IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

BEFORE SHRI AMIT SHUKLA, JM
AND
SHRI PRASHANT MAHARISHI, AM

ITA No. 874/Mum/2022

(Assessment Year 2013-14)

Jt. Commissioner of Income Tax (OSD), Central Circle 1(4) 9th Floor, 902, Pratishtha Bhavan, M.K. Road, Mumbai-400020 **(Appellant)**	Vs.	Podar Media Magazine & Graphics Prints Pvt. Ltd. 85, Podar Centre, Parel Post Office Lane, Opp. Ambedkar Road, Parel, Mumbai-400012 **(Respondent)**

PAN No. AAECP9649K

ITA No. 880/Mum/2022

(Assessment Year 2012-13)

Jt. Commissioner of Income Tax (OSD), Central Circle 1(4) 9th Floor, 902, Pratishtha Bhavan, M.K. Road, Mumbai-400020 **(Appellant)**	Vs.	Parel Graphic Prints Pvt Limited 85, Podar Centre, Parel Post Office Lane, Opp. Ambedkar Road, Parel, Mumbai-400012 **(Respondent)**

PAN No. AAGCP2425D

Assessee by	:	Ms. NishitaMandalaywala, AR
Revenue by	:	Mr. Nimesh Yadav, CIT DR

Date of hearing: 10.08.2022
Date of pronouncement: 09.11.2022

O R D E R

PER PRASHANT MAHARISHI, AM:

01. These are 2 appeals filed by The Joint Commissioner Of Income Tax (OSD), Central Circle – 1 (4), Mumbai (the learned AO) in case of two different assessee for two different years involving same facts arising out of the same search and based on same evidences , therefore, both the parties argued them together and disposed of by this common order.

AY 2013-14
ITA No 874/Mum/2022
Poddar media Magazine and graphic points private limited

02. ITA No.874/Mum/2022 is filed by the Jt. Commissioner of Income Tax (OSD), Central Circle 1(4), Mumbai [the ld. AO] for A.Y. 2013-14 against the order passed by Commissioner of Income-tax (Appeals)-47, Mumbai [the Ld. CIT (A)] dated 23rd March, 2022, wherein the appeal filed by the respondent M/s Podar Media Magazine & Graphics Prints Pvt. Ltd.[Assessee/Respondent] against the assessment order dated 26th December, 2019 passed under Section 143(3) read with section 153C of the Income-tax Act, 1961 (the Act) by the learned Assessing Officer was partly allowed.

03. The learned Assessing Officer is aggrieved by the deletion of the addition of ₹3,99,00,000/- of share application money added by him under Section 68 of the Act was deleted.

04. Brief facts of the case show that Assessee Company is a Private Limited company engaged in the business of printing services and graphic processing.

05. It filed its return of income on 6th September, 2013, declared at ₹ nil. Subsequently, search under Section 132 of the Act was carried out on Podar Education group on 9th January, 2018. The case of the assessee was covered under Section 153C of the Act and accordingly, notice was issued on 21st September, 2018 which was responded by the assessee by filing return of income on 23rd September, 2019, at ₹ nil. Subsequently, notice under Section 143(2) of the Act was issued.

06. During the year, the learned Assessing Officer noted that assessee has received ₹3,99,00,000/- as share capital. The assessee was asked to explain the detail of 19 private limited companies who are allotted those shares. The learned Assessing Officer asked the details as per order sheet dated 3rd October, 2019 asking assessee to prove the identity and creditworthiness of the parties as well as the genuineness of the transactions and also to justify the share premium and applicability of provision of Section 56(2)(viib) of the Act. The learned Assessing Officer further noted that various statements were recorded during the course of search of Shri Kirit Kumar Suba, Shri Naresh Sodhani, Shri Navin Nisar and various Angadias. Based on this, show cause

notice dated 11thDecember, 2019 was issued for the reason that notices sent under Section 133(6) of the Act to the various shareholders, replies were not received.

07. In response to notice, the assessee submitted the

i. complete details of the shareholders,

ii. statements relied upon by the learned Assessing Officer of various persons are already retracted,

Hence, addition under Section 68 of the Act cannot be made.

08. The learned Assessing Officer analyzed the documents submitted by the assessee found that the companies have very meager and nominal income which does not justify the creditworthiness of the parties. It was also stated that some of the companies' name have also been struck off. It further noticed that Assessee Company also has meager income and not worth for such as huge premium. He also held that statements retractedof the parties is merely an afterthought. Accordingly, he made an addition under Section 68 of the Act of ₹3,99,00,000/- and assessment order was passed on 26thDecember, 2019 under Section 153C of the Act.

09. Assessee aggrieved with the assessment order preferred the appeal before the learned CIT (A). The

learned CIT (A) held that he does not agree with the contention of the assessee that there was no incriminating material found during the course of search. However, on the merits of the case, he held that the issue is squarely covered by the decision of the co-ordinate Bench in ITA no.714/Mum/2020 dated 9th August, 2021 in case of another group concern M/s Himadri Machine Tools which was rendered on identical facts and circumstances. Accordingly, he deleted the addition of ₹3,99,00,000/- under Section 68 of the Act.

010. The learned Assessing Officer is aggrieved with the above appellate order and is in appeal before us. All the three grounds raised are with respect to deletion of addition under Section 68 of the Act.

011. The learned Authorized Representative submitted that the learned CIT (A) in paragraph no.7 of his order has dismissed ground no.1,2,3,4,6 and 7 of the appeal of the assessee holding that there is an incriminating material found during the course of search. Ld. AR submitted that there is no incriminating material found during search. Therefore, the issue decided against the appellant are challenged under Rule 27 of the ITAT Rules on the ground that there is no incriminating material found during the course of search, the addition is made merely on the basis of the statement of Third parties which are subsequently retracted and

therefore, the addition on the merits could not have been made without crossing the above threshold.

012. The learned Departmental Representative vehemently objected that there is no written application of Rule 27 and further, the learned CIT (A) has held that there is no incriminating material found during the course of search.

013. The learned Authorized Representative on the merits of the case submitted that the issue is squarely covered on identical facts and circumstances in case of group concern M/s Himadri Machine Tools in ITA No.714/Mum/2020 dated 9thAugust, 2021, which has been followed by the learned CIT (A).

014. The learned Departmental Representative vehemently objected to the same and submitted that cash credit in case of one assessee cannot be considered is having the proper creditworthiness as well the genuineness of the transaction on identical basis in case of another assessee because for each cash credit identity, creditworthiness and genuineness of the transactions is required to be proved by the assessee independently with respect to that transaction. Merely because name of person appears in one order and addition under Section 68 of the Act is deleted of that person, it cannot be stated to be covered for all the credits given by that person to the whole world. Accordingly, the learned

CIT (A) has grossly erred in following the decision of M/s Himadri Machine Tools.

015. We have carefully considered the rival contentions and perused the orders of the lower authorities. The facts clearly shows that assessee has raised the issue that there is no incriminating material found during the course of search, the assessee has not raised any appeal against the issue decided by the learned CIT (A). However, before us, the assessee has challenged that there is an absence of incriminating material based on which the addition has been made. There is no written application made by the learned authorized representative for invocation of rule 27 of the ITAT rules.We find that issue is squarely covered on this ground of the decision of Hon'ble Delhi High Court in case of Mr. Sanjay Sawhney vs Principal Commissioner of Income-tax [2020] 116 taxmann.com 701 (Delhi) where in it has been held that

> **"11.** The Tribunal has taken a pedantic view on the interpretation of Rule27 by holding that for availing the remedy under the said provision, an application in writing is necessary. In our opinion, this surmise is fallacious and we cannot countenance the same. We agree with Mr. Krishnan that Rule27, as it stands today, does not mandate for the application to be made in writing. Revenue has not brought to our notice any particular Form notified for filing

such an application. Revenue also does not controvert the contention of the Appellant that the draft Appellate Tribunal Rules 2017 proposing to insert a proviso to Rule27, providing for an application to be made in writing, have not been notified, as yet. Therefore, the reasoning of the Tribunal for rejecting Appellant's contentions is palpably wrong. If the provision does not specify any defined structure for making an application in a particular manner, the Tribunal ought not to have deprived the Appellant of an opportunity to raise a fundamental question of jurisdiction, taking a hyper technical viewpoint. The Tribunal has plainly refused to consider the additional grounds on an erroneous premise which is contrary to the statutory scheme of the Act, that permits the Respondent to urge all grounds in support of the order appealed, as provided under Rule27. The appeal deserves to be allowed on this short ground and we would have no hesitation in doing so with a consequential direction to ITAT to reconsider the matter afresh on the additional grounds urged by the Appellant. However, that direction would not take the controversy to a logical conclusion. Mr. Hossain raises a more fundamental issue by arguing that in absence of an appeal by the Petitioner, or cross

objections by it, the issue of validity had attained finality, and cannot be raked up by taking recourse to the said Rule putting them in a more disadvantageous position. He persists that irrespective of the format of the application and regardless of the reasons given in the impugned order, the appellant cannot be permitted to urge jurisdictional objections before ITAT. We feel clarity is required on this vital ground, particularly, since Mr. Hossain has attempted to substantiate his submissions by contending that this court has already taken a view that supports his line of arguments. In fact, this prompted the learned counsels for both the parties to cite plethora of case laws dealing with this jurisdictional question."

"14. It emerges that Rule27 ought not to be applied narrowly and therefore we cannot agree with Mr. Hossain, that by permitting the Appellant- Assessee (respondent before the Tribunal) to invoke Rule27 before the Tribunal, to challenge the ground decided against him, scope of the subject matter of appeal would get expanded. We must also bear in mind that jurisdictional issue sought to be urged by the appellant under Rule27 is interlinked with the other grounds of appeal, and its adjudication would have a direct impact on the outcome of the appeal. The validity of the proceedings goes

into the root of the matter and for this reason, the assessee should not be precluded from raising a challenge to that part of the order which was decided against him by the CIT(A)….”

016. It further held in last para that **“**We are, therefore, of the considered opinion that the impugned order passed by the ITAT suffers from perversity in so far as it refused to allow the Appellant - assessee (Respondent before the Tribunal) to urge the grounds by way of an oral application under Rule27. The question of law as framed is answered in favour of the Appellant - assessee and resultantly the impugned order is set aside.”

017. In view of the above we do not have any hesitation allowing the assessee to raise an issue Under rule 27 of the ITAT rules 1963 that addition has been made in the hands of the assessee in a concluded assessment without finding any incriminating evidence.

018. Now the issue required to be examined is whether the addition has been made in the hands of the assessee on the basis of any incriminating material found during the course of search and not. The learned CIT – A has dismissed this ground of appeal of the assessee. The learned CIT – A has dealt with this issue as per paragraph number 7 of his order: -

"7. I have carefully considered the facts of the case, submissions of the appellant, the observations of the AO contained in the assessment order and other materials on record on this issue. During the course of search and seizure action, in the present case and another group entities , it was found that donation to the tune of ₹ 96.90 crores was given by Messer's Poddar group of trust including the assessee trust to various entities namely Delhi vocational school society, Gyan Education welfare Trust, Nav Chetan educational trust, Prabodh Foundation etc. These entities after retaining the commission returned the cash to the assessee group. These facts were clearly stated by Sri Kiritkumar Dharshibhai Suba, in the statement on oath u/s 131, during the course of survey proceedings u/s 133A carried out Simultaneously with the search action.Shri Kiritkumar Dhashibhai clearly mentioned that cash was received back by the trusteesShri N K Sodhani ,Shri Navin Nishar CA etc. In fact, Shri N K Sodhani in his statement also very clearly accepted that donation given to the tune of ₹ 96.90 crores were bogus in nature and was channeled back into the group of entities in the form of cash. These donations have been given by Poddar education and sports trusts from assessment year 2011 – 12 onwards to various

trusts and is returned back in the form of cash after deducting the commission. **No doubt, the statements were retracted later on, but the statements will form the basis for ` Incriminating Material" enough to proceed against the assessee in accordance with the provisions of Section 153A of the income tax act.**Moreover, during the remand proceedings in the case of connected trust, opportunities of cross examination etc. were given to the respective assessee. Opportunities are also given during the appellate proceedings. In the circumstances, I do not agree with the contentions of the appellant that there was no incriminating material found and seized against the appellant, opportunities were not given, et cetera. Accordingly ground number 1, 2, 3, 4, 6 and 7 and by the assessee are rejected."

[underline supplied by us]

019. The learned authorized representative has categorically stated that except the statement of few persons there are no evidences available so far as the amount of addition in the hands of the assessee in the form of share capital. The fact is also been recorded by the learned CIT – A as well as the learned assessing officer that These statements have also been retracted by those persons before the

assessing officer. These statements do not have any evidentiary value. Even otherwise, the statement per se cannot be an incriminating material based on which in any addition can be made. It was also stated that the learned CIT – A is only required to see the material found during the course of search, he cannot rely upon anything which has happened posts search i.e. during the course of assessment proceedings. It was stated that statement cannot be considered as incriminating evidence, it has been held so in several judicial precedents.

020. The learned departmental representative vehemently relied on the order of the learned CIT – A this issue has been decided against the assessee. It was stated that those statements are retracted later on, it is merely an afterthought. Even otherwise the statement recorded during the course of search u/s 132 (4) of the act have immense evidentiary value. Therefore, these statements are incriminating evidence.

021. We find that in the present case search took place on 9/1/2018. The impugned assessment year is 2012 – 13. Therefore, apparently as on the date of search the assessment was not pending but concluded. According to the provisions of Section 153C where the assessing Officer is satisfied that any money, bullion, jewelry or other valuable article or things seized or requisitioned belongs to or any books of

accounts or documents seized or requisitioned, pertains or pertain to, or any information contained therein, relates to a person other than the searched person, then the books of accounts or documents or assessee is to requisitioned shall be handed over to the assessing officer having jurisdiction over such person and that AO shall proceed against each such a person and issue notice and assess or reassess the income of the other person in accordance with the provisions of Section 153A of the act, if the assessing Officer is satisfied that such books of accounts or documents or assessee seized or requisitioned have a bearing on the determination of total income of such person.

022. Therefore, now question is whether the statement recorded of 3rd persons can be considered to be a material based on which the provisions of Section 153C of the act is invoked. On reading of the order of the learned CIT – A, only material that is available is the statement of several persons. It is also a fact that such statements have been retracted. We are not on the issue that whether such a retracted statements have any evidentiary value or not but we are on the issue whether the statement of 3rd party can be said to be an incriminating material based on which an action u/s 153C of the act can be taken in case of other person.Further, this finding of the Ld. CIT(A) that the addition is made simply based on a statement which was retracted is not disputed.It

is submitted that, a mere statement of some third party in some other assessee's search operation and nothing further, cannot be treated as an incriminating material and solely on the basis of such a statement no addition could be made in the hands of an assessee. Even a statement taken u/s 132(4) during the course of search could not be the sole basis for making an addition in the search assessment unless there is some material or evidence unearthed during search to corroborate the same. It is a fact that there is no incriminating material found during the course of search which satisfies the condition of section 153 C of the Act.In view of this, we constrain to hold that there is no incriminating material found during the course of search, based on which the return income for impugned Assessment year can be disturbed. Such is the mandate of the decision of the Hon'ble Supreme Court in case of Shinghad Technical Education Society 397 ITR 344 and also of the Hon'ble Delhi High Court in case of CIT Vs Kabul Chawla 380 ITR 573. Honourable Delhi high court in case of [2017] 397 ITR 82 (Del)PRINCIPAL COMMISSIONER OF INCOME-TAX v. BEST INFRASTRUCTURE (INDIA) PVT. LTD. has held that: -

> "38. Fifthly, statements recorded under section 132(4) of the Act do not by themselves constitute incriminating material as has been explained by this court in CIT v. Harjeev Aggarwal (supra). Lastly, as already pointed

out hereinbefore, the facts in the present case are different from the facts in Smt. Dayawanti Gupta v. CIT (supra) where the admission by the assessees themselves on critical aspects, of failure to maintain accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases, is non-existent in the present case. In the said case, there was a factual finding to the effect that the assessees were habitual offenders, indulging in clandestine operations whereas there is nothing in Page No : 102 the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any suchadmission."

023. Orders of The learned lower authorities as well as the learned departmental representative could not show us any other evidence other than those statements referred, which are also retracted, found during the course of search which can be said to be an incriminating material, based on which addition could be made in the hands of the assessee.

024. In view of this, such retracted statement cannot be considered to be an incriminating material based on which the assessment of the assessee can be disturbed u/s 153C of the act. Accordingly, the

addition made by the learned assessing officer of ₹ 39,900,000/– deserves to be deleted on this ground.

025. As we have decided the issue on rule 27 invoked by the learned authorized representative in this appeal, the appeal of the learned assessing officer also deserves to be dismissed, as the deletion of the addition by the learned CIT – A on the merits of the case is not required to be adjudicated.

026. In the result ITA number 874/M/2022 filed by the learned assessing officer for assessment year 2013 – 14 in case of Podar media magazine and graphics points private limited is dismissed.

ITA number 880/M/2022

assessment year 2012 – 13

Parel graphics prints private limited

027. This appeal is filed by the learned joint Commissioner of income tax (OSD), central circle – 1 (4), Mumbai (the learned assessing officer is preferred against the order passed by the Commissioner of income tax (appeals) – 47, Mumbai dated 22/2/2022 for assessment year 2012 – 13 wherein the appeal filed by the assessee against the assessment order passed u/s 143 (3) read with Section 153C of the income tax act 1961 dated 26/12/2019 was partly allowed. The learned assessing officer is aggrieved with that and is in appeal before us.

028. By this appellate order the learned CIT – A deleted the addition of ₹ 22,500,000 in respect of share application money received by the assessee.

029. Briefly stated the facts shows that the assessee company is a private Ltd company engaged in the business of printing services. The assessee filed its return of income on 20/9/2012 declaring total income at rupees nil. Pursuance of search and seizure action on Podar education group on 9/1/2018, the case of the assessee was covered and therefore necessary notices u/s 153C was issued on 21/9/2019 which was responded to by the assessee by filing return of income on 23/9/2019 declaring Nil income. The assessment order was passed u/s 143 (3) read with Section 153C dated 26/12/2019 where the learned assessing officer has made an addition of Rs 225 lakhs in respect of share application money received by the assessee.

030. On appeal, the learned CIT – A the contention of the assessee that there is no incriminating material found during the course of search however he deleted the addition on the merits of the case following the decision of the coordinate bench in case of Himadri machine tools Ltd (supra). Therefore, the learned AO aggrieved with appellate order is in appeal before us.

031. Identically, the learned authorized representative invokes the provisions of rule 27 of the ITAT rules

and submitted that there is no incriminating material available during the course of search based on which the addition has been made. On the merits of the case, the learned authorized representative relied upon the order of the learned CIT – A.

032. The learned departmental representative vehemently supported the order of the learned assessing officer on the issue of the merits of the addition as well as the order of the learned CIT – A that there reason incriminating material found during the course of search. The learned CIT DR vehemently objected invocation of rule 27 of the ITAT rules as assessee has not filed any application as well as has not filed any appeal before the ITAT.

033. We find that the addition in this case is made on the same set of facts i.e. statement of certain persons recorded during the course of search on Podar group, which was subsequently retracted. Further, orders of the lower authorities do not show any incriminating evidence except the statement of 3rd parties. The learned departmental representative also does not show that what are the incriminating material is other than those statements found during the course of search.

034. Identical issue has been dealt with by us in the impugned order in ITA number 874/M/2022 by this order in case of Podar media magazine and graphics

points private limited for assessment year 2013 – 14.

035. Both the parties have agreed that there is no change in the facts and circumstances of the case except the change of the assessment year and the amount of addition. Both the parties also confirmed that except those statement there are no incriminating material is found during the course of search related to the addition made in the hence of the assessee for this assessment year.

036. Therefore, as per reasons shown by has for deleting the addition in the case of ITA number 874/M/2022 in absence of any incriminating material, we also hold in case of this assessee in ITA number 80/M/2022 for assessment year 2012 – 13 that addition cannot be made in the hands of the assessee.

037. In the result, ITA number 880/M/2022 filed by the learned assessing officer is dismissed.

038. Order pronounced in the open court on 09.11.2022.

Sd/-	Sd/-
(AMIT SHUKLA)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 09.11.2022
Sudip Sarkar, 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.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai