

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "A" 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. 383 to 386/PUN/2016

निर्धारण वर्ष / Assessment Years : 2006-07 to 2009-10

The Assistant Commissioner of Income Tax,  
Central Circle-1, Nashik.

.....अपीलार्थी / Appellant

**बनाम / V/s.**

Mrs. Madhuri Sunil Kotecha,  
4, Siddharth, Sagar Society,  
Vardhaman Nagar,  
Jalgaon-425 001.  
PAN : AHMPK6577H

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA Nos. 2458 & 2459/PUN/2016

निर्धारण वर्ष / Assessment Years : 2006-07 & 2007-08

Mrs. Madhuri Sunil Kotecha,  
4, Siddharth, Sagar Society,  
Vardhaman Nagar,  
Jalgaon-425 001.  
PAN : AHMPK6577H

.....अपीलार्थी / Appellant

**बनाम / V/s.**

The Assistant Commissioner of Income Tax,  
Central Circle-1, Nashik.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Hari Krishan

Revenue by : Shri Abhishek Meshran, JCIT

सुनवाई की तारीख / Date of Hearing : 31.12.2018

घोषणा की तारीख / Date of Pronouncement : 28.02.2019

**आदेश / ORDER****PER VIKAS AWASTHY, JM**

This bunch of six appeals, four by the Revenue and two by the assessee are directed against the order of Commissioner of Income Tax (Appeals)-12, Pune dated 15.12.2015 common for the assessment years 2006-07 to 2009-10.

The Revenue has assailed the findings of First Appellate Authority in ITA No.383/PUN/2016 for the assessment year 2006-07. The assessee has filed cross appeal in ITA No. 2458/PUN/2016 against the order of Commissioner of Income Tax (Appeal) for the assessment year 2006-07.

The appeal filed by the Revenue in ITA No.384/PUN/2016 is against the findings of Commissioner of Income Tax (Appeals) for the assessment year 2007-08. The assessee has filed cross appeal for the said assessment year in ITA No.2459/PUN/2016.

The appeals filed by the Revenue in ITA Nos. 385 & 386/PUN/2016 are directed against the order of Commissioner of Income Tax (Appeals) for the assessment years 2008-09 & 2009-10, respectively. There are no cross appeals by the assessee for the said two assessment years.

2. Since the issue raised in all these appeals are common and are arising from same set of facts, these appeals are taken up together for adjudication and are being disposed of vide this common order.

3. The brief facts germane to these appeals are: A search and seizure action was carried out at the premises of Kotecha Group of Jalgaon on

09.08.2011. The assessee being one of the family members of Kotecha group was covered under search action. The assessee is engaged in trading of shares, trading in Futures and Options and commodity trading. The assessee also earns interest income on fixed deposits. The assessee's minor son Siddharth Kotecha derived Short Term Capital Gain on sale of shares which was clubbed with income of the assessee. The assessee in her return of income had declared income from trading of shares, futures and options under the head capital gains, whereas, the Assessing Officer treated the income from sale of shares as 'business income'. The Assessing Officer in assessment proceedings consequent to the search, made certain additions in the hands of the assessee for the assessment years under appeal.

4. Aggrieved by the assessment order passed u/s.143(3) r.w.s. 153A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for the respective assessment years, the assessee filed appeals before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) after examining the facts and documents on record held that in absence of any incriminating material, no addition can be made where the assessments have not abated. Consequently, substantial additions made by the Assessing Officer in all the impugned assessment years were deleted by the Commissioner of Income Tax (Appeals). Against the findings of the Commissioner of Income Tax (Appeals), the Revenue is in appeal before the Tribunal. The assessee is also in appeal for two assessment years assailing the findings of Commissioner of Income Tax (Appeals) in changing the head of income of assessee's minor son whose income from sale of shares has been clubbed with that of assessee.

**ITA No.383/PUN/2016 ( By Revenue)****ITA No.2458/PUN/2016 (By Assessee)****Assessment year 2006-07**

5. The Revenue in ITA No.383/PUN/2016 has assailed the findings of Commissioner of Income Tax (Appeals) by raising following grounds:

*“i) On the facts and circumstances of the case and in law, the ld. CIT(A) was not justified in adjudicating that the income earned by the assessee of Rs.29,14,221/- by selling of shares is business income on one hand and on the other hand considering the income of minor son clubbed in the hands of the assessee as Short Term Capital Gain, thereby treating the same issue differently for the same assessee.*

*ii) On the facts and circumstances of the case, the ld.CIT(A) was not justified in treating the disclosed income in the revised return as income claimed to be exempt u/s.10(38) i.e. Long Term Capital Gain of Rs.54,82,500/-, when there is no mention of such a nexus and the same has been made on conjecture. Further, the assessee's act of including the exempted income under the head Long Term Capital Gain itself shows that the two are different, i.e. disclosed income in revised return and Impugned exemption claimed under LTCCG.*

*iii) On the facts and circumstances of the case, the Id. CIT(A) was not' justified in deleting the addition of Rs.21,680/- made on interest on PPF account, since the assessee has multiple PPF accounts.*

*The appellant craves to add, amend or delete any grounds of appeal.”*

6. Shri Hari Krishan appearing on behalf of the assessee submitted that during the course of search, no incriminating material was found and there was no pending assessment for the assessment year 2006-07. Thus, it is a case of non-abated assessment. The Assessing Officer could not have made any addition in absence of any incriminating material. The ld. AR in support of his submissions, placed reliance on the decision of Hon'ble Bombay High Court in the case of CIT Vs. Continental Warehousing Corporation (Nhava Sheva) reported as 374 ITR 645 and the decision of Pune Bench of the

Tribunal in the case of Leelavati Vijay Kumar Kotecha in ITA Nos.1294 to 1297/PUN/2016 for the assessment years 2007-08 to 2012-13. The ld. AR pointed that all the additions were made by Assessing Officer without incriminating material, on mere change of opinion.

7. On the other hand, Shri Abhishek Meshran representing the Department vehemently defended the assessment order and prayed for reversing the findings of Commissioner of Income Tax (Appeals).

8. We have heard the submissions made by representatives of rival sides and have perused the orders of the Authorities below. It is an undisputed fact that no incriminating material was found during the course of search that would have resulted in any addition in income returned by the assessee. It is also an uncontroverted fact that assessment consequent to the return of income filed u/s.139 of the Act for the assessment year 2006-07 was completed. Thus, on the date of search, no assessment was pending which could have abated. In other words, it is a case of non-abated assessment. It is a well settled law that no addition can be made in respect of assessments which have become final if no incriminating material is found during search. The law was first propounded by the Hon'ble Bombay High Court in the case of CIT Vs. Murli Agro Products Ltd. reported as 49 taxmann.com 172 which was subsequently followed by the Hon'ble Bombay High Court in the case of CIT Vs. Continental Warehousing Corporation (Nhava Sheva) (supra.). Similar view has been taken by the Hon'ble Delhi High Court in the case of CIT Vs. Kabul Chawla, reported as 380 ITR 573.

Thus, in view of undisputed facts of the case and law laid down by the Hon'ble Jurisdictional High Court which has been consistently followed by the Tribunal, we do not find any merit in the grounds raised by the Revenue, accordingly, the same are dismissed being devoid of any merit.

9. In the result, appeal of the Revenue in ITA No.383/PUN/2016 is dismissed.

10. Now, we proceed to decide the appeal of the assessee. The assessee filed cross appeal against the order of Commissioner of Income Tax (Appeals) for assessment year 2006-07 and contested the same by raising following grounds:

*“1) On the facts and in the circumstances of the case and in law the Honourable CIT (Appeals)-12, Pune erred in confirming the treatment of Short Term Capital Gain Rs.26,24,802/- on sale of shares of Listed Companies as profits and gains of business on the grounds that the appellant is trading in shares. The appellant hereby prays that the Short Term Capital Gain of Rs.26,24,802/- may please be restored and addition as normal business income may please be deleted.*

*2) The appellant hereby reserves the right to add, amend, alter, delete or raise any additional ground/s on or before the date of hearing.”*

11. A perusal of the record reveals that it is a case of non abated assessment and no incriminating material was found during search. Therefore, no addition can be made in the case of the assessee. A change of head of income under such circumstances is also not permissible once the return of the assessee has been subjected to assessment and has been accepted by the Department. Without there being any incriminating material, in the case of completed assessments, neither any addition can be made nor there can be any change of opinion, be it change of head of

income. Hence, we find merit in the submissions of the ld. AR, accordingly, appeal filed by the assessee for the assessment year 2006-07 is allowed.

12. In the result, appeal of the assessee for the assessment year 2006-07 is allowed.

**ITA No.384/PUN/2016 (By Revenue)**

**ITA No.2459/PUN/2016 (By Assessee)**

**Assessment Year 2007-08**

13. The Revenue in ITA No.384/PUN/2016 has assailed the findings of Commissioner of Income Tax (Appeals) by raising following grounds:

*“i) On the facts and circumstances of the case, the ld. CIT(A) was not justified in deleting the addition of Rs.26,414/- made on interest of PPF account, since the assessee has multiple PPF accounts.*

*ii) The appellant craves to add, amend or delete any grounds of appeal.”*

14. The Revenue has assailed the order of Commissioner of Income Tax (Appeals) on the solitary issue of deleting addition of Rs.26,414/- on account of interest on Public Provident Fund (PPF) accounts. The Assessing Officer made addition on the ground that the assessee is having multiple PPF accounts and whereas, the assessee can claim benefit of deduction in respect of only one such PPF account.

15. We find that the solitary ground raised by the Revenue in appeal is identical to ground No.(iii) raised in assessment year 2006-07. The addition has been made by the Assessing Officer merely on change of opinion. The return of the assessee filed u/s.139 of the Act was subject to scrutiny assessment. The assessment order u/s.143(3) of the Act was passed on

29.12.2009 i.e. much prior to the date of search. Thus, it is a case of non-abated assessment. No incriminating material, whatsoever, was found during search and seizure action that could have resulted in addition during the impugned assessment year. Therefore, following the detailed reasons given while adjudicating appeal of Revenue assessment year 2006-07, the present appeal of the Revenue for assessment year 2007-08 is dismissed being devoid of any merit.

16. In the result, appeal of the Revenue for the assessment year 2007-08 is dismissed.

17. The assessee filed cross appeal against the order of Commissioner of Income Tax (Appeals) for assessment year 2007-08 and contested the same by raising following grounds:

*“1) On the facts and in the circumstances of the case and in law the honourable CIT(Appeals)-12, Pune erred in confirming the treatment of Short Term Capital Gain Rs.15,38,490/- on sale of shares of Listed Companies as profits and gains of business on the grounds that the appellant is trading in shares. The appellant hereby prays that the Short Term Capital Gain of Rs.15,38,490/- may please be restored and addition as normal business income may please be deleted.*

*2) On the facts and in the circumstances of the case and in law the honourable CIT(Appeals)-12, Pune erred in confirming the treatment of Long Term Capital Gain Rs.13,11,006/- on sale of shares of Listed Companies as profits and gains of business on the grounds that the appellant is trading in shares. The appellant hereby prays that the Long Term Capital Gain of Rs.13,11,006/- may please be restored and addition as normal business income may please be deleted.*

*3) The appellant hereby reserves the right to add, amend, alter, delete, or raise any additional grounds on or before the date of hearing.”*

18. On perusal of the record, we find that it is a case of non abated assessment and no incriminating material was found during search. Therefore, no addition can be made in the case of the assessee. A change of

head of income under such circumstances is also not permissible. Once the return of income filed u/s.139 of the Act by the assessee has been subjected to scrutiny assessment and has been accepted by the Department, without there being any incriminating material and being the case of non-abated assessment, neither any addition can be made nor there can be any change of head of income. Hence, we find merit in the submissions of the ld. AR and allow the appeal of assessee for assessment year 2007-08.

19. In the result, appeal of the assessee for the assessment year 2007-08 is allowed.

**ITA No.385/PUN/2016 (By Revenue)**

**Assessment Year 2008-09**

20. The Revenue in ITA No.385/PUN/2016 has assailed the order of Commissioner of Income Tax (Appeals) by raising following grounds:

*“i) On the facts and circumstances of the case and in law, the ld. CIT(A) was not justified in considering that the additions which are not based on the material gathered during the search are beyond the scope of assessment u/s.153A without appreciating that the additions made by the AO was as a result of search and the issues, directly or indirectly, emerged only after the search action and evidences gathered during the assessment proceedings and hence, cannot be seen in isolation from search.*

*ii) On the facts and circumstances of the case, the ld. CIT(A) erred in deleting the addition of Rs.1,37,60,491/- as business income and treating the same as Long Term Capital Gain.*

*iii) On the facts and circumstances of the case, the ld. CIT(A) erred in deleting the addition of Rs.1,28,921/- as business income and treating the same as Long Term Capital Gain.*

*iv) On the facts and circumstances of the case and in law, the Id. CIT(A) was not justified in treating the disclosed income being investment in plot of land situated at G.No.105, Plot no.36, Mauje Nimkhedi & Dist.Jalgaon as being included under the head 'investment in plots' without considering that the investment of Rs.18,72,660/-has been unearthed following search action and the assessee has failed to provide any cogent evidence to support her claim.*

*v) On the facts and circumstances of the case, the ld.CIT(A) was not justified in deleting the addition of Rs.31,594/-made on interest of PPF account, since the assessee has multiple accounts.*

*vi) The appellant craves to add, amend or delete any grounds of appeal.”*

21. The ld. AR for the assessee submitted that the assessee had filed return of income u/s.139 of the Act on 30.09.2008. The time allowed for making scrutiny assessment u/s.143(3) of the Act expired on 31.12.2010. A search action was carried out in the case of assessee on 09.08.2011. Thus, by the time search action was carried out, the time period for scrutiny assessment u/s.143(3) of the Act had already expired. The ld. AR further submitted that no incriminating material, whatsoever, was found during search action. The Assessing Officer in assessment proceedings consequent to notice issued u/s.153A of the Act made addition merely on presumption and assumption and change of opinion.

21.1 The ld. AR submitted that ground Nos. (i) and (vi) are general in nature.

21.2 The ld. AR further submitted that in ground Nos. (ii) and (iii), the Revenue has assailed the action of Commissioner of Income Tax (Appeals) in deleting addition arising out of trading in shares by the assessee and her minor son. The additions were made merely on change of opinion without there being any incriminating material.

21.3 In respect of ground No.(iv), the ld. AR submitted that addition was made in respect of investment in plot of land comprising in Gat

No.105, Plot No. 36, Mauje: Nimkhedi & Dist. Jalgaon. The ld. AR submitted that the assessee had acquired the said plot of land in the year 2001 and the same was reflected in the Balance Sheet for the Financial Year 2001-02. The addition was made by the Assessing Officer merely for the reasons that the agreement for purchase of the said plot of land was found during search. The Commissioner of Income Tax (Appeals) deleted the addition by observing that the land was purchased on 02.03.2001 and the transaction was recorded in the books of account. There was no evidence that any unexplained investment was made by the assessee in respect of purchase of land during the year under consideration.

21.4 With regard to ground No.(v), relating to interest on PPF account, the ld. AR submitted that this ground is identical to ground No.(iii) raised in assessment year 2006-07.

22. On the other hand, ld. DR vehemently defended the findings of Assessing Officer in the assessment order and prayed for reversing the findings of Commissioner of Income Tax (Appeals).

23. Both sides heard. Orders of the Authorities below perused. It is an undisputed fact that on the date of search, there was no pending assessment for the impugned assessment year. No document has been placed by Revenue on record to show that incriminating material was found during the course of search action on the basis of which additions have been made in the hands of the assessee for assessment year 2008-09.

23.1 Ground Nos. (i) and (vi) are general in nature and hence, requires no adjudication.

23.2 Ground Nos. (ii), (iii) and (v) of the appeals are similar to the one raised in appeal for the assessment year 2006-07. Since there are no incriminating material and the assessment for assessment year under appeal have not abated, no addition made on the basis of mere change of opinion, is sustainable. Accordingly, ground Nos. (ii), (iii) and (v) of the appeal are dismissed being devoid of any merits.

23.3 In ground No. (iv), the Revenue has assailed deleting addition made on account of investment of Rs.18,72,660/- in plot of land situated at No.105, Plot No. 36, Mauje : Nimkhedi & Dist. Jalgaon. The Commissioner of Income Tax (Appeals) has deleted the addition on the ground that the plot of land was purchased in the year 2001 and the transaction was recorded in the books of account. During search no evidences were found that any unexplained investment was made by the assessee for purchase of said plot of land during the period relevant to impugned assessment year. The ld. AR has drawn our attention to the Balance Sheet as on 31.03.2001 indicating the extent of investment made and list of immovable properties held by the assessee as on 31.03.2001. We find that the plot in question has been disclosed in the list of immovable properties as on 31.03.2001. Since the purchase of asset has already been reflected in the Balance Sheet for the financial year ending in which the asset was purchased, mere seizure of some documents pertaining to the said property would not make the

documents incriminating. We do not find any infirmity in the order of Commissioner of Income Tax (Appeals) in deleting the addition. Accordingly, the impugned order is upheld and the appeal of Revenue for the assessment year 2008-09 is dismissed being devoid of any merit.

24. In the result, appeal of the Revenue for the assessment year 2008-09 is dismissed.

**ITA No.386/PUN/2016 (By Revenue)**  
**Assessment Year 2009-10**

25. The Revenue in ITA No.386/PUN/2016 has assailed the order of Commissioner of Income Tax (Appeals) by raising following grounds:

*“i) On the facts and circumstances of the case and in law, the ld. CIT(A) was not justified in considering that the additions which are not based on the material gathered during the search are beyond the scope of assessment u/s.153A without appreciating that the additions made by the AO was as a result of search and the issues directly or indirectly emerged only after the search action and evidences gathered during the assessment proceedings and hence cannot be seen in isolation from search.*

*ii) On the facts and circumstances of the case, the ld. CIT(A) erred in deleting the addition of Rs.1,19,98,381/- as business income and treating the same as Long Term Capital Gain.*

*iii) The appellant craves to add, amend or delete any grounds of appeal.”*

26. The ld. AR for the assessee submitted that in assessment year 2009-10 as well no incriminating documents were found and there was no pending assessment. The assessee filed return of income u/s.139 of the Act on 03.09.2009, time for issuing notice u/s.143(2) expired on 30.09.2010. No notice u/s.143(2) of the Act was issued to the assessee till then. Thus, it is a case of closed assessment. The ld. AR pointed that addition was made by the Assessing Officer merely by changing head of

income. The assessee had disclosed income from trading of shares as 'capital gain'. The Assessing Officer made addition by holding gain on sale of shares as 'business income'. The ld. AR submitted that in view of law laid down in the case of CIT Vs. Murli Agro Products Ltd. (supra), no addition can be made without there being any incriminating material and there is no pending assessment. The Assessing Officer has made addition merely on the basis of change of opinion. The Commissioner of Income Tax (Appeals) deleted the addition following the law laid down by the Hon'ble Jurisdictional High Court.

27. On the other hand, ld. DR vehemently defended the order of Assessing Officer and prayed for reversing the findings of Commissioner of Income Tax (Appeals) on this issue.

28. Both sides heard. Orders of the Authorities below perused. The solitary issue raised in the appeal by Revenue is with regard to change of head of income. The assessee disclosed gain from trading in shares under the head "capital gains". The Assessing Officer changed the head of income to "Business Income". It is an undisputed fact that there was no pending assessment and no incriminating material was found during search. Thus, it is a case of non-abated assessment. The Assessing Officer cannot make addition by merely changing head of income in assessment proceeding u/s.153A of the Act, without there being any incriminating material in a case of closed assessment. We do not find any infirmity in the order of Commissioner of Income Tax (Appeals) in deleting the addition. The findings of the Commissioner of Income Tax

(Appeals) are upheld, consequently, appeal of the Revenue for the assessment year 2009-10 is dismissed.

29. To sum up, appeals of the Revenue in ITA Nos.383 to 386/PUN/2016 are dismissed and appeals of the assessee in ITA No.2458 & 2459/PUN/2016 are allowed.

Order pronounced on Thursday, the 28<sup>th</sup> day of February, 2019.

Sd/-	Sd/-
(डॉ. करुणाकरा राव/D. KARUNAKARA RAO)	(विकास अवस्थी /VIKAS AWASTHY)
लेखा सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 28<sup>th</sup> February, 2019.  
SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-12, Pune.
4. The Pr. CIT, Central, Nagpur.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

// True Copy //

आदेशानुसार / BY ORDER,

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

		Date	
1	Draft dictated on	15.02.2019	Sr.PS/PS
2	Draft placed before author	28.02.2019	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		