

IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR
BEFORE SHRI P.K. BANSAL, VICE PRESIDENT AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER

ITA no. 20/Nag./2016
(Assessment Year : 2005-06)

Dy. Commissioner of Income Tax, Central
Circle-2(2), Nagpur Appellant

v/s

Shree Agrawal Coal India Pvt. Ltd.
216, Devi Kripa Society
Wardhman Nagar, Nagpur
PAN - AAFCS6709L Respondent

ITA no. 21/Nag./2016
(Assessment Year : 2006-07)

Dy. Commissioner of Income Tax, Central
Circle-2(2), Nagpur Appellant

v/s

Shree Agrawal Coal India Pvt. Ltd.
216, Devi Kripa Society
Wardhman Nagar, Nagpur Respondent
PAN - AAFCS6709L

ITA no. 22/Nag./2016
(Assessment Year : 2007-08)

Dy. Commissioner of Income Tax, Central
Circle-2(2), Nagpur Appellant

v/s

Shree Agrawal Coal India Pvt. Ltd.
216, Devi Kripa Society, Wardhman
Nagar, Nagpur PAN - AAFCS6709L Respondent

Revenue by : Shri A.R. Ninawe
Assessee by : Shri J.M. Ranade

Date of Hearing - 19.06.2017

Date of Order - 21.06.2017



ORDER**PER AMARJIT SINGH, J.M.**

The present appeals filed by the Revenue are directed against the impugned common order dated 22nd December 2015, passed by the learned Commissioner (Appeals)-3, Nagpur-, for the assessment years 2005-06, 2006-07 and 2007-08 respectively, the findings of which will apply to the remaining appeals also.

2. Since all the three appeals pertain to the same assessee involving common issue arising out of identical set of facts and circumstances, except variation in figures, therefore, as a matter of convenience, these appeals were heard together and are being disposed off by way of this consolidated order. However, in order to understand the implication, it would be necessary to take note of the facts of one appeal. We are, accordingly, narrating the facts, as they appear in the appeal in ITA no.20/Nag./2016, for assessment year 2005-06.

3. Grounds raised by the Revenue for the assessment year 2005-06 are reproduced below:-

"1. On the facts and circumstances of the case, the learned CIT(A) erred in holding that the notice and action u/s 153A of the I.T. Act was bad in law, even though the Assessing Officer had recorded his satisfaction that the documents seized from various premises, belonged to the assessee, which is the only pre-

Shree Agrawal
Coal India Pvt. Ltd.

condition for issue of notice under Section 153A of the Income-tax Act, 1961?

2. On the facts and circumstances of the case, the learned CIT(A) has erred in deleting the addition made on account of unsecured loans amounting to Rs. 76,32,827/-.

3. On the facts and circumstances of the case, the learned CIT(A) has erred in deleting the addition made on account of disallowance of expenses of Rs. 13,96,415/- out of expenses claimed on account of rebate and remission and six other heads.

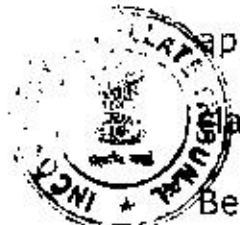
4. On the facts and circumstances of the case, the learned CIT(A) has erred in deleting the addition made on account of disallowance of expenses on account of bad debts and exchange fluctuation charges of Rs. 3,46,714/-."

4. Brief facts of the case are, the assessee filed its return of income under section 139(1) of the Income Tax Act, 1961 (for short "the Act") on 30th October 2005, declaring total income to the tune of ₹ 30,13,900. During the year under consideration, the assessee was engaged in the business of trading and liaisoning of coal and wind power. A search and seizure operation was conducted at the office premises as well as residential premises of the directors and their family members in the group cases of Shree Agrawal Coal India Pvt. Ltd., Nagpur, including the assessee company on 16th March 2011. During the course of search, books of account and other documents of assessee company were found and seized. Thereafter, notice under section 153A, was issued on 3rd April 2012 and served upon the assessee on 7th April 2012. Subsequently, notice under section 142(1) along with questionnaire was issued on 20th November 2012 which



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was served upon assessee on 23rd November 2012. The assessee, in response to the notice under section 153A, filed its return of income declaring total income to the tune of ₹ 30,13,900 along with copy of audited Profit & Loss account and Balance Sheet on 26th November 2012. The Assessing Officer noticed that the assessee during the year has accepted new loan of ₹ 76,32,827. The Assessing Officer stated that the assessee has not produced the books of account and has also not furnished the necessary details such as PAN details, address, identity of the creditor, details of transactions and creditworthiness of the creditors to enable the assessee to explain the genuineness of this loan. The Assessing Officer, therefore, added the said amount of ₹ 76,32,827 to the total income of the assessee. During the first appellate authority, the learned Commissioner (Appeals) allowed the claim of the assessee for all the assessment under consideration. Being aggrieved, the Revenue is in appeal before us for the all the impugned assessment years.



ISSUE NO.1

5. The learned Departmental Representative has argued before us that the Assessing Officer has rightly invoked the provisions of section 132 of the Act and issued notice under section 153A. He submitted that the Assessing Officer has rightly assessed the unexplained receipt

to the tune of ₹ 76,32,827. The learned Commissioner (Appeals) has wrongly set aside the assessment under section 153A of the Act. Therefore, the order passed by the learned Commissioner (Appeals) is not justifiable and is liable to be set aside.

6. The learned Counsel for assessee on the other hand argued that the case of the assessee is duly covered by the decision of the Tribunal, Nagpur Bench, rendered in DCIT v/s Shri Dharampal R. Agrawal, vide order dated 19th December 2016. Therefore, the learned Commissioner (Appeals) has rightly decided the order in question and, hence, the appeal of the Revenue is liable to be dismissed.

7. We have heard the rival contentions and perused the material available on record. Before proceeding further, it is necessary to advert the findings of the learned Commissioner (Appeals) on this issue. Accordingly, the observations of the learned Commissioner (Appeals) on this issue are reproduced below for better appreciation of facts:-

"13. Since the additional ground raised by the assessee raised legal issues, the same is dealt with first. The additional ground raised by the assessee concerns the assessment made u/s 153A of the I.T. Act r.w.s. 143(3). The judgment in the case of CIT vs. Continental Warehousing Corporation (Bombay High Court) (Appeal No. 523 of 2013) & CIT vs. Murli Agro Products Ltd. (Nagpur Bench of Bombay High Court) (Appeal No.36 of 2009), relied upon by the assessee, the Courts have held that the AC cannot make an assessment order or the additions therein which are not based on the



incriminating material found or seized during search for the assessment years for which the assessment proceedings have become final. An exception has been made for those assessment years in which the assessment proceedings have not become final or for which the assessments have been abated.

In *Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra)*, the Bombay High Court answered the question framed by it as under:

"a. In assessments that are abated, the A.O. retains the original jurisdiction as well as jurisdiction conferred on him u/s 153A for which assessments shall be made for each of the six assessment years separately;

b. In other cases, in addition to the income that has already been assessed, the assessment u/s 153A will be made on the basis of incriminating material, which in the context of relevant provisions means - (i) books of account, other documents, found in the course of search but not produced in the course of original assessment, and (ii) undisclosed income or property discovered in the course of search."

The Hon'ble High Court referred to the decisions of Hon'ble Nagpur Bench of Bombay High Court in the case of *Murli Agro Products Ltd.* and of Special Bench of ITAT, Mumbai in the case of *All Cargo Global Logistics Ltd.*

14. For AY 2008-09, the time for issue of notice u/s 143(2) is over. The Hon'ble ITAT, Mumbai has held in the case of *Gurinder Singh Bawa Vs DCIT* as under:

"The Special bench in the case of *Alcargo Global Logistics Ltd. (supra)*, has held that provisions of section 153A come into operation if a search or requisition is initiated after 31.5.2003 and on satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income for six years immediately preceding the year of search. The Special Bench further held that in case assessment has abated, the AO retains the original jurisdiction as well as jurisdiction under section 153A for which assessment shall be made for each assessment year separately. Thus in case where assessment has abated the AO can make additions in the assessment, even if no incriminating material has been found. But in other cases the Special Bench held that the assessment under section 153A can be made on the basis of incriminating material which in the context of relevant provisions means books of account and other documents found in the course



of search but not produced in the course of original assessment and undisclosed income or property disclosed during the course of search. In the present case, the assessment had been completed under summary scheme under section 143(1) and time limit for issue of notice under section 143(2) had expired on the date of search. Therefore, there was no assessment pending in this case and in such a case there was no question of abatement. Therefore, addition could be made only on the basis of incriminating material found during search..."

The judgment follows the ratio laid down by the Hon High Court in the case of CIT vs. Continental Warehousing Corporation (Bombay High Court) (Appeal No, 523 of 2013) & CIT vs. Murli Agro Products Ltd. (Nagpur Bench of Bombay High Court) (Appeal No.36 of 2009) The Hon'ble ITAT has held in the case referred above that if the date of issue of notice u/s 143(2) had expired for a certain assessment year and notice u/s 143(2) was not issued as on the date of search, no assessment was pending and there was no question of abatement.

15. The assessee also relied on the decision of Rajasthan High Court in the case of Jai Steel (India) vs. ACIT (2013) 259 CTR 0281 (Raj) . It was held by Hon'ble Rajasthan High Court in Para 21 as under:-

"21. Now there can be cases where at the time when the search is initiated or requisition is made, the assessment or reassessment proceedings relating to any assessment year falling within the period of the six assessment years mentioned above, may be pending. In such a case, the second proviso to sub section (1) of Section 153A says that such proceedings "shall abate". The reason is not far to seek. Under section 153A, there is no room for multiple assessment orders in respect of any of the six assessment years under consideration. That is because the Assessing Officer has to determine not merely the undisclosed income of the assessee, but also the 'total income' of the assessee in whose case a search or requisition has been initiated. Obviously there cannot be several orders for the same assessment year determining the total income of the assessee. In order to ensure this state of affairs namely, that in respect of the six assessment years preceding the assessment year relevant to the year in which the search took place there is only one determination of the total income, it has been provided in the second proviso of sub 'section (1) of Section 153A that any proceedings for)assessment or reassessment of the assessee which are pending on the date of initiation of the search or making requisition "shall abate". Once those proceedings abate, the decks are cleared, for the Assessing Officer to pass assessment



orders for each of those six years determining the total income of the assessee which could include both the income declared in the returns, if any, furnished by the assessee as well as the undisclosed income, if any, unearthed during the search or requisition. The position thus emerging is that the search is initiated or requisition is made, they will abate making way for the Assessing Officer to determine the total income of the assessee in which the undisclosed income would also be included, but in case where the assessment or reassessment proceedings have already been completed and assessment orders have been passed determining the assessee's total income and such orders subsisting at the time when the search or the requisition is made, there is no question of any abatement since no proceedings are pending. In this latter situation, the Assessing Officer will reopen the assessments or reassessments already made (without having the need to follow the strict provisions or complying with the strict conditions of Sections 147, 148 and 151) and determine the total income of the assessee. Such determination in the orders passed under Section 153A would be similar to the orders passed in any reassessment, where the total income determined in the original assessment order and the income that escaped assessment are clubbed together and assessed as the total income. In such a case, to reiterate, there is no question of any abatement of the earlier proceedings for the simple reason that no proceedings for assessment or reassessment were pending since they had already culminated in assessment or reassessment orders when the search was initiated or the requisition was made."



16. Assessee further relied on order of Mumbai Tribunal in case of Atul Barot vs. DCIT (2014) 65 SOT 0083 (Mumbai) (URO. In Para 9 of this order the ITAT has discussed as under:-

"9. We agree with the view taken by the co-ordinate bench of the Tribunal in the case of Shri Jayendra P. Jhaveri (Supra) and also for the sake of consistency, following the above decision, reassessments made by AO u/s 153A in the above cases in which the assessments have already been concluded, without any incriminating material being found during the search action conducted u/s 132 of the Act, are hereby set aside. Consequently, the additions made by the AO in assessments proceedings u/s 153A do not survive and therefore ordered to be deleted."

17. Assessee further relied on order of Mumbai ITAT in case of Natwar Parekh & Co. Pvt. Ltd. vs. DCIT, ITA No.2143/45/ Mum/ 2009. In Para 12 of this Order the ITAT has observed as under:-

"12. We have heard the rival contentions, perused the findings of

the authorities below with reference to the legal issue raised in the additional ground of appeal as well as the material available on record. The returns of income for the assessment year 2003 - 04 and 2004 - 05 were filed under section 139, which were subjected to assessment under section 143(3), whereas, the return of income for the assessment year 2005 - 06 was subject to the assessment under section 143(1). All these assessments were completed much before the date of search. On the date of issuance of notice under section 153A, no assessment was pending and the assessment so completed earlier had attained finality. From a plain reading of the provisions of section 153A, it is evident that if a search has been initiated under section 132(1) or requisition has been made under section 132A, then the Assessing Officer is obliged to issue notice under section 153A, requiring such person to furnish return of income of six years in the prescribed form for the immediately preceding the year of search. The Assessing Officer is legally required to assess or re-assess the total income of six Natvar Parikh & Co. Pvt. Ltd. Assessment year immediately preceding to the year of search. The second proviso to section 153A provides that if the assessment or re-assessment of any of the assessment year, falling within the period of six years is pending on the date of search, then the same shall get abated. In the present case, for the years under appeal, the assessments were not pending and had attained finality, therefore, the assessments completed in the impugned assessment years will not get abated. Once that is so, the legal position as of now is that the additions over and above the assessed income cannot be made dehors the incriminating material found at the time of search while completing the assessment under section 153A. This, inter-alia, means that if there is no incriminating material, then the original assessment made can be reiterated and no further addition is called for. This has been held so by the Tribunal, Mumbai Special Bench, in All Cargo Global Logistics (supra) and also by the decision of the Hon'ble Rajasthan High Court in Jai Steel, Jodhpur (supra).



..... Thus, the law as envisaged by the High Court is that, if no incriminating material has been found, then no addition can be made in the assessment completed under section 153A which has not been abated.

..... Thus, respectfully following the ratio and the principle laid down by the Hon'ble Rajasthan High Court that once there is no incriminating material found at the time of search, then no addition can be made on the assessments which are not pending and have attained finality. Accordingly, on the legal ground itself, the additions made by the Assessing Officer in all the years under appeal i.e. A. Y. 2003-04, 2004-05 and 2005-06 are cancelled."

18. Various Tribunals and High Courts have held that the assessments which have already concluded, without any incriminating material being found during the search, the additions made by AG in assessments proceedings u/s 153A do not survive and therefore ordered to be deleted. In case where assessment or reassessment proceedings have already been completed and assessment orders have been passed determining assessee's total income and such orders subsisting at the time when the search or the requisition is made, there is no question of any abatement since no proceedings are pending. In the present case, the assessment had been completed u/s 143(3) of the I.T. Act as reported by the AG in remand report dated 10.12.2015. The AO has stated as under in his report dated 10.12.2015 for the Agrawal Group of cases:-

"As regards the cases in which the assessments were abated as a result of search u/s 132 and notice u/s 153A or 153C, it is to inform that as per the records, except in the case of M/s. Shree Agrawal Coal India Pvt. Ltd. for the A.Y. 2009-10, there is no case in which assessment was so abated. It is also submitted that in following cases the assessments were done u/s 143(3) of the Act, prior to the search-



1. N/s. Shree Agrawal Coal India Pvt.Ltd. : AY 2005-06, 2006-07, 2007-08 & 2008-09.
2. Shri Darpan Dharampal Agrawal: AY 2008-09."

Therefore, it is seen that there was no assessment pending in this case and in such a case this no question of abatement.

19. Considering the decisions discussed above and relying upon the decision of Hon'ble jurisdictional High Court in the case of CIT Vs Continental Warehousing (Bombay High Court) (Appeal No. 523 of 2013) & CIT vs. Murli Agro Products Ltd(Nagpur Bench of Bombay High Court) (Appeal No.36 of 2009), the "Additional ground" raised by the assessee is allowed.

The AO has made all the additions in the assessment order without reference to any material seized during search.

20. Therefore, the assessment order made by the AO is cancelled.

In view of the allowance of the additional ground there is no need to discuss the merits of the case in respect of additions challenged in ground of appeal no.2.

The following additions made by the A.O. are deleted:-

i)	Unsecured loans as at 31.3.2005	₹ 76,32,827
ii)	Ad-hoc disallowance at 20% from expenses	₹ 13,96,415
iii)	Disallowance of bad debts and exchange fluctuation charges	₹ 3,46,714
	Total:	₹ 93,75,956"

8. On a perusal of the aforesaid finding, we noticed that the case of the assessee has been decided on the basis of findings given by the Hon'ble Jurisdictional High Court in CIT v/s Continental Warehousing Corporation, [2015] 58 taxmann.com 78 (Bom.). No doubt, the other law has also been mentioned by the learned Commissioner (Appeals) while deciding the issue. In the instant case also, the assessment has been concluded and no new material was found against the assessee. The assessee has already shown the loan received to the tune of ₹ 76,32,827. Provisions under section 153A were invoked only to verify the genuineness of the loan. Similar issue has also been decided by the Tribunal in assessee's own case in DCIT v/s Shri Dharampal R. Agrawal, ITA no.290 & 291/Nag./2016, dated 19th December 2016, for the assessment year 2005-06 and 2006-07, wherein the appeals filed by the Revenue in connection with the same controversy has been ordered to be dismissed. Since the issue involved in the present case is similar to the issue decided by the Tribunal cited supra, therefore, in view of the said facts and circumstances, we are of the considered



opinion that the learned Commissioner (Appeals) has passed the order judicially and correctly and no interference is required at this appellate stage. Consequently, we uphold the orders passed by the learned Commissioner (Appeals) for the years under consideration i.e., assessment year 2005-06.

ISSUE NO.1 TO 3

9. Insofar as issues no.1 to 3 on merit are concerned, we are of the view that when the legal issue has already been decided in favour of the assessee, hence, there is no need to decide the same because it would only be academic in nature.

10. Since the matter of controversy in the appeal for the assessment year 2006-07 and 2007-08 is the same, therefore, the said appeals are also hereby ordered to be dismissed in view of the above stated terms.

11. In the result, Revenue's appeal for assessment year 2005-06, 2006-07 and 2007-08 are hereby ordered to be dismissed.

Order pronounced in the open Court on 21.06.2017

Sd/-
P.K. BANSAL
VICE PRESIDENT

Sd/-
AMARJIT SINGH
JUDICIAL MEMBER

NAGPUR, DATED: 21.06.2017

Shree Agrawal
Coal India Pvt. Ltd.

Copy of the order forwarded to:

- (1) The Assessee;
 - (2) The Revenue;
 - (3) The CIT(A);
 - (4) The CIT, Nagpur City concerned;
 - (5) The DR, ITAT, Nagpur;
- L(6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary



True Copy
By Order

वसिष्ठ नारायण नारायण (निजी सचिव)
(Asstt. Registrar)
Senior Personal Assistant P.S.
Income Tax Appellate Tribunal
NAGPUR.