

आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA Nos.1363 to 1367/PUN/2014
निर्धारण वर्ष / Assessment Years : 2004-05 to 2008-09

Umesh Dhondiram Shinde,
286, Shinde Residency,
Ruikar Colony,
Kolhapur – 416003

.... अपीलार्थी/Appellant

PAN: ACGPS3218J

Vs.

The Dy. Commissioner of Income Tax,
Central Circle, Kolhapur

.... प्रत्यर्थी / Respondent

Assessee by : Shri M.K. Kulkarni
Revenue by : Shri Ajay Modi, JCIT

सुनवाई की तारीख / Date of Hearing : 27.02.2018	घोषणा की तारीख / Date of Pronouncement: 16.03.2018
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

This bunch of five appeals filed by same assessee are against consolidated order of CIT(A), Kolhapur, dated 10.02.2014 relating to assessment years 2004-05 to 2008-09 against respective orders passed under section 153A r.w.s. 143(3) of Income Tax Act 1961 (in short the 'Act').

2. This bunch of appeals relating to the same assessee for different assessment years were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. The assessee in ITA No.1363/PUN/2014, relating to assessment year 2004-05 has raised the following grounds of appeal:-

- 1) *On the facts and circumstances of the case and in law and on the careful perusal of the assessment order framed under S.153A r.w.s. 143(2) and the Panchanama prepared at the time of search action under S.132(1) of the Act on 23-9-2009, it transpires that the additions were not made on the basis of any material seized during the course of search especially when no assessment was pending on the date of search. The additions being unwarranted be quashed.*
- 2) *On the facts and circumstances of the case and in law that considering the Ground No.1 above the Assessing Officer should have closed the assessments without making assessment for the assessment year under appeal, when no incriminating material was found and seized. The Ld. CIT(A) should not have confirmed the assessment made by the A.O.*
- 3) *On the facts and circumstances of the case and in law and as far as Ground No.1 & 2 above are concerned the reliance is placed on the ITAT judgments in the case of the Parivar Properties (P) Ltd. v. Dy. CIT (2014) 41 Taxmann.com 485 (Del-Trib) and Atul Barot v. Dy. CIT, ITAT Mumbai reported as (2014) 57 (II) ITCL 311 (Mum 'A'Trib).*
- 4) *On the facts and circumstances of the case and in law and considering the Ground No.1 to 3 above the following grounds emerge for consideration:-*
 - 4.1 *Whether on the facts and circumstances of the case and in law the search and seizure action conducted against this appellant is not valid in the absence of existence of reason to believe about existence of one or more of the eventualities catalogued in clauses (a) to (c) of sub-section (1) of S. 132 which is the sine qua non to entitle the authority to make authorization as required by Cl. (A) and (B)?*
 - 4.2 *Whether on the facts and circumstances of the case and in law and for having recourse to assessment for block period under chapter XIV a valid search under S. 132 of Ch. XIII, is a condition precedent and a mere fact of search is not enough to give jurisdiction to A.O. have recourse to provision under Ch. XIV of the Act for completion of assessments under Ss. 153A to 153C of the Act?*
 - 4.3 *Whether on the facts and circumstances of the case and in law and for having recourse of block assessment as provided in Ss. 153A to 153C of the Act of the authority before ordering the extreme step of search action u/s 132 was required to be satisfied in consequence of information in his possession about the existence of reason for eventualities catalogued in Cl. (a) of sub-section (1) of S. 132 since under Cl. (a) the specific document or books of account required to be produced are mandatorily required to be specified ? If this condition is not satisfied the search will not be valid and the consequent assessments framed would be bad in law and without jurisdiction?*
 - 4.4 *Whether on the facts and circumstances of the case and in law and for having recourse to block assessment as provided in Ss. 153A to 153C of the Act the authority, before ordering extreme step of search action u/s 132 was required to be satisfied in consequence of information in his possession about eventuality catalogued in Cl. (b) of sub-section (1) of S.*

132, which mandates to record that any person to whom a summons or notice has been issued or might be issued will not, or would not, produce or cause to be produced any books of account or other documents which will be useful for, or relevant to any proceedings under this Act? It is mandatory to specify such position in the reasons recorded and in the event of non-satisfaction of this condition the search action will be invalid and consequent assessments also will become illegal and without jurisdiction?

- 4.5 Whether on the facts and circumstances of the case and in law and for having recourse to block assessment as provided in Ss. 153A to 153C the authority before ordering the extreme step of search action u/s 132 was required to be satisfied about the existence of reasons for eventuality catalogued in Cl. (c) of sub-section (1) of S. 132 since under the CL (c) it is mandatorily required to be specified that any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been or would not be disclosed for the purposes of assessment under the Act? If this condition is not satisfied the search action will become invalid and the consequent assessments framed would also be bad in law and without jurisdiction? A stiffer burden lies on the authorizing authority to justify the grounds of his belief under Cl. (c) and Hon'ble Tribunal is bound to examine whether the authority has discharged such burden?
- 4.6 Whether on the facts and circumstances of the case and in law the search action conducted against the present appellant-assessee was simply based on 'satisfaction Note' prepared by the authority is valid in law since 'satisfaction Note' cannot constitute "information"?
- 4.7 On the facts and circumstances of the case and in law and since the assessment in the present case made under Chapter XIV consequent upon search action u/s 132 and has been specifically challenged that the circumstances contemplated under S. 132(1) did not exist, this is a matter which goes to the root of the matter about jurisdiction of authority to proceed under Ch. XIV, this Hon'ble Tribunal would be within its Jurisdiction to go into the question as to whether the search was conducted consequent upon the authorization having been issued, validly or not.
- 4.8 On the facts and circumstances of the case and in law and in view of the Grounds of Appeal Nos. 1 to 8 the search action conducted against assessee u/s. 132(1) is invalid and consequently the assessment completed u/s. 153A r.w.s. 143(3) is bad in law and without jurisdiction be set aside.
- 5) On the facts and circumstances of the case and in law the Ld. CIT(A) was not justified in confirming the additions of Rs.6,00,000/- made by the A.O. not accepting the claim of receipt of agricultural income. It be deleted.
- 6) On the facts and circumstances of the case and in law the Ld. CIT(A) was not justified in confirming the addition made by the A.O. of Rs.18,01,889/- invoking the provisions of S. 2(22)(e) of the Act. The addition being illegal and without jurisdiction be deleted.
- 7) On the facts and circumstances of the case and in law the Ld.CIT(A) was not justified in confirming the addition of Rs.2,25,000/- made by the A.O. rejecting the claim of depreciation @ 20% on Motor car holding that it was a new claim. The assessee is entitled to claim such depreciation

considering the anatomy of the provisions of S.153A to 153C of the Act. The claim be allowed.

- 8) *On the facts and circumstances of the case and in law the Ld.CIT(A) was not justified in confirming the addition of Rs.13,92,618/- made by the A.O on account of interest payment to Ravi Co. Op. Bank probably invoking S. 43B of the Act. The claim being properly made and allowable the addition be deleted.*
- 9) *On the facts and circumstances of the case and in law the appeal is delayed by 4 days due to unavoidable circumstances. The detailed affidavit for condonation of delay will be filed subsequently. It is therefore. Prayed that the delay be condoned and the appeal be admitted for hearing in accordance with the provisions of law.*
- 10) *On the facts and circumstances of the case and in law the levy of interest u/s 234A, 234B and 234C is not justified.*

4. All the appeals were filed after delay of seven days, for which the assessee has pointed out that there was calculation error in number of days and also because of ending days being Saturday and Sunday. The assessee has filed an affidavit in this regard. In view of the above contention of assessee, we find merit in the aforesaid and condone the delay of seven days in filing appeal late before the Tribunal. We proceed to decide the issue after hearing both the learned Authorized Representatives.

5. Briefly, in the facts of the case, the assessee is an individual engaged in the business of construction of civil contract works, developers & builders, trading in shares & scripts. The assessee for each of the years had furnished return of income within due date of filing return of income. Thereafter, search operations and Survey operation under section 132/133A were carried out at the premises of assessee on 23.09.2009. Consequent thereto, the assessee was issued notice under section 153A of the Act. The assessee in response thereto, filed returns of income for the respective years at a figure of loss higher than originally filed. The Assessing Officer decided various issues in the case of assessee. The first issue was in respect of agricultural income and addition was made in the

respective years on account of aforesaid agricultural income. Secondly, addition was made on account of deemed dividend under section 2(22)(e) of the Act in assessment years 2004-05 and 2005-06. Further, in assessment years 2004-05 to 2006-07, the Assessing Officer also made addition on account of interest payments to Ravi Cooperative Bank. Another set of addition was made on account of disallowance of expenses in assessment year 2005-06 to 2009-10. The Assessing Officer also made addition on account of cash in hand in assessment years 2005-06, 2007-08 to 2009-10. The assessee made fresh claim of depreciation on Motor Car in the return of income filed under section 153A of the Act in assessment years 2004-05 and 2005-06 and similarly, claim of losses suffered in trading of shares was made in assessment year 2006-07, which was also a new claim made by the assessee. The Assessing Officer disallowed the same.

6. The CIT(A) upheld the additions made by Assessing Officer in the respective years on different issues, against which the assessee is in appeal.

7. The learned Authorized Representative for the assessee before us pointed out that the years under appeal are assessment years 2004-05 to 2008-09, for which original return of income was filed in time and thereafter, search proceedings had taken place on 23.09.2009. The years under appeal i.e. assessment years 2004-05 to 2008-09 were the assessment years where the proceedings had not abated and the Assessing Officer thus, pointed out that against non-abated assessment years, no addition could be made in the hands of assessee in the absence of any incriminating material found during the course of search.

8. The learned Departmental Representative for the Revenue on the other hand, pointed out that in case these were non-abated proceedings, then the assessee was also precluded from making any fresh claim in the return of income filed under section 153A of the Act.

9. We have heard the rival contentions and perused the record. The years under appeal are assessment years 2004-05 to 2008-09. The assessee in each of the years had filed the return of income within prescribed period and time for taking up for scrutiny had also lapsed before the date of search on the assessee. Survey proceedings had taken place on 23.09.2009. The assessee in response to notice issued under section 153A of the Act, made certain fresh claims in the returns of income filed. The Assessing Officer while completing proceedings under section 153A r.w.s. 143(3) of the Act made certain additions on account of agricultural income, deemed dividend under section 2(22)(e) of the Act, cash in hand and adhoc addition out of expenses and interest payment to Ravi Cooperative Bank. The new claim of assessee in the returns of income on account of depreciation on Motor Car in assessment years 2004-05 and 2005-06 and loss on trading of shares in assessment year 2006-07 was rejected by the Assessing Officer.

10. The issue which arises is in respect of respective additions made and the rejection of new claim of deduction in the returns of income filed under section 153A of the Act in respect of assessment years for which assessment proceedings have not abated.

11. We find that the issue of abated and non-abated assessment proceedings has been decided by Hon'ble Bombay High Court in CIT Vs. (1) Continental Warehousing Corporation (Nhava Sheva) Ltd. (2) All Cargo Global Logistics Ltd.,

(2015) 374 ITR 645 (Bom). The said ratio has been applied by Pune Bench of Tribunal in Shri Gajendra D. Pawar Vs. DCIT in ITA Nos.1009 to 1012/PUN/2015, relating to assessment years 2005-06 to 2008-09, order dated 31.10.2017. The first issue which was decided by the Tribunal was in respect of claim of expenditure and in some cases on account of depreciation made for the first time in the returns of income filed under section 153A of the Act. The Tribunal vide para 11 held as under:-

“11. We have heard the rival contentions and perused the record. The first issue which arises in the present appeal is in respect of claim of expenditure on account of interest and in some cases on account of depreciation. Admittedly, the said expenditure was not claimed by the assessee in the return of income filed prior to search at the premises of assessee. However, consequent to search proceedings carried on the premises of assessee, notice under section 153A of the Act was served upon the assessee. In response thereto, in the return of income filed by the assessee, fresh claim of interest expenditure and depreciation on certain assets was made. The said claim was not allowed by the authorities below. The assessments for assessment years 2005-06 to 2008-09 i.e. appeals listed before us have not abated. In such cases, where the assessment has not abated, then the Hon'ble Bombay High Court (supra) has laid down that only undisclosed income and undisclosed assets detected during the course of search could be brought to tax. Applying the said ratio to the facts of the present case, we hold that the assessee is not entitled to claim any deduction on account of fresh claim i.e. on account of interest and depreciation in the respective years. Applying the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. (1) Continental Warehousing Corporation (Nhava Sheva) Ltd. (2) All Cargo Global Logistics Ltd. (supra), we hold that in the years under appeal, where the assessment has not abated, then no deduction is to be allowed in respect of fresh claim made in the return of income filed in response to notice under section 153A of the Act. Consequently, the first issue raised by way of ground of appeal No.1 in assessment year 2005-06, grounds of appeal No.1 and 3 in assessment year 2006-07, ground of appeal No.1 in assessment years 2007-08 and 2008-09 are dismissed.”

