

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

BEFORE SHRI M. BALAGANESH, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.2037/Mum/2018

(निर्धारण वर्ष / Assessment Year: 2009-10)

Smt. Pooja Gandhi A/303, Balaji Gardens, Sector-11, Koparkhairne, New Mumbai-400709.	बनाम/ Vs.	ACIT, Central Circle-45 Aayakar Bhavan, Mumbai- 400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABPA1069Q		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Gaurav Kabra	
Revenue by:	Shri V. Sreekar (DR)	

सुनवाई की तारीख / Date of Hearing: 13/01/2020

घोषणा की तारीख /Date of Pronouncement: 29/01/2020

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 25.01.2018 passed by the Commissioner of Income Tax (Appeals) - 48, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2009-10.

2. The assessee has raised the following grounds: -

- "1) *On the facts and circumstances of the case as well as in Law, the Learned CIT (A) has erred in confirming the action of the Learned Assessing Officer in making an addition otherwise than on the basis of incriminating evidence, without considering the facts and circumstances of the case.*



- 2) *On the facts and circumstances of the case as well as in Law, the Learned OI(A) has erred in confirming the action of the Learned Assessing Officer in making an addition of Rs.1,45,279/- on account of alleged Low withdrawal towards household expenses, without considering the facts and circumstances of the case.*
- 3) *On the facts and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of the Learned Assessing Officer in making an addition of Rs.50,00,000/- u/s 68 of the Income tax Act,1961 as alleged Unexplained unsecured Loans, without considering the facts and circumstances of the case.*
- 4) *The appellant craves Leave to add, amend, alter or delete the said grounds appeal."*

3. The brief facts of the case are that a search and seizure action u/s 132 of the I. T. Act, 1961 was carried out on 10.02.2012 at the office premises of M/s. Unity Infra-projects Ltd. and residence of its Directors, its suppliers and their Directors and partners etc. M/s. Dev Steel was a partnership firm from which M/s. Unity group was claimed to have made purchase. The assessee and her husband Shri Devang Gandhi was a partners in M/s. Dev Steel, a firm which was claimed to have engaged in trading of Steel. A search of residential premises of the assessee i.e. A-wing, 303, 3rd Floor, Plot 17, Balaji Gardens, Sector-11, Koparkhairane, Navi Mumbai are covered by way of Warrant No.8598. Further, warrant no.8599 was also issued in respect of Locker No.377 of IDBI, Koparkhairane, Navi Mumbai which was held by jointly. The notice u/s 153C was issued on 14.12.2012 which was served upon the assessee. In pursuance of notice, the assessee filed the return of income declaring total income to the tune of Rs.1,73,855/- which he had already declared in her original return of income u/s 139(1) of the Act. Thereafter, notices u/s 143(2) & 142(1) of the Act were issued and served upon the assessee. Thereafter, the assessment of



the assessee was completed assessing the total income to the tune of Rs.53,19,130/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who dismissed the appeal of the assessee, therefore, the assessee has filed the present appeal before us.

ISSUE NO.1

4. We have heard the argument advanced by the Ld. Representative of the parties and perused the record. At the very outset, the Ld. Representative of the assessee has argued that the no new information came into notice of the AO while completing the assessment u/s 153A of the Act, therefore, the assessment is not liable to be sustainable in the eyes of law. It is also specifically argued that the case of the assessee has duly been covered with the decision of the Hon'ble ITAT in the assessee's own case namely **Shri Devang Gandhi**, therefore, the assessment is liable to be set aside in the interest of justice. The copy of order bearing ITA. No.2031/M/2018 for the A.Y.2007-08 and ITA. No.2032/M/2018 for the A.Y.2008-09 and ITA. No.2033/M/2018 for the A.Y.2006-07 dated 08.11.2018 is on the file in which the relevant finding has been given in para no. 6 to 11 which are hereby reproduced as under.:-

“6. I heard the parties and perused the record. Before Learned CIT(A), the assessee raised a legal ground that the additions could be made in the case of unabated assessments or concluded assessments only on the basis of seized materials. For appreciating the contentions of the assessee, we feel it pertinent to extract below the provisions of sec. 153A of the Act:- “Assessment in case of search or requisition. 153A (1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall— (a) issue notice to



such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139; (b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made: Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years: Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-section pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate: Provided also that the Central Government may by rules made by it and published in the Official Gazette (except in cases where any assessment or reassessment has abated under the second proviso), specify the class or classes of cases in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made. (2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Principal Commissioner or Commissioner.” As per the provisions of sec. 153A of the Act, the assessing officer is required to assess or reassess the total income of six assessment years immediately preceding the year in which the search was initiated. As per the second proviso to sec. 153A(1) the assessment or reassessment, if any, pertaining to the six assessment years pending as on the date of initiation of search shall abate.

7. A careful perusal of the above said provisions would show that, what is required to be seen is whether any assessment or reassessment pertaining to six assessment years mentioned in sec. 153A(1) is pending on the date of initiation of search or not. If assessment of any of the assessment year is not pending, then the same shall not abate. If the assessment of any of the AY is pending, then the same shall abate.



Hence the pendency of the assessment proceedings is the relevant criteria. I have noticed earlier that the Ld CIT(A) has expressed the view that the test to be applied is whether the earlier assessment was completed u/s 143(3) or not. A careful reading of the provisions of sec.153A would show that sec. 153A does not contain any provision to support the view taken by Ld CIT(A).

8. Sec. 153A makes it clear that the assessments which are not pending on the date of initiation of search would not abate, i.e., those assessments will remain intact and they will not get re-opened by virtue of the provisions of sec. 153A of the Act. At this stage, a question that arises is as to when and how an assessment should be considered as pending as on the date of initiation of search. In this regard, I may refer to the decision rendered by the Mumbai bench of Tribunal in the case of Gurinder Singh Bawa Vs. DCIT (2014)(150 ITD 40), wherein the Tribunal has observed that after the expiry of time limit prescribed for issuing notice u/s 143(2) of the Act, the assessment cannot be considered to be pending if no notice under that section was issued. Under the scheme of the Act, after filing of return of income, the assessing officer can assume jurisdiction to assess the income by issuing notice u/s 143(2) of the Act. The return of income is accepted as it is, if the AO did not intend to scrutinize the said return of income. In that case, no notice is issued u/s 143(2) of the Act. It is pertinent to note that the Act prescribes a time limit for issuing notice u/s 143(2) of the Act and it is well settled proposition that the AO cannot issue such notice after the expiry of prescribed time limit. Hence, the co-ordinate bench has held in the case of Gurinder Singh Bawa (supra) that the assessment of a particular year would not be considered to be pending as on the date of initiation of search, if the period for issuing notice u/s 143(2) of the Act had expired by the time the search is initiated u/s 132 of the Act and no notice was issued. In such kind of cases, the assessment shall be considered to have become final by operation of law after the expiry of time limit prescribed u/s 143(2) of the Act, if the AO did not issue notice u/s 143(2) of the Act. In the cases where the assessments were not considered to be pending, the question of abatement of the same does not arise at all, meaning thereby the same would fall in the category of "unabated assessments". Hence, in my opinion, the view taken by Ld CIT(A) that availability of order u/s 143(3) in order to make the decision rendered by Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Nhava shewa) Ltd (supra) is not in accordance with the scheme of the Act.

9. In this regard, it is also pertinent to refer to the following observations made by the Special bench in the case of All Cargo Global logistics Ltd



(supra):- “ 57 (f) In the case of Parashuram Pottery works co. Ltd Vs. ITO (106 ITR 57)(SC), it has been mentioned in the last paragraph of the judgment that the court has to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi judicial controversies as it must in other spheres of human activity. Our decision is in consonance with this observation.”

The decision rendered by the Special bench that the assessing officer can make additions in the case of concluded assessments on the basis of incriminating materials is also based upon principle laid by the Hon’ble Supreme Court in the case of Parashuram Pottery works Co. Ltd (supra).

10. In the instant cases, there is no dispute that the assessment years under consideration are “unabated assessment years” and hence the AO could make any addition to the total income only on the basis of incriminating materials. However, the assessing officer has added cash credits already recorded in the books of accounts and no incriminating material relating to those cash credits was found during the course of search. Hence, as per the decision rendered by Hon’ble Bombay High Court in the case of Continental warehousing corporation (Nhava Sewa) Ltd (supra), the AO could not have made the impugned additions. Accordingly, I set aside the orders passed by Ld CIT(A) in all the years under consideration in the hands of both the assesseees and direct the AO to delete the additions made by him in all the years under consideration.

11. Since I have decided the legal issue in favour of the assessee, there is no necessity to address the grounds urged on merits.

5. The facts of the present case is quite similar to the facts of the case as narrated above. It is also quite clear that the assessment in the case of Shri Devang Gandhi came into existence on the basis of the same search carried out on 10.02.2012 who is the husband of the assessee. The facts of the present case is quite similar to the facts of the case of Shri Devang Gandhi (supra). Accordingly, it is quite clear that the assessment of the assessee is not liable to be sustainable in the eyes of law, therefore, we set aside the finding of the CIT(A) on this issues and allowed the claim of the assessee against the revenue.



ISSUE Nos. 2 & 3

6. Since the case of the assessee has been allowed on the basis of the finding of issue NO. 1, therefore, decision of the case on merits on these issues would be academic in nature, hence, the same are not liable to be decided.

7. In the result, the appeal filed by the assessee is hereby ordered to be allowed.

Order pronounced in the open court on 29/01/2020.

Sd/-

Sd/-

(M. BALAGANESH)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 29/01/2020

Vijay Pal Singh/ Sr. PS

(AMARJIT SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER

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)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai