

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. 472 to 475/PUN/2012
निर्धारण वर्ष / Assessment Years : 2002-03 to 2005-06

Mrs. Bilkis Kadir Shaikh,
L/H of Late Shri Kadir Usman Shaikh,
Bungalow No.1,
Vijay Nagar, Vardhaman Society,
Lonavala, Dist. Pune
PAN : ABXPS8262Q

.....अपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer,
Central-II, Pune

.....प्रत्यर्थी / Respondent

Assessee by : Shri Nikhil Pathak
Revenue by : Shri T. Vijaya B. Reddy

सुनवाई की तारीख / Date of Hearing : 18.07.2018
घोषणा की तारीख / Date of Pronouncement : 03.08.2018

आदेश / ORDER

PER D. KARUNAKARA RAO, AM:

There are 4 appeals of the assessee under consideration involving A.Yrs. 2002-03 to 2005-06. The appeals are filed against 4 different orders of the CIT(A) Central, Pune, commonly dated 24-11-2011. Assessee raised almost similar grounds in all the appeals, therefore, Appeal No.472/PUN/2012 for A.Y. 2002-03 is taken as a standard one.

ITA No.472/PUN/2012
A.Y. 2002-03

2. The grounds of appeal raised by the assessee are extracted as under :

“1. The Ld.CIT(A) erred in holding that the asst. made by the Ld. AO u/s.153A r.w.s. 143(3) was valid without appreciating that no notice u/s.143(2) was issued by the Ld. AO within the time limit prescribed and hence, the said asst. order passed by the Ld. AO was null and void.

1.1 The Ld.CIT(A) erred in holding that no notice u/s.143(2) was required to be served on the appellant for the purpose of completing the asst. u/s.153A and hence, just because the notice u/s.143(3) was not found within the time limit prescribed did not mean that the asst. order passed by the AO was null and void.

1.2 The Ld.CIT(A) failed to appreciate that issue of notice u/s.143(2) was the basic requirement for starting the asst. proceedings u/s.153A and once, the notice u/s.143(2) was not issued within the prescribed time limit, the asst. ought to have been held as null and void.

2. The Ld.CIT(A) erred in not appreciating that the asst. was barred by limitation and without jurisdiction since the asst. order was served on the appellant on 11-01-2010 which was beyond the limitation period prescribed u/s.153B and therefore, the asst. order ought to have been declared null and void.

3. The Ld.CIT(A) erred in not admitting the additional ground of appeal relating to the issue of warrant of authorization without appreciating that the issue raised was purely legal issue and since all the facts were on record, the same ought to have been admitted.

3.1 The Ld.CIT(A) further failed to appreciate that since the warrant of authorization was issued in the name of more than one person, the same was not valid and accordingly, the asst. completed u/s.153A was illegal and without jurisdiction and hence, the same should have been held null and void.

4. The Ld.CIT(A) erred in confirming the addition on account of income from house property of Rs.42,000/- without appreciating that in the course of search, no incriminating evidence was found pertaining to this issue and hence, no addition could be made in the asst. order passed u/s.153A.

4.1 Without prejudice, the appellant submits that the addition made of Rs.42,000/- is not justified and the same may kindly be deleted.

5. The Ld.CIT(A) erred in confirming the addition on account of treating agricultural income as income from other sources of Rs.19,200/- without appreciating that in the course of search, no incriminating evidence was found pertaining to this issue and hence, no addition could be made in the asst. order passed u/s.153A.

5.1 *Without prejudice, the appellant submits that the addition made of Rs.19,200/- is not warranted at all and the same may kindly be deleted.*

6. *The Ld.CIT(A) erred in not appreciating that the Ld. AO had erred in charging interest u/s.234A, 234B & 234C and the same ought to be deleted.*

7. *The appellant craves leave to add, alter, amend or delete any of the above grounds of appeal.”*

3. Referring to the above said grounds, Ld. AR for the assessee brought our attention to Ground Nos. 1, 1.1 and 1.2 and submitted that the said grounds have to be decided against the assessee in view of the binding High Court judgment in the case of Ashok Chaddha vs. ITO reported in 337 ITR 399 (Del.) which is relevant for the proposition that the issue of notice u/s.143(2) of the Act is not mandatory in a case of the assessment made u/s.153A of the Act. Ld. AR filed the written note relying on the said proposition.

Considering the concession given by the Ld. AR for the assessee in this regard by virtue of the judgment of Hon'ble Delhi High Court cited (supra), the said ground Nos. 1, 1.1 and 1.2 are dismissed.

4. Referring to the Ground Nos. 2, 3, and 3.1, Ld. AR for the assessee submitted that the said grounds are not being pressed.

Considering the concession given by the Ld. AR, the same are dismissed as 'not pressed'.

5. Referring to the Ground Nos. 6 and 7, Ld. AR for the assessee submitted that the same are either consequential or general, as the case may be. Accordingly, the same are dismissed as such. That leaves the

Grounds Nos. 4, 4.1, 5 and 5.1 are only to be adjudicated by us. Relevant facts are narrated as follows.

6. Briefly stated relevant facts of the case for the A.Y. 2002-02 include that the assessee is a partner in M/s. K.K. Estate Enterprises, a real estate dealer. There was search and seizure action on the assessee on 18-09-2007. AO issued notice u/s.153A of the Act calling for the returns in February, 2008. Assessee filed the return of income on 24-03-2008. AO issued notice u/s.143(2) of the Act on 12-08-2009 and completed the assessment determining the assessed income at Rs.1,35,750/- against the returned income of Rs.74,550/-. AO made addition on account of rental income from Kondhwa Flat amounting to Rs.42,000/-. AO also made another addition of Rs.19,200/- on account of claim of agricultural income. The relevant discussion on these 2 accounts are given in Para Nos. 3 to 5 of the assessment order and the same are extracted below :

*“3. The assessee has shown agricultural income of Rs.19,200/-. In my detailed order for A.Y. 2003-04 I have rejected the assessee’s claim for agricultural income for the various years including this year. **Accordingly, the claim for agricultural income is rejected in this year also and the income of Rs.19,200/- is taxed as income from other sources.** Penalty proceedings u/s.271(1)(c) are initiated for furnishing inaccurate particulars of income.*

4. It was seen from the balance sheet of the assessee that he had house properties at Lonawala and at Ashok Mew, Kondhwa, Pune. In his return of income the assessee has not shown income from either of these properties. The assessee’s explanation was asked vide this office letter dated 23-12-2009. The assessee has explained vide his letter dated 29-12-2009 that he had purchased 2 flats at Vijay Nagar, Lonawala and joined both the flats and is using the same as his residence. As regard the flat at Pune, the assessee has stated that as he is suffering from hypertension and diabetes, he has to come to Pune regularly for treatment. Therefore, the Pune flat is also being used by him for his residence.

5. As per the provisions of sub-section 4 of section 23 of the I.T. Act, the assessee is not entitled to treat only one of the houses as self occupied. The annual value of the other houses has to be determined as if it had been let out. Accordingly, the income from the Kondhwa flat is computed

*as it is let out. In the subsequent years the assessee has shown rent income from this property at Rs.60,000/-. **Accordingly, the annual value of this property is taken at Rs.60,000/- and property income computed accordingly is added to the assessee's income.** As the assessee concealed the particulars of this income penalty proceedings u/s.271(1)(c) are initiated."*

7. In the First Appellate proceedings, the above two additions were confirmed by the CIT(A) dismissing the appeal of the assessee.

BEFORE THE TRIBUNAL

8. During the proceedings before us, Ld. AR for the assessee brought our attention to the above grounds relevant to the additions in question, i.e. Rs.42,000/- on account of income from Kondhwa Flat and Rs.19,200/- on account of claim of agricultural income and submitted that the AO made these additions (1) in the absence of any incriminating material and (2) based on information disclosed in the balance sheet and financial statements of the assessee originally disclosed in the return so income filed u/s.139(1) of the Act. Further, Ld. AR submitted that this is a case of non-abated assessment and therefore, the additions can only be made which are supported by the seized material/incriminating material found during the search and seizure operations u/132 of the Act.

Referring to the addition of Rs.42,000/- Ld. AR brought our attention to the above extracted Para Nos.4 and 5 of the assessment order and submitted that the balance sheet contains the details of house property, source of information about the properties in Lonavala and Kondhwa. The said paras did not refer to any seized material whatsoever that assisted the AO to make addition on this account.

Similarly the AO made addition of Rs.19,200/- which is claimed as agricultural income by the assessee. In the assessment, AO took a different view and taxed the same as income from other sources. Therefore, Ld. AR for the assessee submitted that the AO did not have any incriminating material for the aforesaid addition too.

9. Ld. Counsel filed a written note on these issues and the same is extracted here as under :

“4] Ground No. 4 - 4.1 : Addition of Rs.42,000/-

4.1] This issue has been discussed by the learned A.O. in para 4 of the assessment order. The learned A.O. has made an addition of Rs.42,000/- on account of income from house property. According to the learned A.O., as per the balance sheet of the assessee, he owned two flats at Lonavala and Pune. The A.O. has held that as per section 23(4) only one flat can be considered as self occupied and therefore, he has considered the annual value of the flat at Kondhwa, Pune at Rs.60,000/- and after reducing the standard deduction of Rs.18,000/-, he has computed the net income under the head 'house property' at Rs.42,000/-. The learned CIT(A) has confirmed the addition made by the learned A.O. The assessee submits that for this year, he had filed the return prior to search. The copy of his return is on page 1 of the Paper Book. The copy of the balance sheet filed along with the return is enclosed on pages 2 - 9 of the Paper Book. The two flats owned by the assessee are clearly disclosed in the balance sheet. The learned A.O. has nowhere pointed out any incriminating evidence found as a result of search in respect of this issue. Accordingly, since the asst. for this year is not pending as on the date of search and in the absence of any incriminating evidence, no addition can be made in the asst. completed u/s153A. For this proposition, the assessee has placed reliance on the decision of Hon'ble Bombay H.C. in the case of Deepak Kumar Agarwal and the decision of Hon'ble ITAT, Pune in the case of Shri Gajendra Pawar [ITA No. 1009 -1012/PN/15]. Accordingly, in view of the above decisions, the assessee submits that the addition made on account of income from house property without any incriminating evidence is bad in law and the same may kindly be deleted.

5] Ground Nos. 5 - 5.1 : Addition of Rs.19,200/-

5.1] This issue is discussed by the A.O. in para 3 of the asst. order. The assessee has shown agricultural income of Rs.19,200/- in his return filed prior to search. The learned A.O. has taxed the said amount as income from other sources. The assessee submits that on this issue no incriminating evidence was found as a result of search and in view of the above referred decisions, the addition made is not warranted. Even, the learned A.O. in the asst. order has not referred to any incriminating evidence relating to this issue and therefore, the addition made is not justified in law.”

10. Ld. DR for the Revenue relied on the orders of AO and the CIT(A).

11. We heard both the sides and perused the orders of the Revenue as well as the written note furnished by the Ld. AR for the assessee. Considering the undisputed position in this regard, we are of the opinion that this is a case where both the additions are made without having support of any incriminating material and therefore, they constitute the additions to be made in the regular assessment only.

Regarding the regular assessment, it is a fact that the same is an unabated assessment in this case. Relevant facts include that the assessee filed the return u/s.139(1) of the Act on 22-11-2000. Return was processed u/s.143(1A) of the Act. The due date for issue of notice u/s.143(2) expired in November, 2003. Considering the above facts as well as considering the decision of Hon'ble Jurisdiction High Court in the case of CIT Vs. Deepak Kumar Agarwal vide Writ Petition No.1709/2014 and others, dated 11-09-2017 and the decision of ITAT, Pune in the case of Shri Gajendra Pawar vide ITA Nos. 1009 -1012/PN/15, the time for issue of said statutory notice expired much before the search action u/s.132 of the Act that took place on 18-09-2007. In this factual matrix of the case, the assessment is undisputedly a non-abated assessment. Therefore, the additions, if any have to be made only with the support of any incriminating material. Considering the same, we are of the opinion that the additions made by the AO being unsupported by incriminating material are not sustainable technically. Accordingly, the Grounds of appeal No. 4, 5 and 5.1 raised by the assessee have to be allowed on technical grounds.

12. In the result, the appeal of the assessee is partly allowed.

ITA Nos. 473 to 475/PUN/2012
A.Yrs. 2003-04 to 2005-06

13. Before us, Ld. AR for the assessee submitted that assessee raised the issue relating to validity of the assessment made by the AO u/s.153A r.w.s. 143(3) of the Act in all these appeals and Grounds of appeal Nos. 1, 1.1 and 1.2 for the A.Yrs. 2003-04 to 2005-06 relate to this issue. He fairly submitted that this issue has to be decided against the assessee by virtue of judgment in the case of Ashok Chaddha vs. ITO reported in 337 ITR 399 (Del.) which is relevant for the proposition that the issue of notice u/s.143(2) is not mandatory in case of the assessment made u/s.153A of the Act.

Considering the concession given by the Ld. AR for the assessee, the Grounds of appeal No.1, 1.1 and 1.2 raised by the assessee in these appeals are dismissed in view of the judgment of Hon'ble Delhi High Court in the case of Ashok Chaddha vs. ITO (supra). Accordingly, the said grounds are dismissed for all the A.Yrs. 2003-04 to 2005-06.

14. Ld. AR for the assessee submitted that Ground Nos. 2, 3 and 3.1 raised by the assessee in all these appeals are not being pressed. Therefore, the said grounds in all these appeals are dismissed.

15. Ld. AR for the assessee submitted that Ground Nos. 4, 4.1, 5 and 5.1 relates to the additions made by the AO are on account of Kondhwa Flat and claim of agricultural income without having support of any incriminating material whatsoever. The issues are identical to that of

A.Y. 2002-03. Therefore, these additions made by the AO are unsustainable and have to be deleted in principle.

16. After hearing both the sides, we find the issues raised by the assessee in these appeals are identical to that of issues in A.Y. 2002-03. We have already held that these additions made by the AO are unsustainable as they were made without the support of any incriminating material and the regular assessment is unabated one. Therefore, for the reasons mentioned by us while deciding the issues in the A.Y. 2002-03, we allow these grounds in favour of the assessee for the A.Yrs. 2003-04 to 2005-06 as well.

17. Assessee raised the ground relating to charging of interest u/s.234A, 234B and 234C in all these appeals. We dismiss the said ground in all these appeals being consequential in nature.

18. Further, there is couple of new issues raised by the assessee for the A.Yrs. 2003-04 to 2005-06 that remains to be adjudicated. The said grounds are discussed in the following paragraphs.

19. The first common issue that is raised by the assessee in the appeals for A.Yrs 2003-04 to 2005-06 is on the disallowance made by the AO u/s.40A(3) of the Act. The said ground reads as under :

“6. The Ld.CIT(A) erred in confirming the disallowance made u/s.40A(3) of Rs.2,16,485/- without appreciating that in the course of search, no incriminating evidence was found pertaining to this issue and hence, no addition could be made in the asst. order passed u/s.153A.

6.1 The Ld.CIT(A) failed to appreciate that the land purchased by the appellant was his capital asset and not a trading asset and therefore, the provisions of section 40A(3) were not applicable and hence, the disallowance made u/s.40A(3) ought to have been deleted.”

20. Briefly stated relevant facts are that the assessee offered the same as exempt income considering the agricultural nature of the land. However, the AO treated the same as business income. The arguments of the Ld. AR for the assessee before us are that the AO did not have any incriminating material and the additions made by the AO are unsustainable. Ld. AR drew our attention to the assessment as well as the appellate orders and demonstrated the absence of any incriminating material support the above views and disclosure of the said information in the returns of the assessee well before the search and seizure action took place on the assessee, i.e. on 18-09-2007. In this regard, Ld. AR submitted a written note and the said submissions are extracted here as under :

“6] Ground No. 6 - 6.1: Addition u/s 40A(3) of Rs.2,16,485/- --

6.1] This issue is discussed by the learned A.O. in para 18 of his order. According to him, the assessee had purchased lands which were shown as an investment by the assessee. The learned A. O. has considered the lands purchased as stock in trade. Now, the lands purchased are duly accounted in the books. The cash paid by the assessee for purchase of land and treated as an investment is duly accounted in the books. The A.O. has disallowed the payment made u/s 40A(3). The assessee submits that all the amounts are duly accounted in the books and in the absence of any incriminating evidence, no addition is warranted in the hands of the assessee. The assessee places reliance on the decisions of Hon'ble Bombay H.C. in the case of Deepak Kumar Agarwal and the decision of Hon'ble ITA , Pune in the case of Shri Gajendra Pawar [ITA No. 1009-1012/PN/15]. Accordingly, the disallowance made is not justified.”

21. Ld. DR for the Revenue relied on the orders of AO/CIT(A).

22. After hearing both the parties and perusing the orders of the Revenue as well as the written submissions of the assessee, we are of the opinion that the assessments made by the AOs are non-abated assessments. The addition made by the AO on this issue cannot be sustained on technical grounds in the absence of any incriminating

material. Thus, we direct the AO to delete the disallowance u/s.40A(3) of the Act in all these assessment years under consideration. Accordingly, the Ground No. 6 and 6.1 raised by the assessee in the appeals for A.Yrs. 2003-04 to 2005-06 stands allowed in favour of the assessee technically.

23. The second common issue that is raised by the assessee for the A.Yrs. 2003-04 and 2005-06 is on the addition of Rs.2,20,277/- for the A.Y.2003-04 and Rs.9,89,248/- for the A.Y. 2005-06. On this issue, the grounds raised by the assessee for A.Y. 2003-04 read as under :

“7. The Ld.CIT(A) erred in confirming the addition of 2,20,277/- (4,36,762-2,16,486) by treating the gain on sale of agricultural land as business income as against the claim of the assessee that the said gain was exempt from tax and without appreciating that no such addition could be made in the asst. u/s.153A particularly because no incriminating evidence was found in the course of search pertaining to this issue.

7.1 The Ld.CIT(A) erred in holding that the gain arising on sale of land of Rs.2,20,277/- was taxable as business income on the ground that the assessee was engaged in the business of trading in lands and hence, the gain was taxable as business income.

7.2 The Ld.CIT(A) failed to appreciate that the assessee has held the lands as an investment and the assessee was not engaging in the business of trading in lands and therefore, the gain arising on sale of the lands was not taxable as business income of the assessee.

7.3 The Ld.CIT(A) erred in not appreciating that the lands sold by the assessee were agricultural lands and since those lands were held as an investment, the gain arising on sale of such lands were exempt from tax.”

24. In connection with the above issue, Ld. AR for the assessee filed the written submissions and the same is extracted is here as under :

“7] Ground Nos. 7 - 7.3 : Treating gain on sale of land as business income -

7.1] The assessee has sold couple of lands in this year and the gain thereof was claimed as an exempt since the said lands were agricultural lands. The details of land sold are given on page 16A of the Paper Book. The learned A.O. has taxed the gain on sale of land as business income. The assessee submits that in the original return filed prior to the search, the relevant details were duly submitted of the sale of land. The copy of the return is on pages 1 - 6 of the Paper Book. In the course of search, the dept. has not found any incriminating evidence relating to this issue. The

learned A.O. has also not referred to any incriminating evidence relating to this issue in the asst. order. Accordingly, in the absence of any incriminating evidence, no addition can be made on this issue.”

25. Ld. DR for the Revenue relied on the orders of the AO and the CIT(A).

26. We heard both the sides and perused the orders of the Revenue as well as the written submissions of the assessee. Considering the fact that the assessments made by the AOs are non-abated assessments, we are of the opinion that the addition made by the AO on this issue cannot be sustained on technical grounds in the absence of any incriminating material. Thus, we concur with the arguments of the Ld. AR for the assessee and therefore, direct the AO to delete the addition made by the AO in these assessment years under consideration. Accordingly, the Ground No. 7 and 7.3 raised by the assessee in the appeals for A.Yrs. 2003-04 and 2005-06 stands allowed in favour of the assessee technically.

27. In the result, the appeals of the assessee for the A.Yrs. 2003-04 to 2005-06 are partly allowed.

28. To sum up, all the appeals of the assessee for the A.Yrs. 2002-03 to 2005-06 are partly allowed.

Order pronounced on 03rd day of August, 2018.

Sd/-
(विकास अवस्थी /VIKAS AWASTHY)
न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-
(डी. करुणाकरा राव/D. KARUNAKARA RAO)
लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 03rd August, 2018.
Satish

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

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

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.