

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 7473/Mum/2019 (Assessment Year 2012-13)

ACIT,CC-1(1) 903, 9 th Floor Prathishta Bhawan Old C.G.O.Building M.K.Road, Mumbai-400 020	Vs.	Nitin B Gajipara Flat No.903, Shreeji Heights, Plot No.A/B/C, Sec.46A Seawoods(W) Navi Mumbai-400 703 PAN : AHEPG8385K
(Appellant)		(Respondent)

Assessee by	Shri Vijay Mehta
Department by	Shri Rahul Raman
Date of Hearing	09.06.2021
Date of Pronouncement	09 .08.2021

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the Revenue is directed against the order of learned CIT(A)-47 dated 20.09.2019 and pertains to Assessment Year 2012-13.

2. The grounds of appeal read as under :

1. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was right in allowing the appeal filed by the assessee by relying on the decision of the Hon'ble Bombay High Court ignoring the fact that issue same as of this appeal is pending before the Hon'ble Supreme Court of India in various other appeals.
2. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was correct in narrowing down the scope of assessment u/s, 153A in respect of completed assessments by holding that only undisclosed income and undisclosed assets detected during the search could be brought to tax.
3. Whether on the facts and circumstances of the case and in law, the Ld.CIT (A) was correct in holding that the scope of section 153A is limited to assessing only search related income, thereby denying Revenue, the opportunity of taxing other escaped income that comes to the notice of the Assessing Officer.
4. Whether on the facts and circumstances of the case and in law, Ld. CIT(A) was correct in holding that information available with the Revenue department as well the information yielded during the post search proceedings and connected to the search

and seizure proceedings regarding unsecured loans, in the form of statement recorded on oath is not incriminating material?

5. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was correct in allowing the appeal filed by the assessee and deleting the addition of Rs.4,56,00,000/- being the addition made u/s 68 of the IT. Act 1961 though the creditworthiness of the parties from whom the share application money was received and genuineness of the said transaction were not proved.
6. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was correct in allowing the appeal filed by the assessee and deleting the addition of Rs. 6,24,807/- being the addition made u/s 69C of the I.T.Act 1961 of interest expenses on unproven unsecured loans in consequences of deleting the additions made u/s.68 of the I.T.Act 1961 as above.

3. Brief facts of the case are that the assessee is an individual and is a partner of M/s Shreenathji Corporation, which is engaged in the business of construction. During the year under consideration, the main source of income declared by the Appellant is income from house property, business and other sources. A search & seizure operation u/s. 132(1) of the Act was conducted on the Appellant on 28/01/2015 by the DDIT(Inv), Unit, Thane.

Consequent to the search operation, notices u/s. 153A of the Act were issued to the Appellant and accordingly, returns of income were filed. Subsequently notices u/s. 142(1) and 143(2) of the Act were issued and served on the Appellant in the assessment orders passed by the AO, additions had been made on account of unsecured loans and interest on unsecured loans,

4. Against the above order assessee appealed before Ld.CIT(A).
5. As regards the challenge to jurisdiction, Ld.CIT(A) held as under:-

11.0 At the outset, I have noted that the case of the Appellant for A.Y. 2012-13 is an unabated one. In this case, the original return of income was filed by the Appellant u/s. 139 of the Act, declaring a total income of Rs. 11.88.750/- on 31st March, 2013. Hence, the last date for issuance of notice u/s. 143(2) of the Act was 30th September, 2013. However, no notice u/s 143(2) of the Act had been issued to the Appellant, within the prescribed mandatory time limit of six months from the end of the Financial Year in which the return had been filed.

11.1 It is pertinent to note that the search operation in the case of the Appellant Company was conducted on 28th January, 2015. Hence, as on the date of search, no assessment proceedings were pending for the A.Y. 2012-13. Further, even the time limit for issuing notice u/s. 143(2) of the Act had expired, as on the date of search. Thus, this is a case of already concluded and completed assessment and as such, the Assessing Officer is empowered to make addition in the proceedings u/s 153A of the Act, only on the basis of incriminating material found during the course of search operation carried out on the Appellant.

No Incriminating Material found during Search Operation on the Appellant:

12.0 During the course of appellate proceedings, the Appellant has filed the copies of the Panchanama dated 28.01.2015 and 26.03.2015 drawn in the name of the Appellant at the time of the search operation. A perusal of the Panchanamas clearly reveal that no incriminating material had been found during the course of search operation, in relation to the unsecured loans or the interest payments, which had been added back by the Assessing Officer in the assessment order passed u/s. 153A of the Act. The Panchanamas along with the attached Annexure makes it apparent that during the course of search operation, only certain cash, jewellery and one brokerage bill was found and seized by the Investigation Wing.

12.1 I have also gone through the assessment order passed by the Assessing Officer u/s. 143(3) r.w.s. 153A of the Act and taken note of the fact that there is not even a whisper about any incriminating document or material, which had been found during the course of search operation. The Assessing Officer, while making the addition on account of unsecured loans and interest had not referred to any incriminating / adverse material being found during the course of search operation in relation to such additions. I have also noted that no incriminating material had been found during the course of search operation on the Appellant in respect of any of the lenders, the unsecured loans from whom had been added back by the AO.

12.2 The above stated facts are further reinforced from the observations of the Assessing Officer in the assessment order itself, which clearly states that in this case enquiries were conducted by issuing commission U/s. 131(l)(d) of the Act and it was on the basis of the statements recorded, the additions have been made in the impugned assessment order. These facts clearly show that the contention of the Appellant that no incriminating material was found during the course of search operation conducted on the Appellant, in relation to the unsecured loans & interest is correct.

6. Thereafter, he referred to various case laws on the subject including the following:-

13.13 The Hon'ble Bombay High Court in the case of *CIT vs. Continental Warehousing Corporation* [374 ITR 645], has held that when the assessment has attained finality, then the AO while passing the independent assessment order u/s 153A of the Act can't disturb the assessment / reassessment order which has attained finality, unless the materials gathered in the course of the proceedings u/s 132 of the Act establish that the reliefs granted under the finalized assessment/reassessment were contrary to the facts unearthed during the course of search operation.

13.14 In the case referred, *supra*, the Hon'ble Bombay High Court has upheld the following observations of Hon'ble ITAT:-

"i. On a plain reading of Section 153A of the Income-tax Act, it becomes clear that on initiation of the proceedings under Section 153A, it is only the assessment / reassessment proceedings that are pending on the date of conducting search under Section 132 or making requisition under Section 132A of the Act stand abated and not the assessments/reassessments already finalized for those assessment years covered under Section 153A of the Act.

ii. By a circular No. 8 of 2003 dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under Section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalized assessment/ reassessment shall not abate. It is only because, the finalized assessments/reassessments do not abate, the appeal revision or rectification pending against finalised assessment/reassessments would not abate.

iii. Therefore, the argument of the revenue, that on initiation of proceedings under Section 153A, the assessments/reassessments finalised for the assessment years covered under Section 153A of the Income-tax Act stand abated cannot be accepted. Similarly on annulment of assessment made under Section 153A(1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1)."

13.15 A similar view has been taken by the Hon'ble Bombay High Court (Nagpur Bench) in case of *Murli Agro Products Ltd Vs. CIT 49 Taxman.com 172in ITA No 36 of 2009*, wherein it has been held that on initiation of proceedings U/s. 153A, it is only the assessment proceedings that are pending on the date of conducting search U/s. 132 or making requisition U/s. 132A of the Act that stand abated and not the assessments already finalized. The relevant excerpts of the judgment are reproduced hereunder:-

"9. What Section 153A contemplates is that, notwithstanding the regular provisions for assessment/ reassessment contained in the IT Act, where search is conducted under Section 132 or requisition is made under Section 132A on or after 31/5/2003 in the case of any person, the Assessing Officer shall issue notice to such person requiring him to furnish return of income within the time stipulated therein, in respect of six assessment years immediately preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made and thereafter assess or reassess the total income for those assessment years. The second proviso to Section 153A provides for abatement of assessment/reassessment proceedings which are pending on the date of search/requisition. Section 153A(2) provides that when the assessment made under Section 153A(1) is annulled, the assessment or reassessment that stood abated shall stand revived.

10. Thus on a plain reading of Section 153A of the Income-tax Act, it becomes clear that on initiation of proceedings under Section 153A, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under Section 132 or making requisition under Section 132A of the Act stand abated and not the assessment/reassessments already finalized for those assessment years covered under Section 153A of the Act. By a circular No.8 of 2003 dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under Section 153A, the proceedings pending in appeal revision or rectification proceedings against finalized assessment/reassessment shall not abate. It is only because, the finalized assessments/reassessments do not abate, the appeal, revision or rectification pending against finalized assessments/reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under Section 153A, the assessments/reassessments finalized for the assessment years covered under Section 153A of the Income-tax Act stand abated cannot be accepted. Similarly on annulment of assessment made under Section 153A(1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1).

11. In the present case, as contended by Shri Mani, learned counsel for the assessee, the assessment for the assessment year 1998-99 was finalized on 29-12-2000 and search was conducted thereafter on 3-12-2003. Therefore, in the facts of the present case, initiation of proceedings under Section 153A would not affect the assessment finalized on 29-12-2000.

12. Once it is held that the assessment finalized on 29.12.2000 has attained finality, then the deduction allowed under section 80HHC of the Income-tax Act as well as the loss computed under the assessment dated 29-12-2000 would attain finality. In such a case, the A.O. while passing the independent assessment order under Section 153A read with Section 143(3) of the IT. Act could not have disturbed the assessment/reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under Section 153A of the Income-tax Act establish that the reliefs granted under the finalized assessment/reassessment were contrary to the facts unearthed during the course of 153A proceedings.

13. In the present case, there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings which would show that the relief under Section 80 HHC was erroneous. In such a case, the A.O. while passing the assessment order under Section 153A read with Section 143(3) could not have disturbed the assessment order finalised on 29.12.2000 relating to Section 80 HHC deduction and consequently the C.I. T. could not have invoked jurisdiction under Section 263 of the Act."

13.16 In the above mentioned judgment, the Hon'ble Bombay High Court has held that no addition can be made in respect of assessments which have become final, if no incriminating material is found during the course of search. It has been held that once the original assessment has attained finality, then the Assessing Officer while passing the assessment order U/s. 153A r.w.s. 143(3) cannot disturb the assessment/reassessment order which had attained finality, unless the material gathered during the course of the search proceedings establishes something contrary to it. If there is nothing on record to suggest that any incriminating material was unearthed during the search, the AO, while passing order U/s. 153A r.w.s. 143(3) cannot disturb the original assessment order passed U/s. 143(3) of the Act.

7. Further, he concluded as under:-

13.36 To conclude, in the case of completed assessments, where no incriminating material is found during the course of search, the assessment u/s.153A of the Act is to be made on originally assessed income and no addition or disallowance can be made de hors the incriminating evidences recovered during the course of search.

11.1 A.Y. 2012-13 relates to the jurisdiction of the Assessing Officer in making addition in an assessment framed u/s 153A of the Act in an unabated case, where no incriminating material has been found, during the course of search operation. This issue is covered in favour of the Appellant by the decision of the Hon'ble ITAT, Mumbai in the case of M/s. Geetanjali Space Pvt. Ltd. reproduced above, which is on similar facts and circumstances. In view of the order of the Hon'ble ITAT and also the binding precedents of the various Hon'ble Courts referred *supra*, it is held that no addition can be made u/s. 153A of the Act in an unabated case, where no incriminating material has been found or seized during the course of search operation. Accordingly, Ground of Appeal Nos. 1 to 3 for A.Y. 2012-13 raised by the Appellant are allowed.

8. Ld.CIT(A) further also held that addition is to be deleted on merits also by observing as under:-

11.3 The Ground Nos.5 to 13 of AY 2012-13 are in relation to addition made by the Assessing Officer on account of unsecured loans u/s.68 of the Act. This

issue is covered in favour of the Appellant by the decision of the Hon'ble ITAT, Mumbai in the case of M/s. Geetanjali Space Pvt.Ltd. reproduced above, which is on similar facts and circumstances. In view of the order of the Hon'ble ITAT in the case of M/s. Geetanjali Space Pvt.Ltd., the various documentary evidences placed on record and after taking into consideration the fact that there is no adverse observation about the Appellant in the statements of Shri Navneet singhania and Shri Praveen Agarwal, the addition made by the AO u/s 68 of the Act needs to be deleted on merits also. Accordingly, Ground of Appeal Nos. 5 to 13 of AY 2012-13 raised by the Appellant are allowed.

9. Against the above order revenue is in appeal before us.
10. We have heard both the parties and perused the records. Ld. Counsel of the assessee contended that issue on validity of jurisdiction is fully covered by Hon'ble Bombay High Court decision in Continental Warehouse Corporation Ltd. 374 ITR 645 and Murali Agro Products Ltd. 49 taxmann.com 172.
11. Per contra Ld. DR could not despite the proposition.
12. Upon careful consideration, we find ourselves in agreement with the above contention. Even revenue acknowledged this in the ground of appeal, wherein it is submitted this department has not accepted the order of Hon'ble Bombay High Court and appeal has been preferred to Hon'ble Supreme Court. We do not find this any reason to interfere with order of Ld.CIT(A) on this issue. Hence, we hold that Ld.CIT(A) is correct in holding that assumption of jurisdiction u/s 153A is bad in absence of any incriminating material found in search, as this is not a non abated assessment. As regards the merits, we find that since the issue on jurisdiction has been decided in favour of assessee, adjudication on merits is order only of academic interest. Hence, we are not engaging in the same. The same is treated as infructuous.
13. Hence, revenue appeal is dismissed.

Pronounced in the open court on 09 .08.2021

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 09/08/2021

Sr.PS. Thirumalesh

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai