

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

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER**

ITA NO. 6312/MUM/2016 : **A.Y : 2007-08**

Dy. Commissioner of Income Tax, Vs. Shri Dhaval D. Shah
Central Circle-2(3), Mumbai 401, Deepak Building, 3rd floor,
(Appellant) S.V. Road, Opp. Pawan Hans,
Vile Parle (W), Mumbai
PAN : AAHPS2691E (Respondent)

Appellant by : Shri Suman Kumar

Respondent by : Shri Nikhil Tiwari

Date of Hearing : 08/11/2017

Date of Pronouncement : 30/11/2017

ORDER

PER G.S. PANNU, AM :

The captioned appeal by the Revenue is directed against the order of CIT(A)-48, Mumbai dated 08.08.2016 pertaining to the Assessment Year 2007-08, which in turn has arisen from the order passed by the Assessing Officer, Mumbai dated 31.03.2015 u/s 153A r.w.s. 143(3) of the Income Tax Act, 1961 (in short 'the Act').

2. In its appeal, Revenue has raised the following Grounds of appeal :-

“(i) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the additions stating that the additions hasnot been made based

on the incriminating material found during the course of search and erred in relying on the decision in the case of Continental Warehousing Corporation (Nhava Seva) (2015) 374 ITR 645 (Bom.) of Hon'ble Bombay High Court without appreciating the fact that the SLP has been admitted by the Hon'ble Supreme Court against the aforesaid decision.

2. *The appellant craves leave to add, to amend and/or alter any grounds of appeal, if need to be.*

3. *The Appellant, therefore, prays that on the grounds stated above, the order of the CIT(A)-48, Mumbai may be set aside and that of the Assessing Officer restored."*

3. In brief, the relevant facts are that the assessee was covered in a search and seizure action carried out by the Department u/s 132(1) of the Act on 17.02.2012. Consequently, a notice u/s 153A(1) of the Act was issued to the assessee on 03.10.2013 in response to which, assessee filed his return of income on 05.12.2013 declaring a total income of Rs.9,19,263/- and in the ensuing assessment finalised u/s 153A(1) r.w.s. 143(3) of the Act dated 31.03.2015, the total income has been assessed at Rs.82,54,940/-. The assessment so made, *inter-alia*, included disallowance of interest paid to the partnership firm in which assessee was a Partner amounting to Rs.73,35,674/-. This disallowance has been deleted by the CIT(A) by noticing that it was not supported by any incriminating material found in the course of search and since on the date of the search, the original assessment did not abate, such an addition could not have been made in the impugned assessment in view of the judgment of the Hon'ble Bombay High Court in the case of *Continental Warehousing Corporation (Nhava Seva)*, [2015] 374 ITR 645 (Bom.). Against such a decision of the CIT(A), Revenue is in appeal before us.

4. From the records, it is emerging that on the date of search, i.e. 17.02.2012, the assessment for Assessment Year 2007-08 had attained finality in view of the assessment finalised u/s 143(3) dated 24.12.2009. Accordingly, in terms of second proviso to Sec. 153A(1) of the Act, such an assessment did not abate. In this factual background, the ratio of the judgment of the Hon'ble Bombay High Court in the case of *Continental Warehousing Corporation (Nhava Seva) (supra)* comes into operation, which prescribes that the impugned addition could have been made by the Assessing Officer only if any incriminating material was found in the course of search relating to such an addition. The discussion in the assessment order does not refer to any incriminating material relating to the disallowance made by the Assessing Officer out of interest paid to the partnership firm in which the assessee is a Partner. The CIT(A) has concluded that there was no incriminating material revealed in the course of search and, therefore, the Assessing Officer was not competent to make the impugned addition in the assessment finalised u/s 153A r.w.s. 143(3) of the Act.

5. Before us, the factual findings of the CIT(A) have not been disputed, but the only point which is sought to be canvassed, as is evident from the Grounds of appeal raised, is that the decision of the Hon'ble Bombay High Court in the case of *Continental Warehousing Corporation (Nhava Seva) (supra)* has not been accepted by the Department as an SLP has been filed in the Hon'ble Supreme Court. In our considered opinion, the order of the CIT(A) deserves to be confirmed inasmuch as it is based on a subsisting decision of the Hon'ble Bombay High Court in the case of *Continental*

Warehousing Corporation (Nhava Seva) (supra). Merely because a SLP has been filed by the Revenue against the judgment of the Hon'ble Bombay High Court does not show any error on the part of the CIT(A) in applying the subsisting judgment of the Hon'ble Bombay High Court in the case of *Continental Warehousing Corporation (Nhava Seva) (supra)*. Therefore, in the absence of any incriminating material, the impugned addition was rightly deleted by the CIT(A) as being lacking in jurisdiction, which is hereby affirmed.

6. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on 30th November, 2017

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Mumbai, Date : 30th November, 2017

SSL

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "B" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai