. This fact also circumstantially vouches for the propriety of the version of the assessee and leaves no legitimate reason to taint the bonafides.

9.5. The AO appears to have mainly relied upon the entries recorded in the dairy. No independent enquiry from the recipient of the payments, whereabouts a plot from the office of the Sub-Registrar etc. has been made. No worthwhile enquiry thus has been done in the instant case. The Revenue itself is to blame such lapses.

9.6. The assessee was not acquiesced with the entries so made. The approach of the AO to draw adverse inference against the assessee solely on the basis of entries found in a diary in the course of search without making an *iota* of enquiry at the time of search or in the course of assessment do not appear sound.

10. Section 132(4A) creates a presumption with respect to the truthfulness or genuineness of the contents of the books of account, its parts, signature and handwriting, etc., found during a search. However, while the operation of section 132(4A) is not extended to the regular assessment in view of judgment in the case of *Metrani (HUF) vs. CIT (2006) 287 ITR 209(SC)*, the operation of s. 292C seeks to extend the presumption even to assessment proceedings. The presumption under s. 132(4A) and s. 292C are however rebuttable. S. 132(4A) and s. 292C are replica of each other and expression used in such provisions are 'may presume' which is also the expression used in s. 114 of the Evidence Act and it was not a mandate that whenever the books of account were seized, the Court shall necessarily draw the presumption, irrespective of any other factors which may dissuade the Court from doing so as held in *ITO vs. T. Abdul Majeed (1987) 169 ITR 440 (ker)*.

11. It is thus essentially the case of assessee that mere entries in the diary would not give rise to a conclusive presumption of any contrived and unreported transactions against the assessee *per se*. As noted, no purposeful

enquiries have been carried out by the AO despite clear stand of the assessee towards disowning the entries found recorded in the diary.

12. Noticeably, the Hon'ble Gujarat High Court in the case of *Maulikumar K Shah 307 ITR 137 (Guj)* observed that mere entries in seized diary is not sufficient to prove the assessee is indulged in such transactions.

13. To summarize, the judgment cited on behalf of the assessee have held in chorus that the presumption available u/s 132(4A) r.w.s 292C of the Act are rebuttable presumptions. The judgments cited on behalf of the Revenue do not say anything different. It is asserted on behalf of the assessee that the entries in loose papers/documents do not belong to the assessee. The entries could relate to any visitor coming for consultations on their proposed transaction. The assessee has denied the contents of loose papers. In the absence of any corroborative material or any admission on the part of the assessee, the primary onus which lay upon the assessee stood discharged. It is difficult to conceive as to how the assessee would be able to disprove the contents of the loose papers/documents. The Revenue, on its part, has not made any worthwhile inquiry independently using tools available under s. 133(6) or s.131, except making enquiries from the assessee at the time of assessment. No material is brought on record to justify the contents of the loose papers/diary. The presumption available u/s 132(4A) & S. 292C of the Act being rebuttable, has to be seen in the light of direct and circumstantial evidences. Despite extreme course of search, no irregularity in the form of excess cash or other unaccounted assets has been claimed to be discovered. The circumstantial evidence thus, does not stand contrary to the assertions made by the assessee. The additions based on mere discovery of diary without anything more, in such circumstances would tantamount to assuming such entry to be conclusive for the purpose of assessment. Such view, if taken, would run contrary to the judicial *dicta* available in this regard. The adverse view taken by the AO as well by Ld.CIT(A) based on the entries in diary seized in the course of search appears to be of abstract nature and without corroboration. Preponderance of probabilities in the facts of the present case are in favour of the assessee and against the Revenue. It is well settled that onus lies on the person who alleges.

The assessee cannot be placed with impossible burden to prove a negative point as held in the case of *K.P.Varghese vs ITO [1991] 131 ITR 597 (SC)*. No negative evidence to support the entries was found despite a drastic step of search. The absence of material and denial by the assessee coupled with social status of the assessee where, as claimed, number of people regularly visit the premises of the assessee, do raise estoppels. The benefit of doubt thus, requires to go in favour of the assessee. The CIT(A) was thus not justified in applying 'Peak Theory' to partially confirm additions carried out by AO. Where the veracity of entries itself is not conclusively established, the additions made by the AO were not justified at all.

14. In view of the multiple factors noted above, the additions made in the instant case cannot be countenanced. The order of the CIT(A) is thus modified and additions made by the AO stands reversed.

15. Since the issue has been determined in favour of the assessee on merits, other objections on legal and factual aspects raised by the assessee do not call for separate adjudication.

16. In the result, captioned appeal of the assessee concerning AY 2011-12 is allowed whereas the appeal of the Revenue is dismissed.

ITA No.1952/Del/2023 [Assessment Year : 2013-14] (Assessee's appeal)

17. As per the grounds of appeal, the assessee has challenged the order of the CIT(A) and the AO broadly on three points namely (i) the additions made in the instant case are not permissible on the basis of entries found in diary alone, in the absence of any corroborative incriminating documents found in the course of search and seizure operation; (ii) the approval granted under s. 153D of the Act by the Competent Authority to the assessment order framed under s. 153A of the Act did not confirm to the requirement of law and therefore, consequential assessment order is bad in law; and (iii) the merits of additions made by the AO amounting to INR 18,50,000/-.

18. We have heard the rival submissions from respective sides and perused the assessment order and the first appellate order. The material referred to and

relied upon in the course of hearing as well as case laws cited have been carefully perused.

19. Identical issue towards alleged unexplained investment by way of purchase of plot from one Mr. Pintu arose in AY 2011-12. The allegation was labeled against the assessee based on jottings in loose papers/diary. Such additions have been deleted in AY 2011-12 having regard to complete lack of corroborative evidences and absence of enquiry in the course of s.132(4) of the Act. The social status of the assessee being 'Mukhiya' of the village was also borne in mind. The legal position was perused and in the absence of any cogent evidence against the assessee, it was held that the preponderance of probabilities do not support the case of the AO. The facts placed in AY 2013-14 are also identical. No documentary evidence has been found towards alleged purchase of plot from Mr. Pintu giving rise to additions of INR 18,50,000/-. The observation made by the Hon'ble Gujarat High Court in the case of *Maulikumar K Shah 307 ITR 137 (Guj.)* that mere entries in seized diary are not sufficient to prove the assessee is indulged in such transaction, was taken into account. The delineations made in AY 2011-12 shall thus apply *mutatis mutandis* to the instant appeal concerning AY 2013-14. The action of the CIT(A) is thus set aside and the additions based on uncorroborated entries stands deleted.

20. In the result, the captioned appeal of the assessee is allowed.

ITA No.1953/Del/2023 [Assessment Year : 2015-16] (Assessee's appeal)

21. As per the grounds of appeal, the assessee has challenged the order of the CIT(A) and AO broadly on three points namely, (i) the additions made in the instant case are not permissible in the absence of any incriminating documents found in the course of search and seizure operation; (ii) the approval granted under s. 153D of the Act by the Competent Authority to the assessment order framed under s. 153A of the Act did not confirm to the requirement of law and therefore, consequential assessment order is bad in law; and (iii) the merits of additions made by the AO amounting to INR 19,58,000/-.

22. We have heard the rival submissions from the respective sides and perused the assessment order and the first appellate order. The material

referred to and relied upon in the course of hearing as well as case laws cited have been carefully perused.

23. The AO, in the instant case, has made additions of INR 19,58,000/- based on entries found in small diary found in the course of search marked at page 7 of Annexure A-3. The CIT(A) confirmed the aforesaid action. The assessee reiterate the contentions that there is no basis for making the impugned additions except some rough jottings. The assessee relies upon the submissions made before the AO and the CIT(A) that these transactions are not undertaken by him nor are recorded in his hand-writing. The hand-written details appear to relate to wedding of one Mr. Viabhav Tyagi, son of a close friend Shri Praveen Tyagi. The entries are only rough jotting which could be a budget for the wedding or something else.

24. In the absence of any corroboration papers in relation to such jotting found in the course of search and in the absence of any independent enquiry by the AO, the principles applicable to other AYs shall apply *mutatis mutandis*. Thus the entries found in the diary etc. on a standalone basis cannot be regarded as sufficient to make additions. The observation made by the Hon'ble Gujarat High Court in the case of *Maulikumar K Shah 307 ITR 137 (Guj.)* observed that mere entries in seized diary are not sufficient to prove the assessee is indulged in such transaction, would applied. In totality, the preponderance of probabilities are against the revenue and in favour of the assessee. The action of the CIT(A) is thus set aside and the additions made by the AO stands deleted.

25. In the result, the captioned appeal of the assessee is allowed.

26. In the combined result, all captioned appeals of the assessee are allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 17th March, 2025.

Sd/-

Sd/-

(VIMAL KUMAR)
JUDICIAL MEMBER

Amit Kumar, Sr.P.S

(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI