

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI**

BEFORE SHRI G.S. PANNU (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 2843/MUM/2016
Assessment Year: 2008-09**

The JCIT (OSD) CC-8(1), Room No. 656, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s Green Water Resort Pvt. Ltd., Room No. 505, 5 th Floor, Narayani Bldg., 27, Brabourne Roadm Kolkata, West Bengal - 700001 PAN: AABCJ7993H
(Appellant)		(Respondent)

Revenue by : Shri Rajesh Kumar Yadav (DR)
Assessee by : None

Date of Hearing: 25/10/2017
Date of Pronouncement: 19/01/2018

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the revenue against order dated 28/01/2016 passed by the Ld. Commissioner of Income Tax (Appeals)-50, Mumbai, for the assessment year 2008-09, whereby the Ld. CIT (A) has allowed the appeal filed by the assessee against assessment order passed u/s 143 (3) read with section 153C of the Income Tax Act, 1961 (for short 'the Act').

2. Brief facts of the case are that a search and seizure action u/s 132 of the Act was carried out in the group cases belonging to M/s Enpar Group promoted by Sh. Ravindra Lad. During the search proceedings, documents/loose papers in the form of trial balances belonging to the assessee for the period April, 2010 to March, 2011, April, 2012 to January, 2013 and April, 2011 to March, 2012 were seized. Accordingly, notice u/s 153C read with section 153A (1) (a) was served upon the assessee. In response thereof the

assessee submitted that the return of income filed u/s 139 (1) may be treated as return of income u/s 153C. In the present case, the assessment had been completed u/s 143 (3) read with section 147 of the Act determining the total income at Rs. 78,470/-.

3. From the perusal of the balance sheets, it was observed that during the year the assessee had raised a sum of Rs. 9,83,70,000/- by allotting 4,91,85 equity shares of Rs. 10 each at a premium of Rs. 190 per share. The assessee filed required details of 18 parties to whom, the AO issued notice u/s 133 (6) of the Act calling the details of return of income filed, copy of bank statements, copies of audited reports. After going through the details, the AO issued show cause notice as to why the addition to the share capital should not be treated as unexplained credit u/s 68 of the Act. The assessee submitted the detailed reply objecting the addition. The AO rejected the contention of the assessee and made addition of the said amount u/s 68 of the Act and determined the total income of the assessee at Rs. 9,84,48,470/-. The assessee challenged the assessment order before the Ld. CIT (A). The Ld. CIT (A) allowed the appeal of the assessee and directed the AO to delete the addition.

4. Aggrieved by the order of Ld. CIT (Appeals), the revenue has preferred this appeal before the Tribunal on the following effective ground:-

“On the facts and in the circumstances of the case and in law, the CIT (A) has erred in deleting the addition of Rs. 9,83,70,000/- being unexplained cash credit relying on the decision in the case of continental warehousing corporation (Nhava Sheva) Ltd. Without appreciating the fact that the decision of the Bombay High court in the case of All Cargo Logistics Pvt. Ltd. (ITA No. 1414 of 2013) on similar issue has not been accepted by the department and SLP has been filed which is pending.”

5. This case was fixed for hearing for 25.10.2017. On the said date, case was called for hearing, however, none appeared on behalf of the assessee. We further noticed that assessee had not appeared on earlier date of hearing. Since, the Ld. CIT (A) has decided the present appeal by following the order of the Hon'ble jurisdictional High Court, we decided to dispose of the case on the basis of material on record after hearing the Departmental Representative (DR).

6. Before us, the Ld. DR relying on the assessment order submitted that the Ld. CIT (A) has wrongly deleted the addition of Rs. 9,83,70,000/- made by the AO being unexplained cash credit relying on the decision in the case of Continental Warehousing Corporation Ltd. without appreciating the fact that the department has challenged the decision of Hon'ble Bombay High Court in the case of All Cargo Logistics Pvt. Ltd., ITA No. 1414 of 2013 on the similar issue by filing SLP in the Hon'ble Supreme Court.

7. We have perused the orders passed by the authorities below and also gone through the cases relied upon by the parties before the authorities below. The findings of the Ld. CIT (A) on the issue involved in this case reads as under:-

"7.1 I have carefully considered the contention of the AO and the submissions of the AR. I find that though the documents relied upon by the initiating the proceedings u/s 153C for AY 2007-08 to AY 2012-13 pertain to period AY 2010-2011, 2011-12 and 2013-14, no additions have been made those assessment years. The only assessment year in which additions have been made is the AY 2008-09. Even in the assessment year, the additions made were not based on the documents as relied upon by the AO. This clearly shows that no incriminating documents relating to the appellant was seized for A.Y. 2008-09. I also find that the assessment for A.Y. 2008-09 was

completed u/s 143 (3) r.w.s. 147 of the Act before the date of initiation of the search.

7.2 In para 9.6 of the assessment order, the AO has relied on the order of the Hon'ble Bombay High Court in the case of Murli Agro Products Ltd. in ITA No. 36 of 2009. In para 3 of that order, the Hon'ble Bombay High Court observed as under:-

“13. In the present case, there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings which would show that the relief under section 80HHC was erroneous. In such a case, the A.O. while passing the assessment order under Section 153A read with section 143 (3) could not have disturbed the assessment order finalized on 29.12.2000 relating to Section 80HHC deduction and consequently the C.I.T. could not have invoked jurisdiction under Section 263 of the Act.”

7.3 Thus, the High Court observed that the A.O., while passing the assessment order under section 153A r.w.s. 143 (3) could not have disturbed the assessment order already finalized as there was nothing on record to suggest that any material had been unearthed during the search or during the 153A proceedings which would show that the relief under Section 80HHC was erroneous. From this the AO wrongly inferred that the Hon'ble Bombay High Court had held that had any material been unearthed during the 153A proceedings, the A.O. while passing the assessment order under section 153A read with Section 143 (3) could have disturbed the assessment order already finalized.

7.4 The AO relied on the order of the Hon'ble Karnataka High Court in the case of Canara Housing Development Co. (274 CTR 122) (Karnataka) wherein the Hon'ble Court held that the Assessing Officer can determine the total income of the assessee taking into consideration the materials which was the subject-matter of earlier return and the undisclosed income unearthed during the search and also any other income which comes to his notice in course of proceedings u/s 153A.

7.5 The Hon'ble jurisdictional Bombay High Court in case of Commissioner of Income-tax-II, Thane v Continental Warehousing Corporation (Nhava Sheva) Ltd., Bharati Vidyapeeth Medical Foundation, it has been held that no additions can be made for unabated assessments which have achieved finality and for which no incriminating material has been found.

7.6 Thus, I find that the decision of the Hon'ble Karnataka High Court is contrary to the decision of the jurisdictional High Court (Bombay High Court). However, the decision of the jurisdictional court is binding on me. Therefore, respectfully following the decision of the Hon'ble jurisdictional Bombay High Court in case of Commissioner of Income-Tax-II, Thane v Continental Warehousing Corporation (Nhava Sheva) Ltd., I hold that the AO was no justified in making the addition. Accordingly, I direct the AO to delete the addition of Rs. 9,83,70,000/-."

8. We notice that the Ld. CIT (A) has decided the issue in question in favour of the assessee by following the judgment of Hon'ble jurisdictional High Court passed in the case of Commissioner of Income Tax vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. and direct the AO to delete the addition in question. We further notice that the department has not challenged the facts mentioned by the Ld. CIT (A) in its order and challenged the impugned order only on the ground that since the department has challenged the judgment of Hon'ble Bombay High Court passed in the case of All Cargo Logistics Pvt. Ltd., ITA No. 1414 of 2013, on the identical issue, the Ld. CIT (A) ought to have affirmed the addition in question made by the AO. During the course of arguments, neither the Ld. DR contended that the Hon'ble Supreme Court has stayed the operation of the judgment passed by the Hon'ble High Court in Continental Warehousing Corporation (Nhava Sheva) Ltd. nor any document was produced to establish that the Hon'ble Supreme Court has stayed the said judgment of the Hon'ble High Court. Under these circumstances, we do not find any infirmity in the order of the Ld.CIT (A) to

interfere with the same. Since, the impugned order is in accordance with the law laid down by the Hon'ble jurisdictional High Court, we uphold the findings of Ld. CIT (A) and dismiss the sole ground of appeal of the revenue.

In the result, appeal filed by the revenue for assessment year 2008-2009 is dismissed.

Order pronounced in the open court on 19th January, 2018.

Sd/-

(G.S. PANNU)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 19/01/2018

Sd/-

(RAM LAL NEGI)

JUDICIAL MEMBER

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai