

IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Before Shri Shamim Yahya, Accountant Member

I.T.A. No. 539/Mum/2021
(Assessment Year 2012-13)

DCIT, CC-7(4) Room No.658, Aaykar Bhawan M.K.Road Mumbai-400 020	Vs.	Smt. Shanti Devi Balkrishna Modi Row House No.8 Gokuldham Goregoan(E) Mumbai-400 063 PAN : AFIPM7154E
(Appellant)		(Respondent)

Assessee by	Ms. Vinita Shah
Department by	Shri T.Sankar, Sr.AR
Date of Hearing	06.01.2022
Date of Pronouncement	22 .03.2022

O R D E R

Per Shri Shamim Yahya (AM) :-

This appeal by the revenue is directed against the order of learned Commissioner of Income Tax (Appeals)-49 dated 10.02.2021 and pertains to assessment year 2012-13.

2. Grounds of appeal read as under:-

1. "On the facts and the circumstances of the case, Ld. CIT(A) erred in deleting the addition of Rs. 23,10,000/- made by the AO account of unexplained investment made in the a penny stock company M/s Global Capital Market Limited."
2. "On the facts and the circumstances of the case, Ld. CIT(A) erred in not appreciating the fact that the sale consideration of Rs, 23,10,000/- derived from the sales of shares of company M/s Global Capital market Limited are bogus and the exemption claimed on such LTCG should not be allowed to the assessee."

3. "On the facts and the circumstances of the case, Ld. CIT(A) erred in deleting the addition made on account of commission paid to entry operator / exit provider @ 5% of total sale consideration of Rs.1,15,500/- u/s 69C as unexplained expenditure,"

4. "On the facts and the circumstances of the case, Ld. CIT(A) erred in not appreciating the fact that neither under section 132 nor under section 153A, of Income Tax Act, 1961 phraseology 'incriminating' is used in the statute, Hence, Ld. CIT(A) erred in narrowing down the scope of assessment u/s 153A to the incriminating material found during the search. "

5. The appellant craves leave to amend or alter any ground and/or add new grounds which may be necessary.

3. Brief facts of the case are that the assessee filed original return of income for AY 2012-13 on 27.10.2012 declaring total income of Rs.4,85,049/-. The return was processed u/s 143(1) of the Act. A search action was carried out in the case of Indo Count Industries Ltd. and other group concerns on 01.02.2018. The assessee was also covered in the said search operations. Notices u/s 153A were issued accordingly and assessment for the year under reference was completed vide order u/s 143(3) r.w.s.153A of the Act dated 17.12.2019 wherein the A.O assessed total income at Rs. 29,10,550/- after making an addition of Rs, 23,10,000/- by treating sale consideration from share of M/s. Global Capital Market Ltd.(GCML) as unexplained investment and income from other sources not taxable as capital gains and further made an addition of Rs. 1,15,500/- u/s. 69 of the Act on account of commission paid on accommodation entry which is the subject matter of this appeal.

4. Before the Id.CIT(A) assessee has objected to the validity of jurisdiction of assessment inasmuch as additions were made without incriminating material found during the search. The Id.CIT(A) upheld the assessee's contention and held that since addition were made dehorse incriminating material found during the search, the same was not sustainable. In this regard, he referred to Special Bench decision of ITAT in the case of All Cargo Global Logistics Ltd (137 ITD 287). He also referred to Hon'ble Bombay High court in the case of Continental warehousing Ltd. [2015] 374

ITR 645 and Hon'ble Jurisdictional High Court in the case of Murli Agro Ltd. in ITA No. 36 of 2009 vide order dated 29.10.2010. Referring to several other decisions, Id.CIT(A) decide the preliminary objection in favour of the assessee. He held that because of the above decision he is not adjudicating the grounds on merits raised by the assessee.

5. The concluding portion of Id.CIT(A)'s order reads as under:-

“In view of the aforesaid detailed discussion and respectfully following the judicial precedents, I am of the view that for the assessment year which do not abate, proceedings u/s 153A of the Act does not empower the AO to adjudicate the issues which are not based on any incriminating material found during the course of search and. hence, in such cases the AO does not have jurisdiction to make additions/disallowances which are not based on any incriminating material found during the course of search. To conclude, in the case of completed/un-abetted 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 / returned income and no addition or disallowance can be made *de hors* the incriminating evidences recovered during the course of search.

In this case, since the additions of Rs.23,10,000/- and Rs, 1,15,500/-were made on the basis of *suo motu* observations and analysis of facts by the Id. AO, which are not based on any incriminating material found during the course of Search conducted u/s 132 of the Act. the additions are directed to be deleted. The Ground No 1 is accordingly allowed.

The contentions and submissions of the assessee in the subsequent grounds No. 2 and 3 as to the merit of the additions become only academic in view of the above and the same is, therefore, not adjudicated upon.”

6. Against the above order, revenue is in appeal before the ITAT.

7. I have heard both the parties and perused the records. I note that the issue is squarely covered in favour of the assessee by the decision of Hon'ble Bombay High Court in the case of Continental warehousing Ltd. (supra) and Murli Agro Ltd, inasmuch as in assessment order framed u/s. 143(3) r.w.s. 153A, the additions are not

based on any incriminating material found and seized during search. It is also not the case that this is abated assessment year. Hence, assessment year is non-abated and no incriminating material has been found and seized during search. The addition dehorse incriminating material found and seized during search in such case is not sustainable. Further, I note that, Ld.CIT(A) in view of deciding the preliminary issue in favour of the assessee had not adjudicated the grounds on merits.

8. I do not find any infirmity in the aforesaid order. Hence, I uphold the order of ld.CIT(A).

9. Before parting, I also note that the tax effect in this case is below the limit fixed by CBDT for filing the appeal before the ITAT. No case has been made out that there is a specific order in this case for filing appeal irrespective of tax effect. Hence, this appeal is not sustainable on tax effect also.

10. In the result, appeal by the revenue stands dismissed.

Pronounced in the open court on 22.03.2022

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 22.03.2022

Thirumalesh, Sr.PS

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)

