

आयकर अपीलीय अधिकरण] पुणे न्यायपीठ “बी” पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “B”, PUNE

**BEFORE MS. SUSHMA CHOWLA, JM AND
SHRI ANIL CHATURVEDI, AM**

आयकर अपील स० / ITA No.163/PUN/2009

Block Period : 1997-98 to 2003-04

Mrs. Aruna J. Kapse,
Classik Arcade, Saigram, Cidco
Ambad Link Road, Ambad,
Nashik – 422010.

..... अपीलार्थी /
Appellant

PAN : ANGPK2783B.

बनाम v/s

The Dy. Commissioner of Income Tax,
Central Circle – 1, Nashik.

..... प्रत्यर्थी /
Respondent

आयकर अपील स० / ITA No.164/PUN/2009

Block Period : 1997-98 to 2003-04

Shri Janardhan R. Kapse
Classik Arcade, Saigram, Cidco
Ambad Link Road, Ambad,
Nashik – 422010.

..... अपीलार्थी /
Appellant

PAN : ABPPK7293K.

बनाम v/s

The Income Tax Officer,
Ward 14(4), Pune.

..... प्रत्यर्थी /
Respondent

Assessee by : Ms. Deepa Khare.

Revenue by : Shri Sudhendu Das.

सुनवाई की तारीख / Date of Hearing : 03.07.2019	घोषणा की तारीख / Date of Pronouncement: 16.10.2019
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आदेश / ORDER**PER ANIL CHATURVEDI, AM :**

1. These two appeals filed by two different assessees, related to each other, are emanating out of the consolidated order of Commissioner of Income Tax (Appeals) – 1, Nagpur dated 29.08.2008 for block period 1997-98 to 2003-04.

2. Before us, at the outset, both the parties submitted that though the appeals filed by two different assessees are against the consolidated order of Commissioner of Income Tax (Appeals) – 1, Nagpur the issues involved in both the appeals are identical except for the assessee and the amounts involved and therefore the submissions made by them while arguing one appeal would be equally applicable to the other appeal also and thus both the appeals can be heard together. In view of the aforesaid submissions of both the parties, we, for the sake of convenience, proceed to dispose of both the appeals by a consolidated order but however, proceed with narrating the facts in ITA No.163/PUN/2019 for block period 1997-09 to 2003-04.

3. The relevant facts as culled out from the material on record are as under :-

Assessee is an individual who is stated to be engaged in supervision of construction activities. A search and seizure action u/s 132 of the Act was conducted in the case of Prakash Laddha Group on 09.10.2002. The block assessments were completed in F.Y. 2004-05. During the verification of material found in the search, it was seen that Prakash Laddha had acquired shares of M/s. Vastukrupa Construction (India) Pvt. Ltd. from Mr. and Mrs. Janardhan Kapse. Prakash Laddha in the statement recorded u/s 132(4) of the Act on 11.10.2002 had accepted the acquisition of shares

of Vastukrupa Construction (India) Pvt. Ltd from Mr. and Mrs. Janardhan Kapse. It was noted that Vastukrupa Construction (India) Pvt. Ltd was incorporated in the year 1991 and was doing the business of land development and construction of residential and commercial complex and its Authorized Capital was Rs.5 lakhs and Paid up Capital was Rs.1,80,000/-. Mr. and Mrs. Janardhan Kapse were holding 400 shares each. Mr. Laddha submitted that the total sale price of the company was fixed at Rs.45 lakhs. It was further stated that assessee had received Rs.5 lakhs by cheque from Prakash Laddha and her husband had received Rs.5 lakhs cheque and further Prakash Laddha had issued post dated cheques for the balance amount to the assessee which could not be encashed. In view of the aforesaid facts, notice u/s 158BD was issued and served on the assessee. Thereafter, the case was taken up for scrutiny and subsequently, assessment was framed u/s 158BD r.w.s 143(3) of the Act vide order dt.21.11.2006 and the total undisclosed income was determined at Rs.21,89,923/- on account of capital gains on sale of shares of Vastukrupa Construction (India) Pvt. Ltd. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who vide order dt.29.09.2008 (in appeal No.CIT(A)-1/160/2007-08) dismissed the appeal of the assessee. Aggrieved by the order of Ld.CIT(A), assessee carried the matter before the Tribunal. The Co-ordinate Bench of the Tribunal vide consolidated order in the case of assessee and her husband in ITA No.163 & 164/PN/2019 vide order dt.10.07.2015 dismissed the appeals of the assessee. Thereafter, assessee filed M.A.N.45/PN/2015 wherein it was submitted by the assessee that while deciding the issue, the Tribunal had considered the assessment order passed u/s 158BD r.w.s. 143(3) of the Act and order of Ld.CIT(A) dated 26.12.2006 passed in the case of Shri Prakash Laddha. It was assessee's submission that the assessment order as well as order of Ld.CIT were neither referred by the assessee nor the Ld. D.R. during the course of hearing and no arguments were placed on the above documents.

It was further the submission of the assessee that the assessee was not confronted with the same nor any opportunity was given by the Tribunal. Assessee therefore submitted that there was mistake in the order of the Tribunal and sought for its re-calling and decide it afresh on merits. The Tribunal vide order passed in M.A.No.45 dt.29.06.2016 recalled the order of the Tribunal for fresh hearing. Accordingly, the assessee is now before us in the second round and has raised the following grounds :

“1. On the facts and in law the CIT(A) has erred in adopting sale consideration for transfer of 400 shares at Rs. 22,50,000/- as against Rs.5,00,000/-.

2. On the facts and in law the CIT(A) has erred in not appreciating the fact that the consideration for transfer of 400 shares was Rs. 5,00,000/- as per copy of share transfer form seized in action u/s. 132(4), statement of Mr. Prakash Laddha u/s. 132(4) and statement of cross examination of Mr. Prakash Laddha.

3. On the facts and in law the CIT(A) has erred in accepting part of the contents of the letter filed by the appellant beneficial to the revenue and rejecting part of the contents of the same letter, which is not beneficial to the revenue against the proposition of law laid down by hon'ble Pune ITAT, in the case of 'Chandramohan Mehta Vs. ACIT, 71 ITD 245.

4. On the facts and in law the CIT(A) has erred in taxing the consideration of Rs. 27,00,000/- towards expenditure incurred by the appellant for site development of the land during 1990-91 to 31/3/2000 Rs.13,37,745/-.

5. On the facts and in law the CIT(A) has erred in not appreciating the fact that, no consideration towards expenditure incurred by the appellant for site development of the land was received and the purchaser is also not willing to pay the same and litigating the same in Nashik Court.

6. On the facts and in law the CIT(A) has erred in not considering cost of land development etc. incurred by the appellant at Rs. 13,37,745/- while arriving at taxable capital gain.”

4. Before us, Ld.A.R. submitted that assessee had made request for admission of additional grounds before the Tribunal while the matter was being heard in the first round and the additional ground was with respect to challenging the invocation of provisions of Sec.158BD as it was assessee's submission that there was no undisclosed income arisen belonging to the assessee as found in the material seized.

5. The additional grounds raised in ITA No.163/PN/2009 reads as under :

“1. The learned AO erred on facts and in law in invoking action u/s 158BD without any indication in the material seized at Annexure – A item No.18 that any undisclosed income is arriving or belonging to the appellant.

2. The learned AO erred in law and on facts in assessing the capital gain in the block assessment u/s 158BD when the respective investments as also the subsequent sale of shares had been disclosed by the appellant in the regular returns filed by the appellant before the date of search.”

6. Similar grounds and additional grounds have been raised in ITA No.164/PN/2009 for the block period 1997-98 to 2003-04.

7. Before us, Ld.A.R. reiterated the submissions made before lower authorities and further submitted that of the consideration of Rs. 45 lakhs, Rs. 35 lakhs was never received by the assessee or her husband as the cheques issued by Mr. Prakash Laddha were not honoured by him and in such a situation, no addition was called for in the present case. The Ld.A.R. submitted that since the order has been recalled, the jurisdictional issue of assessment framed u/s 158BD also needs to be decided now. She submitted that the AO has erred in invoking action u/s 158BD of the Act more so, as the respective investments were disclosed by the assessee in the returns of income filed prior to search. She therefore submitted that the assessment order passed u/s 158BD of the Act be set aside. Ld. D.R. on the other hand, supported the order of lower authorities.

8. We have heard the rival contentions and perused the material on record. The issue which arises in the present appeal is consequent to the order in Miscellaneous Application (M.A.) filed by the assessee against the order of the Tribunal dated 29.06.2016. The Tribunal while deciding the appeal of the assessee in the first round had decided the issue of 158BD vide Para 7 and 8 and held as under :

“7. We have heard the submissions made by rival sides and have perused the orders of the authorities below. The first argument raised by the ld. AR is with respect to validity of proceedings u/s. 158BD. We find that the assessee had neither raised this ground before the Commissioner of Income Tax (Appeals) nor this ground has been taken in the grounds of appeal before the Tribunal. The ld. AR for the first time has assailed the invoking of jurisdiction u/s. 158BD in oral arguments before the Tribunal. The ld. DR has strongly objected to the same. It is a well settled law that the appellant can raise fresh legal ground before the Tribunal even if it is not taken before the First Appellate Authority. However, the appellant has to make an application for raising such additional ground. National Thermal Power Corp. Ltd. v. CIT 229 ITR 383 (SC). Dehors the fact that invoking of jurisdiction u/s. 158 BD has been challenged without any formal application for admitting additional ground, we are deciding this issue.

8. During the course of search proceedings in the case of Laddha Group, documents relating to sale of shares of Vastukripa Construction (I) Pvt. Ltd. were found and seized. Sh. Prakash Laddha and his wife Smt. Aruna P. Laddha had purchased 400 shares each in Vastukripa Construction (I) Pvt. Ltd. from the assessee in Financial year 1999-2000. In statement recorded u/s. 132(4), Sh. Prakash Laddha admitted the purchase of shares. For verification of facts, assessee were summoned u/s. 131. On the basis of documents seized, verification of case records and the statements recorded, it transpired that assessee have not returned the capital gains on sale of shares in their respective return of income. In the backdrop of these facts notice u/s. 158BD was issued to the assessee. The provisions of section 158BD can be invoked where the Assessing Officer is satisfied that any undisclosed income of a person other than one against whom search was conducted is reflected in the books of accounts/documents of the person searched. We find that after recording of satisfaction notice u/s. 158BD was issued to the assessee by the Assessing Officer on 29-09-2004. The ld. AR of the assessee has contended that the entire income has been accounted for and is reflected in the balance sheet of the assessee. However, no documentary evidence has been placed on record in support of such contentions. Further, the ld. AR has not been able to show that the assessee have disclosed Capital Gains on sale of shares in any of the impugned assessment years. Thus, we are not inclined to accept the contentions of the assessee that invoking of jurisdiction u/s. 158BD is unjustified. Accordingly, we reject the same.

9. Thereafter, the issue was decided on the merits of the case vide Para No.9 onwards. The assessee filed M.A. against the order of the Tribunal and in Para 1 of the M.A. the assessee referred to the decisions of Tribunal in Paras 11 and 12 and has adjudicated the issue. The issue was decided by the Tribunal on the basis of the material which was never confronted to the assessee i.e., the letter of Shri Prakash P. Laddha mentioned in Para No.11 of the Tribunal's order. We have perused the M.A. filed by the assessee and find no mention of Paras 7 and 8 of the order of the Tribunal dated 10.07.2015 by which the Tribunal decided the issue of invoking jurisdiction u/s 158BD of the Act.”

10. The Ld.A.R. for the assessee states that while deciding the M.A. in M.A.No.45/PN/2015 order dated 29.06.2016, the Tribunal had recalled its order and Registry was asked to list the appeal of the assessee for fresh hearing after due course. In this regard, it is the case of the assessee that both the issues of the jurisdiction i.e., the application of provisions of Sec.158BD and on merits have been recorded. We find no merit in the said plea of the assessee. The M.A. is clearly for the limited purpose wherein the reference was only made to the issue decided in Paras 11 and 12 i.e., the issue decided on merits. No reference made to Paras 7 and 8 of the original order of the Tribunal order by which the jurisdictional issue was decided. Hence, this plea of the assessee is dismissed.

11. Now coming to the issue raised on merits of the case whether in the present facts, any addition is warranted on account of the sale of shares over and above the cheque amount received by the assessee and Shri Janardhan R. Kapse. The assessee Ms. Aruna Kapse had sold 400 shares for consideration of Rs.13 lakhs and the other assessee Shri Janardhan R. Kapse had sold 400 shares at Rs.32 lakhs. The total sale consideration was fixed at Rs.45 lakhs. Both the assessees claim to have received Rs.5 lakh each by cheque from Shri Prakash Laddha. For the remaining amount, post dated cheques were issued which were dishonoured.

12. During the course of search, in the case of Prakash Group, Prakash Laddha and his wife Mrs. Aruna Laddha accepted the purchase of shares for a total consideration of Rs.45 lakhs. During the course of 158 BD proceedings, the assessee claimed that the amount due from Prakash Laddha on account of dishonour of cheques were not received till date and issue arose between the parties wherein the case was pending before the District Court, Nashik. The assessee claims that they had only received the sum of Rs.5 lakhs each. Another plea raised was that the they have spent

a sum of Rs.17,49,617/- for improvement of site of land. The AO was of the view that since both the assesseees had equal number of shares in Vastukrupa Construction (India) Pvt. Ltd., then the sale consideration should be equally divided. Thus, AO computed the long term capital gains on the sale of shares after giving benefit of indexation. However, the claim of unsecured loan given for improvement of sites was not allowed.

13. The issue which was decided by the Tribunal was on the merits of the case on the admission of the assessee that it was to be received Rs.45 lakhs as sale consideration. The next contention was that it had only received Rs.10 lakhs and the balance Rs.30 lakhs was not received by the assessee till the date of transaction. Since the post dated cheques remained dishonoured, the assessee also claimed deduction on account of expenditure incurred for improvement of site totaling to Rs.17,49,617/- and claimed that the same was in the nature of unsecured loan to the company. The assessee further claimed that sum of Rs.45 lakhs was not only towards transfer of shares but also repayment of cost of improvement of site. The assessee failed to furnish any evidence of payment of the amount towards improvement of site and this plea of the assessee was rejected. Before us also no such evidence has been filed. In any case, the assessee had claimed to have sold the shares for a sum of Rs.45 lakhs against which it had jointly received Rs.10 lakhs and for balance there was dispute pending before the District Court, Nashik. While assessing the income under the head of capital gains, the sale consideration of the assets sold is to be taken into account, whether the amount is received or to be receivable in future. Undoubtedly since the assessee only pleads that they received Rs. 5 lakhs each towards sale consideration, it should be adopted. But the transaction was for a sum of Rs.45 lakhs jointly to be received by the two persons. Hence, for the purpose of inclusion of capital gains, the said amount is to be adopted irrespective of the fact that the balance

amount has not been received. We have decided this issue on the basis of the facts and the law point. The plea of the assessee in the M.A. proceeding was that it had not received copies of seized documents and hence, that evidence cannot be used against the assessee. The Tribunal in M.A. had accepted the said plea of the assessee. However we have proceeded to decide the appeal on the merits of the case keeping in mind the facts and law involved and are not deciding the issue on the basis of the seized documents. In view thereof, the plea of the Ld. D.R. for the Revenue is that it was immaterial whether the sale consideration was received in full or part while deciding the issue of the capital gains is accepted and the grounds of appeal raised by the assessee are dismissed.

14. **In the result, both the appeals of assesseees are dismissed.**

Order pronounced on 16th day of October, 2019.

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(ANIL CHATURVEDI)
लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 16th October, 2019.

Yamini

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(A)-1, Nagpur.
4. CIT (Central), Nagpur.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" / DR, ITAT, "B" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER

// True Copy //

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