

आयकर अपीलीय अधिकरण “एफ” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH, MUMBAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing Through Video Conferencing Mode)

1. आयकरअपील सं./ I.T.A. No.3798/Mum/2013
(निर्धारण वर्ष / Assessment Year: 2003-04)
&
2. आयकरअपील सं./ I.T.A. No.3799/Mum/2013
(निर्धारण वर्ष / Assessment Year: 2004-05)
&
3. आयकरअपील सं./ I.T.A. No.3800/Mum/2013
(निर्धारण वर्ष / Assessment Year: 2005-06)
&
4. आयकरअपील सं./ I.T.A. No.3801/Mum/2013
(निर्धारण वर्ष / Assessment Year: 2006-07)
&
5. आयकरअपील सं./ I.T.A. No.1475/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2004-05)
&
6. आयकरअपील सं./ I.T.A. No.1476/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2005-06)
&
7. आयकरअपील सं./ I.T.A. No.1477/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2006-07)

Shri Vinod K. Faria Flat No. 3, Fairy Manor, 13, Gunbow Street, Fort Mumbai-400 706	बनाम/ Vs.	DCIT (OSD-II), Central Range-7 Room No. 413, Aayakar Bhavan, Mumbai-400 020
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AAAPF-1045-J		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri Hiral Sejpal- Ld. AR
Revenue by	:	Shri H. N. Singh- Ld. CIT-DR

सुनवाई की तारीख/ Date of Hearing	:	02/08/2021
घोषणा की तारीख / Date of Pronouncement	:	01/09/2021

आदेश / O R D E R

Per Bench

1. Aforesaid appeals by assessee for Assessment Years (AY) 2003-04 to 2006-07 contest separate orders of learned first appellate authority on certain common grounds. The first 4 appeals are quantum appeals for AYs 2003-04 to 2006-07 whereas remaining 3 appeals are penalty appeals for AYs 2004-05 to 2006-07. Therefore, the appeals were heard together and are now being disposed-off by way of this consolidated order for the sake of convenience & brevity.
2. First, we take up quantum appeal ITA No.3799/Mum/2013 for AY 2004-05 which arises out of the order of Ld. Commissioner of Income-Tax (Appeals)-40, Mumbai [CIT(A)], dated 25/02/2013 in the matter of assessment framed by Ld. Assessing Officer (AO) on 28/12/2010 u/s 153A / 144 of the Act. In this appeal, the assessee is aggrieved by addition of Rs.2.94 Lacs u/s 69C, addition of Rs.21.03 Lacs u/s 69A & estimation of total income at Rs.1.50 Lacs.
3. We have carefully heard the rival submissions and perused relevant material on record. The judicial pronouncements as cited during the course of hearing have been deliberated upon. Our adjudication to the appeal would be as given in succeeding paragraphs. The Ld. AR has not pressed the issue of service of notice u/s 143(2) in all the appeals.
4. Pursuant to search action on assessee group on 30/05/2008, an assessment was framed against the assessee u/s 153A / 144 on

28/12/2010. The assessee being resident individual is stated to be engaged in the trading of plywood, veneers, glass & aluminum etc. Though notice u/s 153A was issued by Ld. AO, however, the assessee did not file any return of income in response to the notice and failed to supply requisite details and documents as sought by Ld. AO during assessment proceedings. It is matter of record that the assessee had filed original return of income for this year on 01/11/2004 declaring business income of Rs.1.29 Lacs. The following additions were made while framing the assessment order which are the subject matter of appeal before us: -

5. Unaccounted expenditure paid to M/s Advaita Interiors

5.1 Upon perusal of seized documents, it was noted by Ld. AO that the assessee made payment in cash for interior work to M/s Advaita Interior. Accordingly, an amount of Rs.2,94,316/- was added as unexplained income u/s 69C since the assessee could not explain the source of investments. The Ld. CIT(A), after considering remand report, confirmed the additions.

5.2 Upon perusal of page no.34 of the paper book (reply of advocate of M/s Advaita Interiors to the assessee's advocate), it could be gathered that it was M/s Advaita interiors who owed sum of Rs.1,47,158/- against the assessee's proprietor concern namely M/s Mayur Ply-N-Veneers and not vice-versa as wrongly noted by Ld. AO in the assessment order. It is also evident from the Balance Sheet of M/s Mayur Ply-N-Veneers (page no.31 of the paper-book) wherein M/s Advaita Interiors has been shown as Sundry Debtors. The assessee had supplied goods to that entity and M/s Advaita Interior was sundry debtors for the assessee. This being so, there could be no occasion to presume that there was payment in cash

by the assessee to the said party. The Ld. AO could not appreciate the issue properly and went on to making addition of double amount while framing the assessment. Therefore, this addition is not sustainable. We delete the same. The ground stand allowed.

6. Unaccounted investment in Shares

6.1 The seized documents reflected details of shares held by the assessee in M/s Orbit Securities Private Ltd. for Rs.21.03 Lacs as on 22/01/2004. The same was added u/s 69 as unexplained investment. The addition, upon confirmation by Ld.CIT(A), is in further challenge before us.

6.2 The details of seized document containing details of investment in shares as on 22/01/2004 with M/s Orbit Securities Private Ltd. has been placed on page no.39 of the paper-book. Upon perusal of the same, it could be gathered that the assessee held various scrips for aggregate amount of Rs.21.03 Lacs. Upon perusal of original return of income, computation of income and & financial statements (as placed on page nos.14 to 33 of the paper-book), we find that the assessee has declared Short-Term Capital gain on sale of shares for Rs.3.88 Lacs in the return of income. Upon perusal of computations, we find that all these shares were sold by the assessee during this year and the resultant gain / loss were taken into account while computing short-term capital gains and the same has already been offered to tax. This being so, the investments as mentioned on the seized document could not be termed as unexplained investment. The gains / loss on shares very much formed part of the computation of income and therefore, this addition is not sustainable. By deleting this addition, we allow this ground of appeal.

7. Estimation of business income

7.1 In the absence of any information forthcoming from the assessee, the business income was estimated at Rs.1.50 Lacs which was confirmed by Ld. CIT(A). Aggrieved, the assessee is in further appeal before us.

7.2 We find that the assessee had filed the original return of income on 01/11/2004 declaring business income of Rs.1,29,487/- and the search took place on assessee group on 30/05/2008. The statutory time limit for issuance of notice under Sec. 143(2) and already expired and thus, on the date of search, no proceedings were pending against the assessee for this year. In other words, this year was a non-abated year. Therefore, no addition could be made in respect of assessment that had become final, in event where no incriminating material was found during the course of search action as per the decision of Hon'ble Bombay High Court rendered in **CIT Vs. Continental Warehousing Corporation [2015 374 ITR 645]** wherein it was held as under: -

31. We, therefore, hold that the Special Bench's understanding of the legal provision is not perverse nor does it suffer from any error of law apparent on the face of the record. The Special Bench in that regard held as under:-

"48. The provision under section 153A is applicable where a search or requisition is initiated after 31.5.2003. In such a case the AO is obliged to issue notice u/s 153A in respect of 6 preceding years, preceding the year in which search etc. has been initiated. Thereafter he has to assess or reassess the total income of these six years. It is obligatory on the part of the AO to assess or reassess total income of the six years as provided in section 153A(1)(b) and reiterated in the 1st proviso to this section. The second proviso states that the assessment or reassessment pending on the date of initiation of the search or requisition shall abate. We find that there is no divergence of views in so far as the provision contained in section 153A till the 1st proviso. The divergence starts from the second proviso which states that pending assessment or reassessment on the date of initiation of search shall abate. This means that an assessment or reassessment pending on the date of initiation of search shall cease to exist and no further action shall be taken thereon. The assessment shall now be made u/s 153A. The case of Ld. Counsel for the assessee is that necessary corollary to this provision is that completed assessment shall not abate. These assessments become final

except in so far and to the extent as undisclosed income is found in the course of search. On the other hand, it has been argued by the Ld. Standing Counsel that abatement of pending assessment is only for the purpose of avoiding two assessments for the same year, one being regular assessment and the other being assessment u/s 153A. In other words these two assessments coalesce into one assessment. The second proviso does not contain any word or words to the effect that no reassessment shall be made in respect of a completed assessment. The language is clear in this behalf and therefore literal interpretation should be followed. Such interpretation does not produce manifestly absurd or unjust results as section 153A (i)(b) and the first proviso clearly provide for assessment or reassessment of all six years. It may cause hardship to some assesses where one or more of such assessments has or have been completed before the date of initiation of search. This is hardly of any relevance in view of clear and unambiguous words used by the legislature. This interpretation does not cause any absurd etc. results. There is no casus omissus and supplying any would be against the legislative intent and against the very rule in this behalf that it should be supplied for the purpose of achieving legislative intent. The submissions of the Ld. Counsels are manifold, the foremost being that the provision u/s 153A should be read in conjunction with the provision contained in section 132(1), the reason being that the latter deals with search and seizure and the former deals with assessment in case of search etc, thus, the two are inextricably linked with each other.

49. Before proceeding further, we may now examine the provision contained in subsection (2) of section 153, which has been dealt with by Ld. Counsel. It provides that if any assessment made under subsection (1) is annulled in appeal etc., then the abated assessment revives. However, if such annulment is further nullified, the assessment again abates. The case of the Ld. Counsel is that this provision further shows that completed assessments stand on a different footing from the pending assessments because appeals etc. proceedings continue to remain in force in case of completed assessments and their fate depends upon subsequent orders in appeal. On consideration of the provision and the submissions, we find that this provision also makes it clear that the abatement of pending proceedings is not of such permanent nature that they cease to exist for all times to come. The interpretation of the Ld. Counsel, though not specifically stated, would be that on annulment of the assessment made u/s 153(1), the AO gets the jurisdiction to assess the total income which was vested in him earlier independent of the search and which came to an end due to initiation of the search.

50. The provision contained in section 132 (1) empowers the officer to issue a warrant of search of the premises of a person where any one or more of conditions mentioned therein is or are satisfied, i.e. - a) summons or notice has been issued to produce books of account or other documents but such books of account or documents have not been produced, b) summons or notice has been or might be issued, he will not produce the books of account or other documents mentioned therein, or c) he is in possession of any money or bullion etc. which represents wholly or partly the income or property which has not been and which would not be disclosed for the purpose of assessment, called as undisclosed income or property. We find that the provision in section 132 (1) does not use the word "incriminating document".

Clauses (a) and (b) of section 132(1) employ the words "books of account or other documents". For harmonious interpretation of this provision with provision contained in section 153A, all the three conditions on satisfaction of which a warrant of search can be issued will have to be taken into account.

51. Having held so, an assessment or reassessment u/s 153A arises only when a search has been initiated and conducted. Therefore, such an assessment has a vital link with the initiation and conduct of the search. We have mentioned that a search can be authorised on satisfaction of one of the three conditions enumerated earlier. Therefore, while interpreting the provision contained in section 153A, all these conditions will have to be taken into account. With this, we proceed to literally interpret to provision in 153A as it exists and read it alongside the provision contained in section 132(1).

52. The provision comes into operation if a search or requisition is initiated after 31.5.2003. On satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income of six years immediately preceding the year of search. The word used is "shall" and, thus, there is no option but to issue such a notice. Thereafter he has to assess or reassess total income of these six years. In this respect also, the word used is "shall" and, therefore, the AO has no option but to assess or reassess the total income of these six years. The pending proceedings shall abate. This means that out of six years, if any assessment or reassessment is pending on the date of initiation of the search, it shall abate. In other words pending proceedings will not be proceeded with thereafter. The assessment has now to be made u/s 153A (1)(b) and the first proviso. It also means that only one assessment will be made under the aforesaid provisions as the two proceedings i.e. assessment or reassessment proceedings and proceedings under this provision merge into one. If assessment made under subsection (1) is annulled in appeal or other legal proceedings, then the abated assessment or reassessment shall revive. This means that the assessment or reassessment, which had abated, shall be made, for which extension of time has been provided under section 153B.

53. The question now is - what is the scope of assessment or reassessment of total income u/s 153A (1) (b) and the first proviso? We are of the view that for answering this question, guidance will have to be sought from section 132(1). If any books of account or other documents relevant to the assessment had not been produced in the course of original assessment and found in the course of search in our humble opinion such books of account or other documents have to be taken into account while making assessment or reassessment of total income under the aforesaid provision. Similar position will obtain in a case where undisclosed income or undisclosed property has been found as a consequence of search. In other words, harmonious interpretation will produce the following results: -

a) In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the AO,

(b) in respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course

of original assessment but found in the course of search, and undisclosed income or undisclosed property discovered in the course of search.”

The aforesaid decision has subsequently been followed by Hon'ble Bombay High Court in **CIT V/s Gurinder Singh Bawa (79 taxmann.com 398 05/10/2015)** wherein the original return was processed u/s 143(1) and the time limit for issuing notice u/s 143(2) had already expired. The Hon'ble Court chose to follow its own decision rendered in **CIT Vs. Continental Warehousing Corporation [2015 374 ITR 645]**.

The case law of Hon'ble Andhra Pradesh High Court in **Gopal Lal Bhadraka V/s DCIT (346 ITR 106)** as referred to by Ld. CIT(A), is distinguishable on facts since in this case, the question before the Hon'ble High Court was whether, for the purpose of computing income under section 153A / 153C of the Act, Ld. AO is required to confine himself only to the material found during the course of search or not. In reply to this question, the Hon'ble Court held that AO could take into consideration material other than what was available during the search and seizure operation for making an assessment of the undisclosed income of the assessee. Thus, this decision is distinguishable from assessee's case on facts.

7.3 In view of the foregoing, we find that the addition which could be made, was to be only with reference to incriminating material found during the course of search action. Since this addition is not with reference to any incriminating material, the same is not sustainable. By deleting the addition, we allow this ground of appeal. The appeal stand partly allowed in terms of our above order.

8. ITA No.3798/Mum/2013, Assessment Year 2003-04

In this year, the assessee is aggrieved by the fact that declared income of Rs.83,845/- has been assessed at Rs.1,25,000/-. In this year also, the assessee did not file any return of income in response to notice u/s 153A. Consequently, Ld. AO estimated business income at Rs.1.25 Lacs. The same, upon confirmation by Ld. CIT(A), is in further appeal before us. We find that this issue is pari-materia the same as in AY 2004-05. This is a non-abated assessment year. Taking the same view, we direct Ld. AO to delete the impugned addition. The appeal stand partly allowed.

9. ITA No.3800/Mum/2013, Assessment Year 2005-06

9.1 In this year, the assessee is aggrieved by addition of unsecured loan for Rs.18,21,953/- & another addition of estimation of business income at Rs.1,75,000/-. In response to notice u/s 153A, the assessee had filed return, though belatedly, at Rs.1.29 Lacs which was held to be invalid. Finally, the assessment was framed on similar lines. The Ld. CIT(A) confirmed the action of Ld. AO, against which the assessee is in further appeal before us.

9.2 We find that this year is also a case of non-abated assessment year since the original return of income was filed on 31/10/2005. The statutory time limit to issue notice u/s 143(2) had already expired and no proceedings were pending against the assessee on the date of search. Therefore, the additions which could be made was to be only with reference to incriminating material as found during the course of search action. We find that no such specific reference has been made by Ld. AO in the assessment order while making the addition. The Ld. AO, at para-10, has simply alleged that the assessee has accepted

accommodation entries for bogus loans and therefore, the loans could not be accepted as genuine. However, there is no specific reference to any seized material to show that the loans taken by the assessee from the lenders was its own unaccounted money. The unsecured loans very much formed part of the assessee's financial statements as placed on record. Therefore, respectfully following the binding judicial precedents of **CIT Vs. Continental Warehousing Corporation [2015 374 ITR 645]**, we delete both the additions. The appeal stands partly allowed.

10. ITA No.3801/Mum/2013, Assessment Year 2006-07

10.1 In this year, the assessee is aggrieved by addition of unsecured loan for Rs.43,34,700/- & addition of estimation of business income at Rs.2,50,000/-. Another addition of Rs.2 Lacs has been made on account of unaccounted expenditure on foreign trips. In response to notice u/s 153A dated 09/12/2009, the assessee had filed return on 19/11/2010 which was held to be invalid. The original return of income for the year was filed on 28/12/2006. Finally, the assessment was framed on similar lines as in earlier assessment years.

The addition of unsecured loans was made since it was alleged by revenue that the assessee introduced bogus capital contribution in the companies controlled by him. Further, the assessee did not furnish the requisite details during assessment proceedings.

The addition of Rs.2 Lacs stem from the fact that certain documents were found during the course of search action which established assessee's visits to UAE two times during the year. The assessee could not explain the source of expenditure incurred on foreign visits and accordingly, estimated addition of Rs.2 Lacs made in the hands of the assessee.

The business income was estimated at Rs.2.50 Lacs in the absence of any details forthcoming from the assessee.

10.2 During appellate proceedings, the assessee furnished additional evidences which were subjected to remand proceedings. After going through the same, Ld. CIT(A) upheld the addition of Rs.2 Lacs on account of foreign trips since the assessee could not substantiate the source of expenditure.

In support of unsecured loans, the assessee filed Xerox copies of loan confirmations which were held to be defective since the confirmations were without corresponding address, PAN, bank statements of the lenders. Therefore, the addition was upheld.

The estimation of business income was also upheld as done in earlier years. Aggrieved, the assessee is in further appeal before us.

10.3 We find that this year is also a case of non-abated assessment year and therefore, the addition which could be made was to be with reference to incriminating material only. We find that no incriminating material has been found so far as the estimation of business income is concerned. Therefore, the addition of Rs.2.50 Lacs is not sustainable. We order so.

10.4 So far as the addition on account of unexplained expenditure on foreign trip is concerned, we find that this addition is based on incriminating material found during the course of search. Nothing has been shown by the assessee as to how the expenditure was sourced. Therefore, this addition stand confirmed. The estimation of Rs.2 Lacs is quite fair & reasonable. We order so.

10.5 The addition of unsecured loans has been confirmed by Ld. CIT(A) since the confirmations filed by the assessee were found to be defective.

However, upon perusal of material on record, we find that the detail of unsecured loans was as follows: -

No.	Name of the Party	Amount
1	Kanji Bhachu Shah	553700/-
2	Keshavji Thavar Faria	404000/-
3	L. M. Furniture	35000/-
4	Loans & Advances	1135000/-
5	Mahesh V. Faria	42000/-
6	Manjula Harilal Chheda	300000/-
7	Monglben Keshavji Faria	377000/-
8	Neelam Laxmichaand Hariya	150000/-
9	Nisha Laxmichaand Hariya	150000/-
10	Nutan Laxmichaand Hariya	200000/-
11	Rajendra Joshi	160000/-
12	Rajendra Joshi HUF	15000/-
13	Rsila Umarshi Chheda	100000/-
14	Tax Prints	100000/-
15	Velji Bhachu Shah	475000/-
16	Vinod Keshavji Faria HUF	88000/-
17	Vinod Padiyar	50000/-
	Total	43,34,700/-

It is the submissions of Ld. AR that most of the loans have been obtained in earlier years and therefore, no addition u/s 68 could be made in this year. We are in agreement of this plea since for application of Sec. 68, it is sine-qua-non that there should be credit in the books of accounts during the year. Therefore, we restore this issue back to the file of Ld. CIT(A) for reconsideration in the light of the submissions made before us. The assessee is directed to file the requisite details and substantiate the loans. The Ld. CIT(A) is directed to re-adjudicate this issue. The ground stand allowed for statistical purpose.

10.6 The appeal stands partly allowed.

11. Penalty appeals ITA Nos. 1475 to 1477/Mum/2016 for AYs 2004-05 to 2006-07

The assessee has saddled with penalty u/s 271(1)(c) for Rs.8.12 Lacs for AY 2004-05 against quantum addition of Rs.25.47 Lacs. The amount

of penalty for AY 2005-06 is Rs.6.43 Lacs against quantum addition of Rs.19.96 Lacs. The amount of penalty for AY 2006-07 is Rs.15.54 Lacs against quantum addition of Rs.47.84 Lacs. Since we have deleted all the additions or restore the issue back to the file of Ld. CIT(A) except to the extent of sustaining addition of Rs.2 Lacs representing unaccounted expenditure during foreign trips, the consequential penalty would not survive. The addition of Rs.2 Lacs as confirmed by us is only an estimated addition and therefore, no penalty is justified against the same. Hence, by deleting penalty for all the years, we allow all these appeals.

Conclusion

12. ITA Nos. 3798 to 3800/Mum/2013 stand partly allowed whereas ITA Nos.1475 to 1477/Mum/2016 stands allowed in terms of our above order.

Order pronounced on 1st September 2021

Sd/-

(Mahavir Singh)

उपाध्यक्ष / Vice President

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 01.09.2021
Sr.PS, Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.