

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI

BEFORE SHRI AMARJIT SINGH, JM AND S. RIFAUR RAHMAN, AM

आयकर अपील सं/ I.T.A. No. 2925/Mum/2019

(निर्धारण वर्ष / Assessment Year: 2010-11)

DCIT, Central Circle-5(4) Room No.1927, 19 th Floor, Air India Building, Nariman Point, Mumbai-400021.	बनाम/ Vs.	Rajindrakumar Miglani Uttam House, 69, P ‘Dmello Road, Carnac Bunder, Mumbai-400009.
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Cross Objection No.20/Mum/2021

आयकर अपील सं/ I.T.A. No. 2925/Mum/2019

(निर्धारण वर्ष / Assessment Year: 2010-11)

Rajindrakumar Miglani Uttam House, 69, P ‘Dmello Road, Carnac Bunder, Mumbai-400009.	बनाम/ Vs.	DCIT, Central Circle-5(4) Room No.1927, 19 th Floor, Air India Building, Nariman Point, Mumbai-400021.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABPM7288D		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Revenue by:	Shri Sanjeev Kashyp (DR)
Assessee by:	Shri K Shivaram & Rahul Hakani

सुनवाई की तारीख / Date of Hearing: 30/03/2022

घोषणा की तारीख /Date of Pronouncement: 25/04/2022

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The Revenue as well as assessee have filed the above mentioned appeal as well as cross-objection against the order dated 25.02.2019 passed by the Commissioner of Income Tax (Appeals)-53, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Y.2010-11.



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2. The revenue has filed the present appeal against the order dated 25.02.2019 passed by the Commissioner of Income Tax (Appeals)-53, Mumbai relevant to the A.Y.2010-11.

3. The revenue has raised the following grounds: -

1. On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in allowing the appeal of the assessee by holding that addition cannot be made in the order passed u/s 143(3) rws 153A in the absence of any incriminating material seized or findings emerging from search action when there are judgements contrary to the findings of the ld. CIT(A).”

4. The brief facts of the case are that the assessee filed his return of income on 27.07.2010 declaring total income to the tune of Rs.1,33,93,060/-. The return was processed u/s 143(1) of the Act. A search & seizure action u/s 132 of the Act was conducted on Uttam Galva Group on 29.02.2012 wherein the residential premises of its Promoters and Directors was also covered u/s 132 of the Act. Thereafter, notice u/s 153A dated 29.11.2012 was issued and served upon the assessee. In response to the notice, the assessee filed the return u/s 153A of the Act declaring total income to the tune of Rs.1,33,93,220/-. Thereafter, necessary notices u/s 143(2) & 142(1) of the Act were issued and served upon the assessee. The assessee was the Chairman and Managing Director of Uttam Galva Steels Ltd. and drawing Directors Remuneration from the company. The assessee claimed the exempt income of Rs.11,81,53,780/- on account of sale of



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agriculture land situated at Wangni, Terri Waje & Ambivli, Taluka Panvel, Distt. Raigad, Maharashtra to M/s. Valuable Properties Pvt. Ltd. The assessee purchased the land in December 2008 and sold in April 2009. On appraisal of the sale-deed, it was found that the company has taken into consideration special permission for developing the said land as township from Government of Maharashtra. The assessee was asked to explain on the exempt capital gain on the sale of agriculture land amounting to Rs.11,81,53,780/-as the same was taxable gain in the hands of assessee. After the reply of the assessee, the said sale amount was treated as Short Term Capital Gain and accordingly taxed. The total income of the assessee was assessed to the tune of Rs.13,15,47,000/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who allowed the claim of the assessee, therefore, the revenue has filed the present appeal before us.

ISSUE NO.1

5. Under this issue the revenue has challenged the challenged the finding of the CIT(A) to the effect that addition was not required to be made in the hands of the assessee in the absence of any incriminating material seized from search action. The Ld. Representative of the Department has argued that the said finding is not justifiable because there are contrary decision to this legal issue, therefore, the finding of the CIT(A) is not justifiable and is liable to be set aside. However, on the other hand, the Ld. Representative of the assessee has strongly placed reliance upon the order passed by CIT(A) in question. Before going further, we deem it necessary to advert the finding of the CIT(A) on this issue: -



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5.1 In Ground of Appeal No. 3, the appellant has contended that the assessment order was passed u/s 153A r.w.s. 143(3). The addition has been made by treating the capital gain on sale of agricultural land, which was treated as exempt by the appellant but considered to be taxable by the AO. It is contended that this issue does not arise out of any material seized or findings emerging from the search action. Hence such addition cannot be made in the order u/s 153A r.w.s. 143(3) as has been done by the assessing officer. The appellant has relied on the decisions such as the decision of the Mumbai ITAT in the case of Atul Barot vs DCIT reported in 65 SOT 83 dated 26.02.2014 and ACIT vs Jayendra P Jhaveri 65 SOT 118 (Mum). The jurisdictional High Court decision in the case of CIT vs Murli Agro Products Ltd. [2014] 49 taxmann.com172 dated 29.10.2010 is also relied upon. The appellant also submitted copy of statement recorded u/s 132(4) dated 30.03.2012 during the course of search action, claiming that this issue did not arise from the search action.

5.2. While submitting the rejoinder to remand report, it was further contended that even otherwise the addition cannot be made in the proceedings u/s 153A in respect of issues not arising out of any incriminating documents found during the search. The AO has failed to appreciate that the assessment for AY 2010-11 was not pending on the date of initiation of search on 29.02.2012, as per the second proviso to section 153A(1) and hence the assessment for AY 2010-11 has not abated in terms of section 153A. The AO has lost jurisdiction to make regular assessment and make addition on account of short term capital gain on sale of agricultural land. The relevant facts were quoted as following:



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Date of filing of return u/s 139(1) 27.07.2010

Return of income is processed u/s 143(1) before the date of search

Time limit for issuing notice u/s 143(2) expired on 30.09.2011, which is before the date of search on 29.02.2012.

5.3. Reliance was placed on the special bench decision of Mumbai ITAT in All Cargo Global Logistics Ltd. 37 ITD 287, where it was observed that where return of income filed by the assessee and intimation is passed or not passed u/s 143(1) and time limit for issue of notice u/s 143(2) has expired there return of income of the assessee shall be treated as having been accepted and attained finality. The AO loses jurisdiction to verify the return of income. Since no assessment would be pending there would be no abatement of any proceedings. The appellant also relied on the subsequent decision of the Mumbai ITAT in Gurinder Singh Bawa vs DCYP 150 ITD 40. It was contended that in this decision the Hon'ble ITAT has held that where the assessment is completed under summary scheme u/s 143(1) and time limit for issue of notice u/s 143(2) has expired on the date of search. There was no question of abatement of assessment proceeding and, therefore, addition could be made only on the basis of incriminating documents found during the search. It was further stated that the decision of the Mumbai ITAT in Gurinder Singh Bawa has been upheld by the Bombay High Court reported in 386 IFR 483. Several other decisions of the Mumbai Tribunal on the same point -ere highlighted by the appellant to buttress its case.



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5.4. Vide this office letter dated 05.11.2018, the AO was informed of the contention of the assessee and was requested to verify the seized documents and inform whether any material found or seized during the search pertained to this issue of sale of land. A reminder was issued vide letter dated 20.11.2018, calling for the report urgently. Till date, no information has been provided by the AO, nor any submission offered on this contention of the appellant.

5.5. I have considered the submissions carefully. It is noted from the copy of statement recorded of Shri Rajinder Miglani dated 30.3.2012 u/s 132(4)} in the course of search that no question was put to him regarding gains arising from sale of land. At this stage regular return of income had already been filed by the appellant. The assessing officer has also not furnished any evidence found in the course of search pertaining to this issue, leave alone incriminating evidence. Thus, as far as the contention of the appellant that not based on any documents found in the course of search nor was this issue arising out of any investigation in the search action, has merits.

5.6. It is noted that there are several decisions supporting the contention raised by the appellant such as the Hon'ble Gujarat High Court in the case of Pr. CIT v. Saumya Construction (P.) Ltd. {2016} 387 ITR 529/{(2017)} 81 Taxmann.com 292, Pr. CIF v. Desai Construction (P.) Ltd.{2016} 387 ITR §52/{(2017)} 81 taxmann.com 271 (Guj.), CIT v. Deepak Kumar Agarwa2017} 86 taxmann.com 3/251 Taxman 22/398 ITR 586 (Bom.), CIT v. Gurinder Singh Bawaj2016} 386 ITR 483/{(2017)} 79 taxmann.com 398 (Bom.) and decision of Hon'ble Dethi High Court im the case of CIT v. Kabul Chawla [2016] 380 ITR 573/234 Taxmann 300/61 taxmann.com.412.



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In the case of CIT v. Gurinder Singh Bawa the Hon'ble Bombay High Court noted and made reference to its earlier decision in the case of CIT v. Continentat Warehousing Corporation (Nhava Sheva) Ltd. [2015] 374 ITR 645/58 taxmann.com 78/232 Taxman 270 (Bom.) upholding the view of the Special Bench of the Tribunal in Al-Cargo Global Logistics Ltd. It was held that consequently, once an assessment has attained finality for a particular year we. it is not pending then the same cannot be subject to tax in proceedings under Section 153A of the Act. This of course would not apply if incriminating materials are gathered in the course of search or during proceedings under Section 153A of the Act which are contrary to and/or not disclosed during regular assessment proceedings.

5.7. In light of the judicial decisions of the jurisdictional High Court, ground of appeal no 3 is allowed.”

6. The factual position is not in dispute. The assessee filed the return of income on 27.07.2010. The assessment was completed u/s 143(3) of the Act. The time limit with regard to serve the notice u/s 143(2) expired on 30.09.2011. A search was completed on 29.02.2012. The assessment has been completed which is not required to be reopened in the absence of any incriminating material. No incriminating material was found during search. Even at the time of recording the statement of the assessee on 30.03.2012 u/s 132(4) no question with regard to the capital gain was put to be him. The assessment is not required to be reopened in absence of any incriminating evidence during search action u/s 153A of the Act. The CIT(A) has relied upon the decision in the case of **Pr. CIT Vs. Saumya Construction P. Ltd. (2016) 387 ITR 529, Pr. CIT Vs. Desai**



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Construction P. Ltd. (2016) 387 ITR 552, CIT Vs. Deepak Kumar Agarwal (2017) 86 taxmann.com 3/251, CIT Vs. Kabul Chawla (2016) 386 ITR 483. All the decision speaks about this fact once an assessment has attained finality for a particular year i.e. it is not pending then the same cannot be subject to reopened in proceedings u/s 153A of the Act unless any incriminating material recovered during search action. No law contrary to the law relied by the Ld. Representative of the assessee has produced before us. The facts are not distinguishable at this stage. Taking into of all the facts and circumstances, we are of the view that the finding of the CIT(A) is quite correct which is not liable to be interfered with at this appellate stage. Accordingly, this issue is decided in favour of the assessee against the revenue.

In the result, the appeal filed by the revenue is hereby dismissed.

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7. The assessee has filed the present cross – objection against the order dated 25.02.2019 passed by the Commissioner of Income Tax (Appeals)-53, Mumbai relevant to the A.Y.2010-11.

8. The assessee has raised the following cross-objection: -

1. The learned CIT(A) erred in confirming the order of learned Assessing Officer taxing exempt income of Rs.11,81,53,780/- as short term capital gain arising on sale of agricultural land without appreciating that assessee had sold agricultural land which is not a capital asset u/s 2(14) and hence gains on sale of such land cannot be brought to tax.



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2. *The respondent craves leave to add, amend, alter or vary the grounds of appeal at the time of or before the date of hearing.*”

9. The brief facts of the case are not liable to be repeated because the facts are the same as discussed above while deciding the appeal of the assessee bearing ITA. NO.2925/Mum/2019.

10. Since the appeal of the revenue has been dismissed above, therefore, deciding the cross objection would merely be academic in nature, hence, is not required to be adjudicated.

11. In the result, the appeal filed by the revenue is hereby dismissed and cross objection filed by the assessee is also hereby dismissed.

Order pronounced in the open court on 25/04/2022

Sd/-
(S. RIFAUR RAHMAN)
लेखा सदस्य / ACCOUNTANT MEMBER
मुंबई Mumbai; दिनांक Dated : 25/04/2022
Vijay Pal Singh (Sr. PS)

Sd/-
(AMARJIT SINGH)
न्यायिक सदस्य/JUDICIAL MEMBER



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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,

सत्यापित प्रति //True Copy//

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