

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

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 3249/MUM/2017 (A. Y: 2009-10)

Shri Ashok M. Shah Flat No. 403, 4 th Floor Parsuram Puria Enclave Haji Bapu Road, Malad (E) Mumbai – 400 064 PAN: ASDPS 2793 R	v.	Income Tax Officer – 24(1)(3) C-13, 4 th Floor Pratyakshar Bhavan, Bandra (E) Mumbai – 400 051
(Assessee)		(Respondent)

Assessee by : **Ms Dinkle Hariya**
Department by : **Shri Rajesh Kumar Yadav**

Date of Hearing : **25.04.2019**
Date of Pronouncement : **12.07.2019**

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the assessee against the order of the Learned Commissioner of Income Tax (Appeals)–41, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 31.03.2017 for the A.Y. 2009-10.
2. Assessee challenged the order of the Ld.CIT(A) in sustaining the addition made by the Assessing Officer on protective basis. Assessee also raised additional grounds challenging the reassessment made u/s.143(3) r.w.s. 147 of the Act.

3. Ld. Counsel for the assessee, at the outset submits that the addition has been made substantively in the assessment of Shri Mangilal Pukhraj Jain and he has accepted the addition and no appeal has been filed by him. Ld. Counsel for the assessee submits that since the addition which was made substantively in the hands of Shri Mangilal Pukhraj Jain came to be accepted and since Shri Mangilal Pukhraj Jain has not filed any appeal, the protective addition made in the hands of the assessee i.e. Shri Ashok M. Shah should be deleted.

4. On a specific query by the Bench to the Ld.DR that whether Shri Mangilal Pukhraj Jain filed any appeal against the addition made in his hands substantively, the Ld.DR referring to the order of the Ld.CIT(A) wherein the Ld.CIT(A) has referred to the remand report of the Assessing Officer who communicated that it is not known as to whether Shri Mangilal Pukhraj Jain filed any appeal or not and no appeal folder could be located, he places reliance on the Ld.CIT(A) order.

5. We have heard the rival submissions, perused the orders of the authorities below. It is the observation of the Ld.CIT(A) that the assessee before him contended that protective addition was made in his hands and substantive addition was made in the assessment of Shri Mangilal Pukhraj Jain and Shri Mangilal Pukhraj Jain has accepted the assessment and no appeal has been filed and therefore since the addition came to be

finally assessed substantively in the hands of Shri Mangilal Pukhraj Jain there cannot be any protective addition in the case of assessee as it amounts to double addition. To verify the contentions of the assessee, the Ld.CIT(A) required the Assessing Officer to ascertain the finality of the assessment in the case of Shri Mangilal Pukhraj Jain by letter dated 18.03.2016. Subsequently, Ld.CIT(A) issued a reminder dated 04.07.2016 to the Assessing Officer. We find that Income Tax Officer, Ward No. 31(2)(3) received a letter dated 27.01.2017 from the office of the Ld. Commissioner of Income-tax (Appeals)-42 informing that there has been no record of any appeal folder in the case of Shri Mangilal Pukhraj Jain. Subsequently the Income Tax Officer, Ward No. 31(2)(3) written a letter dated 01.02.2017 to Income Tax Officer, Ward No. 30(1)(1) who is the Assessing Officer of the Assessee before us stating that there is no appeal pending with Ld.CIT(A)-42, Mumbai for disposal as per information received from Ld.CIT(A)-42, Mumbai. We notice from the record before us on 16.02.2017 the Assessing Officer sent a report to the Ld.CIT(A) stating as under: -

To,
**The Commissioner of Income Tax
(Appeal)-41, Mumbai,**

(Through Joint CIT Range 30(1), Mumbai)

Sir,;

Sub: Remand report in the case of Ashok M Shah for A.Y. 2009-10 Intimate the fate of assessment in the case of Shri Mangilal P Jain

Ref: - 1. No CIT (A)-41/ Remand report/2016-17 dated 16.01.2017
2. This office letter No ITO 30(1)(1)/ Remand report/2016-17 dated 25.01.2017

Kindly refer to the above

In continuation to earlier communication, it is further informed that a communication has been received from ITO 31(2)(3), Mumbai vide letter dated 01.02.2017. In the said letter it has been informed that as per the information received from CIT (A)-42, Mumbai, no record of appeal folder in the case of Mangilal P Jain is available in their office (copy enclosed)

Submitted for kind perusal. Issue may be decided on merits

Yours faithfully,

(MANTSH KJJMAR)
Income-tax Officer-30(I)(I)
Mumbai.

6. The Ld.CIT(A) in spite of receiving the remand report from the Assessing Officer stating that no appeal folder is available and also having said that it is not known as to whether Shri Mangilal Pukhraj Jain has filed any appeal or not, the Ld.CIT(A) is not justified in sustaining the protective addition made in the hands of the assessee, though Shri Mangilal Pukhraj Jain in his statement might have stated that he has received the monies from the assessee which was deposited in bank account. The fact that no appeal has been filed by Shri Mangilal Pukhraj Jain and accepted the addition made in his assessment cannot be ignored and lost sight of.

7. On the material available on record before us and in the absence of any evidences filed by the Department to show that Shri Mangilal Pukhraj Jain has agitated the substantive addition made in his hands before the Commissioner of Income-tax (Appeals), we conclude that the Shri

Mangilal Pukhraj Jain has not filed any appeal by him and the addition made substantively in his hands stood finally accepted by him. Therefore, the protective addition made in the hands of the assessee has no legs to stand and will not survive as it become double addition which is not permissible in law. Thus, we direct the Assessing Officer to delete the protective addition made in the hands of the assessee. We make it clear that the Department is at liberty to revive the assessment of the assessee, if the Assessing Officer is able to prove that the substantive addition made in the case of Shri Mangilal Pukhraj Jain has been agitated in appeal proceedings in his case. The additional ground raised by the assessee challenging the reopening of assessment u/s. 147 of the Act is admitted being a pure legal ground. However, this ground is left open and the assessee may agitate this ground at appropriate time. With these observations, we allow the appeal of the assessee.

8. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on the 12th July 2019

Sd/-
(MANOJ KUMAR AGGARWAL)
ACCOUNTANT MEMBER

Mumbai / Dated 12/07/2019
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. The Assessee
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum