

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

**BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER &
MS. KAVITHA RAJAGOPAL, JUDICIAL MEMBER**

**ITA Nos. 1959 & 1960/Mum/2022
(A.Ys.2014-15 & 2016-17)**

Dy. Commissioner of Income Tax, CC-6(1) Room No. 1905, 19 th Floor, Air India Building Nariman Point, Mumbai – 400021	Vs.	Rashi Fincorp Limited 72-A, Mittal Tower, Nariman Point, Mumbai – 400 021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACJ2576M		
Appellant	..	Respondent

Appellant by :	Riddhi Mishra
Respondent by :	Neelkanth Khandelwal

Date of Hearing	07.12.2022
Date of Pronouncement	23.12.2022

आदेश / O R D E R

Per Amarjit Singh (AM):

Both the appeals filed by the revenue are directed against the combined orders of Id. CIT(A)-54, Mumbai. Since, both these appeals are based on identical issue on common facts, therefore, these appeals are adjudicated together by taking the ITA No. 1959/Mum/2022 as a lead case and its finding will be applied mutatis mutandis to ITA No.1960/Mum/2022. The revenue raised the following grounds before us:

- “1. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in quashing the assessment order passed u/s 143(3) r.w.s.153A by holding that in the absence of any incriminating material for that assessment year, no addition/disallowance could be made?*
2. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was right in limiting the scope of section 153A only to such cases wherein incriminating material is found/seized ignoring the first proviso to Section 153A which states that "Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years and for the relevant assessment year or years.?"*
3. *Whether the Ld CIT(A) is correct in law, in quashing the assessment order u/s 143(3) r.w.s.153A of the Act without considering the judgement of the Hon'ble Kerala High Court n the case of Shri E.N. Gopakumar Vs. CIT (Central) [390 ITR 131] wherein it was held that the assessment proceedings initiated by the issuance of a notice u/s153A(1)(a) can be concluded against the interest of the assessee including making additions even without any incriminating material being available against the assessee in the search proceedings u/s 132 of the Act. ?*
4. *Without prejudice to the Ground No 1, 2 & 3, whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in ignoring that the material discussed in the body of assessment order does not constitute incriminating material. ?*
5. *Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in deleting disallowance u/s 37(1) of the Act of Rs 1,55,11,052/- being non-genuine losses incurred by the assessee in F&O traders.*
6. *Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting addition of Rs.3,10,221/ u/s69C of the Act as unexplained expenditure @2% on estimated basis on the non-genuine loss disallowance of Rs. 1,55,11,052/-.*
7. *The appellant craves to leave, to add, to amend and/or to alter any of the ground of appeal if need be.*

2. The fact in brief is that search and survey action was conducted in the case of M/s Rashi Commercial Company and Others on 04.12.2019. A search action u/s 132 was also conducted at the office premises of the assessee located at Nariman Point, Mumbai. A notice u/s 153A of the Act was issued and served on the assessee on 14.01.2021. Subsequently, notice u/s 143(2) of the Act was issued and served on 12.01.2021. In the case of the assessee previously order u/s 143(3) of the Act was passed on 29.12.2016 determining the total income at Rs.4,50,10,256/-.

During the course of proceedings u/s 153A information was received from DDIT, Investigation Units-6, Mumbai that under the 'Project Falcon-II' on investigation of claim of fictitious losses through coordinated and premeditated trading in illiquid stock options it had come to notice that there were several instances/internal alerts wherein a set of entities were consistently seen incurring trading losses by executing Reversal of trades in options of individual stock ("stock options") in Equity Derivative Segment. With Reversal of Trades, huge losses were generated by various clients by letting the options expired. During the course of investigation under project Falcon -II Shri Sanjay Kumar Periwal (director of Vedika the Vanijya Pvt. Ltd.) and Shri Arun Shah (director of Aryav Securities Pvt. Ltd.) in their statements explained such modus operandi of booking bogus losses. Therefore, the A.O observed that M/s Rashi Commercial Company, a group concern of the assessee company was also covered under the project Falcon -II and the non-genuine losses from trading in stock options was disallowed by it in the computation of total income itself. The A.O had obtained trading data of the Equity Options/Derivative Segment related to the assessee for assessment year 2014-15 & 2016-17. The A.O analysed the data received and observed that assessee had booked only sell trade and there was no subsequent buy trade which showed that the assessee had consistently booked losses. From the data received the A.O worked out losses of Rs.2,91,99,600/- from expired trades booked by the assessee in respect of stock options for assessment 2014-15. The A.O also observed that assessee was also engaged in booking non genuine losses due to reversal trades in assessment year 2014-15. On query the assessee submitted that scrutiny assessment order for the assessment year 2014-15 was completed u/s 143(3) of the Act on 29.12.2016 and assessee has

submitted all the relevant detail in respect of the derivate trades (Future and Options) and the same had been accepted by the assessing officer. The assessee has also furnished the detail of the losses incurred in the trades done in the stock options, derivatives etc, through brokers of stock exchange and entered in the books of account of the assessee company. The assessee further submitted that all the losses were genuine and done in the normal course of the business. However, the A.O has not agreed with the submission of the assessee he was of the view that assessee has claimed non genuine losses through expired trades. Therefore, the A.O has made disallowance of Rs.1,53,11,052/- being non genuine losses on expired trades u/s 37(1) of the Act. The A.O has also added the commission payment @ 2% of the total non genuine losses. The A.O has made addition u/s 69C amounting to Rs.3,10,221/-.

3. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) held that no incriminating material related to losses claimed in respect of trading in F & O by the assessee company were found/seized during the entire search proceedings in the case of the assessee, therefore, disallowance made by the A.O was deleted.

4. During the course of appellate proceedings before us the ld. D.R has referred the order of the assessing officer and contended that assessee could not explain the genuineness of the losses claimed and supported the order of the Assessing Officer.

On the other hand, the ld. Counsel has vehemently contended that A.O has failed to bring on record any incriminating material during the course of assessment u/s 153A r.w.s 143(3) of the Act made in the case of the assessee. He has also explained that prior to issue of notice u/s 153A of the Act, original assessment u/s 143(3) was already completed

in the case of the assessee on 29.12.2016 after verification of detailed submission made by the assessee. The ld. Counsel has also placed reliance on the various judicial pronouncements that in the absence of incriminating material no addition u/s 153A and 153C can be made in the case of completed assessment.

5. Heard both the sides and perused the material on record. Without reiterating the facts as elaborated above during the course of appellate proceedings before the ld. CIT(A) the assessee has submitted that during the search proceedings no incriminating material was found/seized from the assessee. The A.O had disallowed non-genuine losses u/s 37(1) of the Act to the amount of Rs.1,55,11,052/- and addition of Rs.3,10,221/- was made u/s 69 of the Act as unexplained expenditure. It is undisputed fact that in the case of the assessee assessment for the year under consideration was already completed u/s 143(3) of the Act on 29.12.2016. Therefore, assessment for the year 2014-15 was unabated and not pending. In this regard, detail finding of ld. CIT(A) are reproduced as under:

“5.3.1 During the appellate proceedings it is submitted by the appellant that a search action u/s 132 of the Act was conducted on 04.12.2019 in the case of Rashi Group including the appellant company. It is also submitted that during the search proceedings, no incriminating material was found/seized from the appellant. In the Assessment Order u/s 153A passed by the AO on 13.07 2021, the AO has disallowed non genuine losses u/s 37(1) of the Act amounting to Rs.1,55,11,052/- and addition of Rs 3,10,221/- u/s.69C of the Act as unexplained expenditure. It is also submitted by the appellant that for AY 2014-15, the assessment was completed u/s.143(3) on 29 12 2016. Therefore, the assessment for AY 2014-15 was unabated and no case was pending as on the date of search. It is further. submitted that no addition in respect of the unabated assessment year can be made where no incriminating material is found in relation to that assessment year u/s 153A of the Act The appellant has relied upon the decision in the case of (i) Commissioner Of Income Tax Vs Sinhgad Technical Education Society Supreme Court Of India (2017) 397 ITR 0344 (SC)(ii) Commissioner Of Income Tax Vs. Kabul Chawla (High Court of Delhi) (2016) 380 TR 0573 (iii) Principal Commissioner Of Income Tax &Ors Vs. Meeta Gutgutia Prop Ferns N Patels & Ors High Court Of Delhi (iv) Commissioner Of Income Tax Vs

Gurinder Singh Bawa (High Court Of Bombay) (2016) 386 ITR 0483 (Bom) (v) Commissioner Of Income Tax Vs. Gurinder Singh Bawa (High Court Of Bombay) (2016) 386 ITR 0483 (Bom) (vi) Principal Commissioner Of Income Tax Vs Dharampal Premchand Ltd. High Court Of Delhi (2018) 408 ITR 0170 (Delhi) & (vii) Poojashish Infrastructures Pvt. Ltd vs Deputy Commissioner Of Income Tax (8 April, 2019) (ITA No. 1120/JP/2018)(Jaipur Tribunal)

5.3.2 The facts of the case of the appellant are that return of income for AY 2014-15 was filed on 30.09 2014 declaring total income of Rs 4,17 59,250 In the order u/s 143(3) of the Act, disallowance u/s 14A was made by the AO No addition in respect of derivative trading, loss was made by the AO in the Assessment Order u/s 143(3) of the Act. A search u/s 132 of the Act was conducted in the case of the appellant on 04 12.2019. A notice u/s 153A was issued on 14 01 2021 In response to the notice u/s 153A, the appellant filed its return of income and the order u/s 153A was passé don 13.07.2021 in which disallowance of Rs.1,55,11,052/- has been made u/s 37(1) and addition of Rs 3.10.221/ has been made u/s 69C of the Act.

It is noted by the AO in the Assessment Order that during the course of assessment proceedings, information was received from DDIT (Inv)Unit-6, Mumbai with respect to investigation came under the name Project Falcon- The investigation revealed that certain entities including the appellant company were claiming trading losses by executing reversal of trades in stock option in equity derivative segment The AO has also referred to the statements of Shri Sanjay Kumar Periwal (Director of Vedika Vanijya Private Limited) and Shri Arun Shah (Director of Aryav Securities Private Limited) who had also explained the same modus operandi of non genuine trading losses in stock option. In the entire Assessment Order, there is no whisper about incriminating material found/seized during the search proceedings which was related to booking of non genuine losses in respect of trading in stock option by the appellant. The AO has also referred to the statements of Shn Vivek Singhania and Shri Ashish Singhani, the Directors of the appellant company. However, from the statements of both the persons, it could not be stated that any incriminating material related to non genuine losses on trading in stock option were found or seized during the search proceedings. Thus, it is evident that no incriminating material related to losses claimed in respect of trading in F&O by the appellant company were found/seized during the entire search proceedings in the case of the appellant Now, it is a well settled principle that in the absence of any incriminating material for that assessment year. no addition/disallowance could be made. The appellant has relied upon the decision in the case of (1) Commissioner Of Income Tax Vs. Sinhgad Technical Education Society Supreme Court Of India (2017) 397 ITR 0344 (SC) (1) Commissioner Of Income Tax Vs. Kabul Chawla (High Court of Delhi) (2016) 380 ITR 0573 (m) Principal Commissioner Of Income Tax & Ors Vs. Meeta Gutgutia Prop Ferns 'N' Patels & Ors High Court Of Delhi (iv) Commissioner Of Income Tax Vs Gurinder Singh Bawa (High Court Of Bombay) (2016) 386 ITR 0483 (Bom) (v) Principal Commissioner Of Income Tax Vs. Dharampal Premchand Ltd. High Court Of Delhi (2018) 408 ITR 0170 (Delhi) (vi) Poojashish Infrastructures Pvt. Ltd vs Deputy Commissioner Of Income Tax (8 April, 2019) (ITA No 1120/JP/2018) (Jaipur Tribunal) In all the above decisions, it has been held that for making any addition/disallowance for the unabated assessment year, there must be incriminating material for that particular assessment year

The disallowance has been made by the AO amounting to Rs 1,55,11,052/- u/s 37(1) of the Act and addition of Rs.3,10,221/- u/s 69C of the Act for the AY 2014-15, which is unabated assessment year, in the absence of any incriminating material with respect to such disallowance and addition. Thus the Assessment Order u/s 153A making disallowance of Rs.1,55,11,052/- u/s 37(1) of the Act and addition of Rs.3,10,221/- u/s 69C of the Act is not a legally valid order and is, therefore, quashed. Accordingly, this ground of appeal is Allowed.”

After perusal of the facts, findings of CIT(A) and material on record it is observed that during the course of search and seizure action no incriminating material was found and seized on the basis of which impugned addition were made by the Assessing Officer. The A.O has categorically pointed out at para 4 of the assessment order that during the course of proceedings u/s 153A information was received from DDIT, Unit-6 Investigation, Mumbai, and nowhere he had referred any incriminating material found and seized during the course of search action in the case of the assessee. The A.O has further referred the statement of Shri Vivek Singhania and Shri Ashish Singhania, the directors of the assessee company, however, nowhere it was established that any incriminating material relating to non-genuine losses or trading in stock option were found and seized during the search proceedings. The A.O has further simply referred the statement of Shri Sanjay Kumar Periwal (Director of Vedika & Vanijya Pvt. Ltd.) and Shri Arun Shah (Director of Aryav Securities Pvt. Ltd.) who had only explained the modus operandi of non genuine trading losses in stock option but there was no any reference to any incriminating material found/seized during the course of search action relating to booking of non-genuine losses in respect of trading in stock options made by the assessee.

We have considered the decision of the jurisdictional Bombay High Court in the case of CIT Vs. Continental Warehousing Corporation (2015) 374 ITR 645 (Bom) wherein held that when the assessment has attained

finality, then the A.O while passing the independent assessment order u/s 153A of the Act cannot disturb the assessment/reassessment order which has attained finality, unless the materials gathered in the course of 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 operations. We have also perused the decision of Hon'ble Bombay High Court in the case of Murli Agro Product Ltd. Vs. CIT, taxman.com 172 in ITA No. 26 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 action u/s 132 of marketing requisition u/s 132A of the Act that stand abated and not the assessment already finalized. This view was also upheld in an other decisions of the Hon'ble jurisdictional High Court in the case of CIT Vs. Gurinder Singh Bawa (2016) 386 ITR 483 (2017) 79 taxman.com 39. The Hon'ble Delhi High Court in CIT Vs. Kabul Chawla 381 ITR 573 (Del) has affirmed the view that no addition can be made for a particular assessment year without their being an incriminating material that relates to the said assessment year which would justify such an addition. There is a similar decision of Hon'ble High Court of Gujarat in the case of Pr.CIT Vs. Saumya Construction Pvt. Ltd (2016) 387 ITR 529 (Guj). After perusal of the aforesaid judicial pronouncements we consider that it is settled legal position that if an assessment is already concluded u/s 143(3) then addition cannot be made u/s 153A of the Act unless and until some incriminating material was found during the course of search operations. After considering aforesaid judicial pronouncements and fact of the case that during the course of search and seizure action no incriminating material was found and seized on the basis of which impugned addition were made by the

A.O we don't find any infirmity in the decision of Id. CIT(A), therefore, ground nos. 1 to 4 of the revenue stand dismissed.

6. Since, we have dismissed the ground nos. 1 to 4 of the revenue that no incriminating material was found and seized on the basis of which addition was made, therefore, ground nos. 5 & 6 are not required any adjudication. Therefore, the appeal of the revenue stand dismissed.

ITA No.1960/Mum/2022

7. As the facts and the issue involved in this appeal is the same as supra in ITA No. 1959/Mum/2022, therefore, applying the same findings mutatis mutandis, this appeal of the revenue is also dismissed

8. In the result, both these appeal of the revenue are dismissed.

Order pronounced in the open court on 23.12.2022

Sd/-

(Kavitha Rajagopal)
Judicial Member

Sd/-

(Amarjit Singh)
Accountant Member

Place: Mumbai

Date 23.12.2022

Rohit: PS

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 DR, ITAT,
Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

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