

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA Nos.1210 & 1211/PUN/2015
निर्धारण वर्ष / Assessment Years : 2010-11 & 2011-12

Shri Gajendra D. Pawar,
1641, Sadashiv Peth,
Madhav Heritage,
Tilak Road, Pune – 411030

PAN : AFEPP7678E

.....अपीलार्थी / Appellant

बनाम / V/s.

Dy. Commissioner of Income Tax,
Central Circle -1(1), Pune

.....प्रत्यर्थी / Respondent

Assessee by : Shri Nikhil Pathak and
Shri Suhas Bora
Revenue by : Shri B. Kishore

सुनवाई की तारीख / Date of Hearing : 07-02-2018

घोषणा की तारीख / Date of Pronouncement : 28-03-2018

आदेश / ORDER

PER VIKAS AWASTHY, JM :

These two appeals have been filed by the assessee. ITA No. 1210/PUN/2015 is directed against the order of Commissioner of Income Tax (Appeals)-11, Pune dated 31-03-2015 for the assessment year 2010-11. In ITA No. 1211/PUN/2015 the assessee has assailed the order of

Commissioner of Income Tax (Appeals)-11, Pune dated 30-04-2015 for the assessment year 2011-12.

Since, the issues involved in both the appeals are identical, these appeals are taken up together for adjudication and are decided vide this common order.

2. The brief facts of the case as emanating from records are : A search action u/s. 132 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") was conducted in the case of Pinnacle Group on 10-02-2011. The assessee is the proprietor of M/s. Pinnacle Constructions and Director in Pinnacle Constro Homes Pvt. Ltd., the prime concerns of the group. Notice u/s. 153A of the Act was issued to the assessee on 20-10-2011 for assessment year 2010-11. In response to the said notice the assessee filed his return of income on 29-06-2012 declaring total income of Rs.2,82,59,870/-. The assessment for assessment year 2010-11 was completed u/s. 153A r.w.s. 143(3) vide order dated 28-02-2013. The Assessing Officer made following additions in the income returned by the assessee:

- | | |
|--|-------------------|
| i. On money received on sale of flats | Rs.1,05,07,000/-. |
| ii. Disallowance of fresh claim of interest on loan, depreciation and membership fee | Rs.14,61,006/-. |
| iii. Disallowance of telephone and travelling expense | Rs.21,150/-. |
| iv. Proportionate interest disallowance on interest free advance | Rs.1,30,000/-. |

For the assessment year 2011-12 the assessee filed his return of income u/s. 139(1) on 29-09-2011 declaring total income of Rs.8,44,94,115/-. Thereafter, the assessee filed revised return of income

on 23-02-2013 declaring income of Rs.9,23,22,087/-. In scrutiny assessment proceedings the Assessing Officer made following additions/disallowances :

- i. Disallowance of interest Rs.5,85,780/-.
- ii. Disallowance of telephone & travelling expense Rs.2,29,662/-.
- iii. On money received on sale of flats Rs.1,96,88,000/-.

Aggrieved by the additions made during assessment proceedings, the assessee filed appeals before the Commissioner of Income Tax (Appeals) for the respective assessment years. The Commissioner of Income Tax (Appeals) rejected the appeals of the assessee in toto for both the assessment years. Now, the assessee is in second appeal before the Tribunal assailing the findings of Commissioner of Income Tax (Appeals) for respective assessment years.

For the sake of convenience we will first take up the appeal in ITA No. 1210/PUN/2015 for assessment year 2010-11.

ITA No. 1210/PUN/2015 (A.Y. 2010-11)

3. Shri Nikhil Pathak appearing on behalf of the assessee submitted at the outset that he is not pressing ground Nos. 4, 5, 6 and 7 raised in the appeal.

3.1 In respect of ground No. 1, the ld. AR submitted that the assessee in the return of income filed in response to notice u/s. 153A disclosed additional income and also claimed certain additional expenditure. The authorities below erred in rejecting assessee's claim on the premise that since these expenditures were not claimed in the original return of income, fresh claim cannot be entertained in return of income filed in response to

notice u/s. 153A of the Act. The ld. AR submitted that the assessment proceedings for the assessment year under appeal were pending as on the date of search. Further, the time for filing revised return of income had also not expired. Since, the assessment proceedings were pending as on the date of search, the assessee could very well make fresh claim in the return of income filed in proceedings u/s. 153A of the Act. The ld. AR in support of his submissions placed reliance on the decision of Hon'ble Bombay High Court in the case of Commissioner of Income Tax Vs. B.G. Shirke Construction Technology Pvt. Ltd. reported as 395 ITR 371. The ld. AR further pointed that the assessee had made similar claim of expenditure in return of income filed in proceedings u/s. 153A for the assessment years 2005-06 to 2008-09. The authorities below rejected the claim of assessee. The assessee carried the matter in appeal before Tribunal. The Tribunal in ITA Nos. 1009 to 1012/PUN/2015 decided on 31-10-2017 rejected the claim of assessee on the ground that the assessments for those years were not pending as on the date of search. The ld. AR pointed that similar disallowance was made by Assessing Officer in assessment year 2009-10. The assessment for assessment year 2009-10 had abated. Thus, the facts in present assessment year are identical to assessment year 2009-10. The ld. AR submitted that the Assessing Officer during assessment proceedings has not verified the correctness of the expenditure and has rejected the same out rightly. The assessee has no objection if the Assessing Officer is directed to verify the correctness of claim made by assessee.

3.2 In respect of ground Nos. 2 and 3 the ld. AR pointed that the Assessing Officer has disallowed interest expenditure in respect of borrowed funds on the premise that the assessee has diverted Rs.10 lakhs

interest bearing funds towards non-business purpose. The authorities below have failed to appreciate that own funds and interest free funds of assessee were much more than the amount advanced by assessee to its sister concern. The ld. AR referred to Balance Sheet of assessee at page 31 of the paper book. The ld. AR further submitted that similar disallowance was made in the assessment years 2005-06 to 2008-09. The Tribunal held that considering the fact that interest free funds available with the assessee are much higher, no disallowance of interest is warranted. The ld. AR referred to the order of Tribunal in ITA Nos. 1009 to 1012/PUN/2015 (supra).

3.3 The assessee has raised additional ground of appeal with respect to 'on money' received during the year. The ld. AR submitted that the Assessing Officer made addition of 'on money' Rs.1,05,07,000/- allegedly received by assessee on sale of flats/shop from three parties as per details given here-in-below :

Bundle No.	Page No.	Flat No.	Booking date	Amount	A.Y.	Total
B-21	84	K 106		12,00,000	2010-11	10507000
B-21	53	Shop-106		6,00,000	2010-11	
B-8	2	604, 605, 605		87,07,000	2010-11	

3.4 The ld. AR submitted that the Assessing Officer has erred in making addition in excess of Rs.12 lakhs. An amount of Rs.6 lakhs has been added on the basis of Bundle No. 27, page 53 seized during search. The seized document is at page 201 of the paper book, Vol.-II. A perusal of the same shows that on the right margin of the document two amounts have been mentioned viz. Rs.4 lakhs and Rs.6 lakhs. The Assessing Officer has ignored the amount of Rs.4 lakhs and has made addition of Rs.6 lakhs as

'on money'. Except for those amounts there is no reference on the page that the amount of Rs.4 lakhs and Rs.6 lakhs represent 'on money'. The Assessing Officer arbitrarily picks one of the two amounts and has made addition of Rs.6 lakhs. In the absence of any evidence there is no reason for including the aforesaid amount of Rs.6 lakhs as on money. The ld. AR asserted that the addition of Rs.6 lakhs has to be deleted as the addition is without any basis.

3.5 The ld. AR further submitted that an addition of Rs.87,07,500/- has been made on the basis of document seized paper No. 2, part of Bundle No. 8. The said seized paper is at page 110 of the paper book, Vol.-I. The ld. AR pointed that a perusal of seized document would show that the same is dated 09-06-2010 i.e. period relevant to the assessment year 2011-12. The Assessing Officer made addition of the said amount in assessment year 2010-11. The Assessing Officer erred in making addition of Rs.87,07,500/- in the assessment year 2010-11 without taking into consideration the date of document which is very vital. The ld. AR asserted that no addition can be made on the basis of document which bears the date subsequent to assessment year in appeal. Accordingly, the addition on account of 'on money' has to be restricted to Rs.12 lakhs which has already been accepted by the assessee.

4. Shri B. Kishore representing the Department fairly admitted that the issue raised by the assessee in ground Nos. 1 to 3 are similar to the grounds raised in appeal by the assessee for assessment year 2009-10. In so far as the issue raised in additional ground of appeal the ld. DR vehemently supported the findings of Commissioner of Income Tax (Appeals).

5. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. In ground No. 1 the assessee has assailed disallowance of Rs.14,61,006/- on account of interest on borrowed capital, depreciation and membership fees. The disallowance has been made by the authorities below on the ground that these expenses were not claimed by the assessee in return of income filed u/s. 139 of the Act. Identical disallowance was made by Assessing Officer in assessment year 2009-10. The Tribunal decided the issue in favour of the assessee by observing as under :

“5. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. We have also considered the decisions on which the ld. AR of assessee has placed reliance. The first issue raised by assessee in ground No. 1 of appeal is with respect to additional claim of expenditure viz. interest on borrowed funds, depreciation and membership fee in the return of income filed in response to notice u/s. 153A of the Act. It is an undisputed fact that on the date of search the assessment in respect of return of income filed u/s. 139 for assessment year 2009-10 was pending. Thus, it is a case of abated assessment. The Hon’ble Jurisdictional High Court in the case of Commissioner of Income Tax Vs. B.G. Shirke Construction Technology Pvt. Ltd. (supra) has held that where the assessee is being assessed in respect of abated assessment for first time, the provisions of the Act which would be applicable in the case of return filed in regular course u/s. 139 would apply in case of return u/s. 153A of the Act. The relevant extract of the judgment of Hon’ble High Court is as under :

“11. In the present facts for the subject assessment years it is an undisputed position that the pending assessment before the Assessing Officer consequent to return filed under section 139(1) of the Act for the subject assessment years had abated. This was on account of the search and as provided in second proviso to section 153A(1) of the Act. The consequence of notice under section 153A(1) of the Act is that the assessee is required to furnish fresh return of income for each of the six assessment years in regard to which a notice has been issued. It is this return which is filed consequent to the notice which would be subject of assessment by the Revenue for the first time in the case of abated assessment proceedings. Consequent to notice under section 153A of the Act the earlier return filed for the purpose of assessment which is pending, would be treated as non est in law. Further, section 153A(1) of the Act itself provides on filing of the return consequent to notice, the provision of the Act will apply to the return of income so filed. Consequently, the return filed under section 153A(1) of the Act is a return furnished under section 139 of the Act. Consequently, the respondent-assessee is being assessed in respect of abated assessment for the first time

under the Act. Therefore the provisions of the Act which would be otherwise applicable in case of return filed in the regular course under section 139(1) of the Act would also continue to apply in case of return filed under section 153A of the Act and the case law on the provision of the Act would equally apply.”

6. Thus, in view of the aforesaid decision and the facts of the case, we are of considered view that the assessee was well within its right to make fresh claim of expenditure in return of income in response to notice u/s. 153A of the Act. However, we find that during assessment proceedings the Assessing Officer has not verified claim of assessee and has rejected the same out rightly. In our considered view the claim made by assessee before it is allowed requires verification. Accordingly, we deem it appropriate to remit this issue back to the file of Assessing Officer for verification of authenticity of claim of expenditure and thereafter allow the same in full or to the extent admissible, as the case may be in the light of our above findings. Accordingly, ground No. 1 raised in appeal is allowed for statistical purpose.”

Since, both the sides are unanimous in admitting that the issue in present appeal is identical to issue raised in appeal by the assessee in assessment year 2009-10, the ground No. 1 raised in appeal by the assessee is allowed for statistical purpose with similar directions.

6. In ground Nos. 2 and 3 raised in appeal, the assessee has assailed disallowance of interest Rs.1,30,000/- on borrowed capital. A perusal of Balance Sheet as on 31-03-2010 reveal that own funds of assessee are much more than the funds advanced by assessee for alleged non-business purpose. Similar disallowance was made by Assessing Officer in assessment years 2005-06 to 2008-09 (supra), the Co-ordinate Bench of Tribunal deleted the addition by observing as under :

“18. The second aspect of the issue is the interest free funds available with the assessee. The perusal of Balance Sheet in respect of all the years reflect the availability of interest free funds with the assessee, out of which the said interest free advances have been made by the assessee. Relying on the ratio laid down by the Hon’ble Bombay High Court in CIT Vs. Reliance Utilities & Power Ltd. (supra) and the Pune Bench of Tribunal in M/s. Kolta Patil Developers Ltd. Vs DCIT (supra), we hold that availability of funds as on the date of Balance Sheet has to be seen and there is no merit in the orders of authorities below in looking at the day-to-day position of availability of funds. Hence, the assessee is also entitled to the said deduction on merits of its claim and the same is allowed. The ground of appeal No.2 raised in all the appeals is allowed.”

Thus, in view of the facts of the case we find merit in the submissions of assessee and delete the addition made on account of disallowance of interest. Accordingly, ground Nos. 2 and 3 raised in appeal are allowed.

7. The ld. AR of assessee has stated at the Bar that he is not pressing ground Nos. 4, 5, 6 and 7 raised in the appeal. According, the same are dismissed as not pressed.

8. The ground No. 8 raised in appeal is general in nature. Hence, requires no adjudication.

9. In additional ground of appeal the assessee has assailed addition of Rs.1,05,07,000/- on account of 'on money'. The ld. AR has pointed that during assessment proceedings, the assessee has admitted receipt of 'on money' Rs.12 lakhs. Apart from that the Assessing Officer has made addition of Rs.6 lakhs and Rs.87,07,500/- on account of on money received by assessee during the period relevant to the assessment year under appeal. The addition of Rs.6 lakhs is made on the basis of document seized during the course of search at page 201 of the paper book, Vol.-II. An examination of the said document reveal that two amounts i.e. Rs.4 lakhs and Rs.6 lakhs have been mentioned on the right margin of document. The Assessing Officer has arbitrarily picked up an amount of Rs.6 lakhs from the said document and has presumed it to be on money received by assessee. Except for mentioning of two amounts i.e. Rs.4 lakhs and Rs.6 lakhs there is no other writing on the paper indicating that these amounts represent on money. No reason whatsoever has been given by the Assessing Officer in the assessment order to support his

decision to make addition of Rs.6 lakhs as on money. The addition of Rs.6 lakhs has been made by Assessing Officer on surmises. The Commissioner of Income Tax (Appeals) has also confirmed the addition in a mechanical manner. Thus, in our considered view this addition of Rs.6 lakhs deserves to be deleted.

The second addition of Rs.87,07,500/- is emanating from a document seized during search which is at page 110 of the paper book, Vol.-I. A perusal of said document shows that the said document is dated 09-06-2010. Thus, the said document pertains to Financial Year 2010-11 i.e. period relevant to assessment year 2011-12. The Assessing Officer at the time of making addition has failed to consider the fact that the document does not pertain to the period relevant to the assessment year under appeal i.e. assessment year 2010-11. Since, the date of document on the basis of which addition of Rs.87,07,500/- has been made is outside the period of assessment year under appeal, no addition can be made on the basis of such document. Accordingly, addition of Rs.87,07,500/- is deleted and additional ground raised in the appeal by assessee is partly allowed in the terms aforesaid.

10. In the result, the appeal of assessee for assessment year 2010-11 is partly allowed.

ITA No. 1211/PUN/2015 (A.Y. 2011-12)

11. The ld. AR submitted that the ground Nos. 1 and 2 raised in appeal are with respect to disallowance of interest Rs.5,85,780/- on borrowed capital. The assessee has made interest free advances from own funds. The ld. AR referring to the Balance Sheet of the assessee at page 7 of the paper book pointed that the assessee has own funds much more than the

amount advanced. No disallowance of interest u/s. 36(1)(iii) is warranted. The ld. AR further pointed that similar disallowance was made by Revenue authorities for the assessment years 2005-06 to 2009-10. The Tribunal has deleted the addition in earlier assessment years.

12. The ld. AR of assessee has stated at the Bar that he is not pressing ground Nos. 3, 4 and 5 raised in the appeal.

13. In respect of ground No. 6, the ld. AR submitted that the authorities below have refused to grant the benefit of telescoping in respect of on money received and the unexplained investment/expenditure offered by the assessee. The ld. AR pointed that after search the assessee has filed return of income u/s. 139(1) wherein he offered amount of Rs.8,27,57,100/- as an additional income on account of unexplained investment/expenditure. The Assessing Officer made addition of Rs.1,96,88,000/- on account of on money received by assessee during the period relevant to the assessment year 2011-12. While making addition on account of receipt of on money, the Assessing Officer has taxed undisclosed income, as well as, undisclosed expenditure. Against unexplained investment/expenditure to the tune of Rs.8,27,57,100/- offered to tax by assessee in the return of income. The on money allegedly received by assessee outside the books should be adjusted by giving the benefit of telescoping.

14. The ld. DR vehemently opposed the submission of the assessee with regard to grant of benefit of telescoping. The ld. DR submitted that there is no nexus between unexplained income and the unexplained expenditure. Therefore, no benefit of telescoping should be given to the assessee.

15. Both sides heard. Orders of the authorities below perused. The ground Nos. 1 and 2 raised in appeal are similar to the ground Nos. 2 and 3 raised in the appeal by the assessee for assessment year 2010-11. A perusal of Balance Sheet as on 31-03-2011 at page 7 of the paper book show that own interest free funds of the assessee are much more than the funds advanced by the assessee without charging interest. The findings given by us while deciding ground Nos. 2 and 3 in assessment year 2010-11 would mutatis mutandis apply to the ground Nos. 1 and 2 raised in the present appeal. For the detailed reasons mentioned therein the ground Nos. 1 and 2 raised in the appeal for assessment year 2011-12 are allowed.

16. The ld. AR of assessee has stated at the Bar that he is not pressing ground Nos. 3, 4 and 5 of the appeal. Accordingly, the same are dismissed as not pressed.

17. In respect of ground No. 6 of the appeal the assessee has sought the benefit of telescoping in respect of addition made on account of 'on money' Rs.1,96,88,000/- against undisclosed expenditure/investment of Rs.8,27,57,100/-. We find similar relief was claimed by the assessee in ITA No. 1209/PUN/2015 for assessment year 2009-10. The Tribunal accepted the assessee's ground by observing as under :

"9. In ground No. 7 of appeal the assessee has prayed for grant of benefit of telescoping in respect of on money receipts of Rs.28 lakhs against undisclosed expenditure/investment Rs.20 lakhs. The contention of the assessee is that the assessee has made undisclosed investment from undisclosed source of income i.e. on money received during relevant period of time. We find that the authorities below have made addition in respect of undisclosed income from on money as well as undisclosed investment to the tune of Rs.20 lakhs disclosed by assessee. After taking into consideration entirety of facts we are of considered view that the benefit of telescoping can be granted to the assessee in respect of on money against undisclosed expenditure. Accordingly, ground No. 7 raised in appeal is allowed."

The issue raised in ground No. 6 is remitted to the file of Assessing Officer to decide the same in line with the order of Tribunal in assessee's own case in ITA No. 1209/PUN/2015 (supra). Accordingly, ground No. 6 raised in appeal by assessee is allowed for statistical purpose.

18. In the result, the appeal of assessee for assessment year 2011-12 is partly allowed.

19. To sum up, the appeals of the assessee for assessment years 2010-11 and 2011-12 are partly allowed.

Order pronounced on Wednesday, the 28th day of March, 2018.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 28th March, 2018

RK

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-11, Pune
4. The Pr. CIT (Central), Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

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