12. The issue arising before us is identical to the issue before the Tribunal in Shri Gajendra D. Pawar Vs. DCIT (supra) and following the same parity of reasoning, we hold that the assessee is not entitled to make any fresh claim of deduction on following counts:-

Sr. No.	Particulars	2004-05	2005-06	2006-07
1	Depreciation on Motor Car	2,25,000/- (new claim)	1,80,488/- (new claim)	-
2	Loss suffered in trading of shares	-	-	47,95,057/- (new claim)

13. Now, coming to the addition made by the Assessing Officer on account of various issues in the assessment years which are non-abated assessment years. We find this issue was also elaborately considered by the Tribunal in Shri Gajendra D. Pawar Vs. DCIT (supra) and it was held as under:-

“16. We have heard the rival contentions and perused the record. The second issue which is arising in the bunch of appeals is against the disallowance of interest expenditure on account of interest free advances made by the assessee from year to year. Admittedly, in none of the cases, any incriminating documents were found in this regard. The assessments for all these years have not abated. The question which arises is whether in the circumstances where no incriminating document was found from the possession of assessee with regard to such disallowance of interest expenditure can the same be made in the case of non-abated assessments?”

17. The Pune Bench of Tribunal in Kranti Realtors Pvt. Ltd. Vs. ACIT (supra) had held that even in the absence of any incriminating document where the assessment was completed under section 143(1) of the Act and the assessment had not abated, but such an addition could be made. However, before the Mumbai Bench of Tribunal in the case of Deepak Agarwal Vs. ACIT (supra), the issue was in respect of non-abated assessment proceedings, wherein incriminating material was not found and the assessment was either made under section 143(1) or 143(3) of the Act. The Hon'ble Bombay High Court in CIT Vs. Shri Deepak Kumar Agarwal (supra) has upheld the order of Tribunal and has held that the additions made in the absence of any incriminating material in the case of non-abated proceedings are not sustainable and are to be deleted in cases of assessments under section 143(1) or 143(3) of the Act. In view of the ratio laid down by the jurisdictional High Court, we hold that in the case of non-abated assessments for the relevant assessment years, where no incriminating document was found during the course of search, whether the assessment was completed under section 143(1) or 143(3) of the Act, there is no basis for making the routine disallowance as made by the Assessing Officer i.e. the disallowance of interest expenditure on account of interest free advances made by the assessee. Accordingly, we hold so. The issue raised by the assessee in the bunch of appeals is thus, allowed.”

14. In the facts of the present case also, admittedly, no incriminating document was found, on the basis of which additions were made. In view thereof and following the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. (1) Continental Warehousing Corporation (Nhava Sheva) Ltd. (2) All Cargo Global Logistics Ltd. (supra) and in CIT Vs. Shri Deepak Kumar Agarwal in Income Tax Appeal No.1709 of 2014, judgment dated 11.09.2017, we find that in the absence of any incriminating document, no addition is warranted in the hands of assessee in the respective years which are non-abated assessment years.

Accordingly, we direct the Assessing Officer to delete all the additions made in the respective years from assessment years 2004-05 to 2008-09. Further, the assessee is also not entitled to any fresh claim on account of depreciation on Motor Car and loss on trading of shares. The grounds of appeal raised by the assessee are thus, partly allowed.

15. In the result, all the appeals of assessee are partly allowed.

Order pronounced on this 16th day of March, 2018.

Sd/-
(ANIL CHATURVEDI)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-
(SUSHMA CHOWLA)

न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 16th March, 2018.

GCVSR

आदेश की प्रतिलिपि अग्रहित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A), Kolhapur;
4. The CIT-I / II, Kolhapur / CIT(Central), Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "ए" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune