

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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SANDEEP SINGH KARHAIL, JM

ITA No. 1198/MUM/2020

(Assessment Year 2014-15)

Rajesh Omprakash Agrawal
16 Sai Shyam Chhaya Kopar
road, Dombivali West,
Thane-421202

(Appellant)

DCIT(CC)4(3)
R No. 1921, 19th Floor, Air
India Bldg, Nariman Point,
Mumbai-400 021

(Respondent)

ITA No. 1284/MUM/2020

(Assessment Year 2015-16)

DCIT(CC)4(3)
R No. 1921, 19th Floor, Air
India Bldg, Nariman Point,
Mumbai-400 021

(Appellant)

Rajesh Omprakash Agrawal
16 Sai Shyam Chhaya Kopar
road, Dombivali West,
Thane-421202

(Respondent)

PAN No. ADYPA5448F

Assessee by : Shri. Ajay Daga, Ashok Bansal
Revenue by : Ms Ridhi Mishra (CIT DR)

Date of hearing: 02.02.2023

Date of pronouncement : 01.05.2023

ORDER

PER PRASHANT MAHARISHI, AM:

01. ITA number 1198/M/2020 is filed by the assessee against Appellate order of The Commissioner Of Income Tax (Appeals) – 52, Mumbai (the learned CIT – A) dated 16/12/2019 for assessment year 2014 – 15 wherein the appeal filed by the assessee against Assessment Order passed by the learned Deputy Commissioner Of Income Tax, Central Circle – 4 (3), Mumbai (the learned AO) dated 22/12/2016 passed

under section 143 (3) read with section 153A of the income tax act 1961 (the act) was partly allowed.

02. Assessee has raised following grounds of appeal: –

ITA No. 1198/MUM/2020

(Assessment Year 2014-15)

"1. The Id.CIT(A) erred in confirming the validity of the issue of notice u/s. 153A of the Act ignoring the fact that the search action was not undertaken on the appellant but was undertaken on his employer shri Krishan khadaria vide search warrant dt. 13.06.2014 and, therefore, notice to the appellant, if at all, could have been issued u/s. 153C of the Act.

2. The Id. CIT(A) further did not appreciate that the subsequent search warrant dt. 06.08.2014 issued in the name of the appellant, with the limited purpose to search content of the bank locker, was illegal as the said bank locker did not stand in the name of the appellant but stood in the name of the appellant's father Shri Omprakash Agrawal.

3. The Ld. CIT(A) erred in confirming the addition of Rs.23,95,024/- in respect of gain on sale of shares of Luminaire Technologies Ltd. as non-genuine long term capital gain.

3.i. In doing so, the Id. CIT(A) did not appreciate that the overwhelming evidence placed in the course of assessment proceedings remained to be dislodged and he erred in confirming the addition merely based on wild guess, rumor and gossip.

4. *The Id.CIT(A) erred in confirming the addition of ₹ 1,43,701/- being alleged commission paid for availing alleged bogus long-term capital gain as unexplained expenditure.*

5. *In doing so, the Id.CIT(A) did not appreciate that not an iota of evidence was brought on record to support the addition.”*

03. Brief facts of the case shows that assessee is an individual who is deriving income mainly from income from salaries, capital gains and other sources. Original return of income was filed on 20/1/2016 declaring a total income of ₹ 642,020/-.
04. A search under section 132 of the act was carried out in the case of Mr Rajkumar Kedia group on 13/6/2014 by The Deputy Director Of Income Tax (investigation) unit 3 (3), Delhi. The allegation against the group was that it is engaged in providing various types of accommodation entries to large number of beneficiaries all over the country. Mr RK Kedia group is also involved in issuing bogus long-term capital gain.
05. During post search proceedings, AO alleged that seized material contains certain incriminating transactions and other information pertained to the assessee. The residential premises of the assessee at Dombivali West, Thane was also covered under section 133A of the act simultaneously on 13/6/2014.

06. Notice under section 153A was issued on 29/7/2015. Assessee objected that no search warrant was in respect of search action on 13/6/2014 was issued in the name of assessee. The learned assessing officer disposed of the objection rejecting the same. The assessee thereafter filed return of income on 21/1/2016 declaring a total income of ₹ 642,020/-. The return of income was picked up for scrutiny and notice under section 143 (2) of The Act was issued on 21/1/2016 and notice under section 142 (1) of the Act was issued on 13/6/2016. The assessee objected that the proceedings are without the authority of law.
07. On perusal of a statement of long-term capital gain, it was observed that assessee has shown long-term capital gain of ₹ 2,395,024/- as long-term capital gain earned on sale of equity shares of Luminaire technologies Ltd. This was claimed as exempt income under section 10 (38) of the act.
08. Learned AO found that the above company was a penny stock company, which was utilized for giving accommodation entries of bogus long-term capital gains. It was found that some of the beneficiaries who obtained long-term capital gain accommodation entries have admitted so that long-term capital gain has been obtained by them by giving a commission of 5 – 6% of the entry amount in cash. Therefore, the assessee was asked to show why the entire

capital gain of ₹ 23.95 lakhs should not be treated as bogus.

09. Assessee submitted he has applied for the shares of Paridhi properties Ltd on 30/3/2011 issuing a cheque from his axis bank account on 30/3/2011 of ₹ 75,000/-. The source of the above sum is the transfer of short-term deposit of ₹ 45,000 and ₹ 30,000 withdrawn. As per order of the honourable High Court dated 27 July 2012, the above company was amalgamated with luminaire technologies Ltd. Therefore, assessee received 75,000 equity shares of this company in physical form. The same are sent for dematerialization on 24/1/2014 with progressive share brokers private limited. Assessee also submitted his Demat holding to show that he is holding 18 other companies share. The above shares were sold in three trenches on 12/2/2014 (25,000), 13/2/2014 (12,380) and on 14/2/2014 (37,620) shares at Bombay stock exchange Ltd through his broker. He also submitted that time and date stamp contract notes. The share broker through the payout of stock exchange made on 14/2/2014 and 18/2/2014 that is credited in his bank account with axis bank Ltd. It was therefore stated that assessee has not engaged himself into any nongenuine trading activities of these shares. He further referred to the price movement of above share at Bombay stock exchange from 4 April 2011 to 31st of March 2014. He submitted that this company is regularly traded

at stock exchange and there is no unusual trading in volume in the shares of this company.

010. The learned assessing officer held that assessee has failed to prove the genuineness of the capital gain and the submission is not tenable in the backdrop of the prearranged trading in shares of various non-descriptive listed companies established as penny stock by the investigation wing. The learned AO also held that RK Kedia group has been involved in evading income tax itself but also helping other persons in revision of income tax on a very large-scale by providing bogus long-term capital gain and various other kinds of accommodation entries. Shri Manish Aurora keeps the record of unaccounted transaction. Sri Rajkumar Kedia operates from and through a close network of associates in Delhi Mumbai and Calcutta. The entire entry providing operation comprises of various level. Accordingly, relying on the report of investigation wing where the modus operandi of accommodation entry of long-term capital gain is explained and ultimately he held that the scheme is a pure tax avoidance scheme without any commercial justification further the transactions are self concealing and are designed only with a view to earn exempt capital gain under section 10 (38) of the act. Therefore based on the investigation conducted by the investigation wing the learned assessing officer has treated the above long-term capital gain as non genuine amounting to ₹

2,395,024/- and further made an addition of commission at the rate of 6% as expenses incurred amounting to ₹ 143,701/-. Accordingly, total addition of ₹ 2,538,725/- was made.

011. The learned assessing officer also found that there are certain materials seized at from the residential premises of the assessee in the form of messages in mobile phone. According to that the addition of ₹ 128 lakhs was made to the total income of the assessee. The main reason is that some of the messages mention cash transaction while many other messages mention selling/buying of fixed number of shares at a fixed price in the scripts, which have already been admitted and proved to be used for providing bogus long-term capital gain to various beneficiaries. The contents of the messages and statement of Mr Rajesh Agrawal (assessee) in this regard clearly proved that the manipulative trading in shares of certain listed scrip is being done by the assessee on the instruction of Mr Kishen khaderia. During the course of post search enquiries on 6/8/2014, the statement of Mr Kishen Khaderia was recorded who denied to have given any instructions for such transaction. Assessee could not show any valid explanation. As the mobile pertained to the assessee, he miserably failed to discharge any onus.
012. Consequently assessment order under section 143 (3) read with section 153A of the act was passed on

22/12/2016 wherein the total income of the assessee was determined at ₹ 15,980,750/-.

013. The assessee preferred an appeal before the learned CIT - A. Before the learned CIT - A, the assessee challenged that AO should not have issued any notice under section 153A of the act as search warrant dated 13/6/2014 was not in the name of the assessee but was in the name of his employer Mr Kishen Khaderia . Though assessee admitted that subsequent search warrant dated 6/8/2014 was in the name of the assessee but it was only for the purpose of searching the content of the bank locker which stood in the name of the Father of the assessee. As such there is no seizure from that bank locker. Therefore the same could not have been used for issuing notice under section 153A of the act. The learned CIT (A) rejected this contention holding that that warrant of authorization was issued in the name of the assessee regardless of the fact that it was further locker and not for any premises. Once there is a warrant of authorization in the name of person the search related assessment have necessarily be undertaken as per the provisions of section 153A of the act. It is immaterial as to whether anything was seized from the premises or not. Accordingly the preliminary objection of assessee was dismissed. With respect to the addition of long-term capital gain of ₹ 2,395,024/- CIT (A) relied upon the information contained in the investigation Wing report and

statement of various persons contained in that report confirmed the addition. With respect to the addition of Rs 128 lakhs on the basis of incriminating short messages found from the mobile of the assessee about the unaccounted cash transaction, the learned CIT - A examined the statements of the various persons and thereafter he tabulated the total transaction from 10/3/2014 to 12/6/2014 and found that there is an aggregate outgo of ₹ 25,650,000/- this is required to be taxed under section 69C of the act. He further analyzed that the total sum of ₹ 59,750,000 is the inflow out of which only ₹ 128 lakhs is added by the learned AO. However he held that the above sum is required to be added in the hands of Mr Kishen Khaderia and not the assessee. Accordingly, he deleted the addition in the hands of the assessee of ₹ 128 lakhs. Therefore the assessee has raised ground of appeal aggrieved with that order challenging the validity of action under section 153A of the act and further the addition under section 68 of the act of ₹ 2,395,024/- and consequent addition under section 69C of ₹ 143,701. Revenue is not in appeal against the deletion of addition of ₹ 128 lakhs.

014. The learned authorized representative vehemently submitted that that assessment proceeding under section 153A of the act is bad in law. He submitted that the search pursuant to the search warrant issued in the name of his employer as per

panchanama dated 13/6/2014. During the search only one key of bank locker in the name of Father of the assessee was found and seized. The said bank locker was opened and as per panchnama dated 6/8/2014 nothing was found from the same. It was the contention that as the search warrant as per authorization dated 12/6/2014 as per panchnama dated 13/6/2014 was in the name of employer of the assessee and search warrant dated 28/7/2014 per panchnama dated 6/8/2014 was issued to search locker of the assessee's father and therefore it is clear that the search under section 132 of the act was not initiated on the appellant and therefore notice issued under section 153A of the act is without jurisdiction. He relied upon the decision of the honourable Allahabad High Court in case of Tapasya projects Ltd versus ACIT. He further relied upon the decision of the coordinate bench in case of ACIT versus K G Finvest private limited in ITA number 6759/Del/2013 dated 28/4/2017.

015. The learned authorized representative further challenged that the long-term capital gain has been earned by the assessee for which the assessee has proved the genuineness of the transaction. He submitted that he is not at all connected with RK Kedia group as far as the transaction of long-term capital gain earned by the assessee is concerned. He submitted that assessee has earned meager long-term capital gain of only ₹ 24 lakhs. He specifically

referred to the decision of the honourable Bombay High Court in case of CIT versus Shyam R Pawar 229 taxmann 256 dated 10/12/2014. Therefore the long-term capital gain earned by the assessee has been clearly demonstrated as genuine transactions. There is no evidence available with the assessing officer that the above transaction is non genuine. He therefore submitted that addition on that account deserves to be deleted.

016. The learned departmental representative vehemently supported the order of the learned CIT – A on the issue of validity of the issue of notice under section 153A of the act. She further relied upon the decision of the learned CIT – A on the issue of long-term capital gain held to be bogus. She extensively referred to the order of the learned CIT – A. She further referred to the decision of honourable Supreme Court in case of Suman poddar versus ITO 112 taxmann.com 330.

017. We have carefully considered the rival contention and perused the orders of the lower authorities. With respect to the first ground of appeal challenging that the issue of notice under section 153A of the income tax act by the learned assessing officer to the assessee is invalid, we found that panchnama dated 13/6/2014 issued in the name of Mr Kishen Rugnath Prasad Khadaria at the residential premises of the assessee at 16, Sai Satyam, Kopar Road Dombivile (w) . Thane. During the course of search at the

premises of the assessee locker key was found of locker number 400 and locker key number 356 of Dena Bank . The locker was in the name of the Father of the assessee. A panchnama was drawn on 6/8/2014 to open that bank locker and warrant was issued in the name of the assessee. Admittedly from that locker jewelry was found. Based on this notice under section 153A of the act was issued to the assessee. This is challenged by the assessee. The assessee has also supported his argument relying upon the decision of the coordinate bench in case of JM trading Corporation [20 SOT 489] wherein paragraph number 21-22 wherein it has been held that is a condition precedent to be satisfied before start of any proceedings against the assessee the search only should not have been merely initiated but conducted. The tribunal is required to verify whether the jurisdictional facts exist before notice can be issued under section 158BC. In the present case, we find that search warrant is issued in the name of the assessee while opening the locker. The keys of the locker were found from the residential premises of the assessee during the course of search on Mr. Kishan Khaderia at residence of the assessee. Therefore we find that the search was initiated as well as conducted on the assessee and therefore it is mandatory to issue notice under section 153A of the act on the assessee. We find no infirmity in the order of the learned CIT – A in upholding the same.



018. With respect to the second ground of appeal about the addition of long-term capital gain held to be non genuine, it is a Cardinal principle that it is the duty of the assessee to prove the identity, creditworthiness and genuineness of the transaction if any sum is found credited in the books of the accounts of the assessee. The initial onus lies on the assessee to prove the nature and source of such credit. In the present case we find that assessee has discharged initial onus by showing with adequate evidence that assessee has earned and exempt long-term capital gain of ₹ 24 lakhs. On the submission of the details of acquisition of shares, holding of shares and also disposal of shares along with the source of the origin of the funds for investment in the shares and proceeds of the sale of the shares, learned assessing officer did not make any enquiry but made addition only on the basis of report of investigation wing. No details of the exit providers to the assessee as well as accommodation entry providers with respect to purchase of shares is available in the assessment order. Further we found that the learned CIT – A has made an addition of ₹ 25,650,000 under section 69C as well as of ₹ 59,757,000 under section 68 of the act in the hands of Mr Kishan Khaderia, therefore, even if the above long-term capital gain is held to be bogus based on the material available in the mobile phone of the assessee, this addition also cannot be made in the hands of the assessee but has to be made if at all to be made in the hands of Mr Kishan



Khaderia. This is the finding of the learned CIT – A. Therefore, even otherwise, if this addition is required to be made it should be made in the hands of the employer of the assessee and not this assessee. Further as the mobile transaction, as alleged by Id Ao is believed, then also the addition held to be made in hands of Mr Kishan Khaderia subsumes this amount. Undisputedly revenue has not challenged the order of the Id CIT (A) holding that income arising from transaction recorded in mobile for assessee is chargeable to tax in the hands of Mr Kishan Khaderia. In the result addition under section 68 of the act of ₹ 2,395,024/- under section 68 of the income tax act on sale of shares of luminaire technologies as well as the addition of ₹ 143,701/- on account of the alleged commission paid for availing alleged bogus long-term capital gain as unexplained expenditure under section 69C of the act cannot be made in the hands of the assessee, hence, deleted.

019. Accordingly, ground number 1 and 2 of the appeal is dismissed and ground number 3 and 4 of the appeal is allowed.
020. Accordingly ITA number 1198/M/2020 filed by the assessee for assessment year 2014 – 15 is partly allowed.

ITA No. 1284/MUM/2020

(Assessment Year 2015-16)

BY AO

021. This appeal is filed by the learned AO against the order of The Commissioner Of Income Tax (Appeals) – 52, Mumbai dated 16/12/2019 for assessment year 2015 – 16 raising following grounds:-

"1. Whether on the facts and circumstances of the case and in law, the Ld.CIT(AO erred in deleting the addition of ₹ 10,71,00,000/- for A.Y. 2015-16 in the case of the assessee?

2. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition of ₹ 10,71,00,000/- for A.Y. 2015-16 in the case of the assessee and holding that the addition, for an amount of ₹ 5,97,50,000/- is required to be added in the hands of shri Krishan Khadaria without giving an opportunity to the Assessing Officer?"

022. Assessee has filed his return of income on 20/8/2016 declaring a total income of ₹ 825,050/-. The return of income was picked up for scrutiny. The return contained income from salary as well as interest income under the head income from other sources.

023. The learned assessing officer based on the mobile phone of the assessee found that unaccounted cash involved in those short messages is to the tune of ₹ 1071 Lacs. The AO was of the view that assessee was actively involved in handling and routing cash transaction. The assessee was asked to show cause

why the above sum should not be added into the hands of the assessee. The assessee failed to offer any explanation and therefore the above sum was added into the hands of the assessee by an Assessment order under section 143 (3) of the act dated 22/12/2016 determining the total income at ₹ 1077,05,000/-.

024. Assessee approached the learned CIT – A challenging the above addition. The learned CIT – A held that for assessment year 2014 – 15 he has held that above addition is required to be made in the hands of Mr. Kishan Khaderia and not the assessee.
025. Learned AO aggrieved with that order, preferred appeal before us. The learned CIT DR supported the order of the learned AO and submitted that the said addition should have been made in the hands of the assessee as the mobile phone of the assessee is the source of information of such transaction which were not explained by the assessee. Therefore the finding of the learned CIT – A to tax the above sum in the hands of employer of the assessee is erroneous.
026. Learned authorized representative submitted that the above income is not required to be added in the hands of the assessee as the learned CIT has merely reiterated his finding for assessment year 2014 – 15 wherein he has deleted the addition of ₹ 128 lakhs holding that the above income is required to be taxed in the hands of the employer of the assessee.

He submitted that learned AO was not in appeal for assessment year 2014 – 15 against the deletion of addition of ₹ 128 lakhs in the hands of the assessee. Therefore this position is accepted by the revenue for assessment year 2014 – 15 but now it is disputing the same on identical facts and circumstances for assessment year 2015 – 16.

027. We have carefully considered the rival contention and perused the orders of the lower authorities. In fact the addition has been made based on the short messages found from the mobile phone of the assessee. As the assessee is an employee of Mr Kishan Khaderia, the learned CIT – A has held that above addition is required to be made in the hands of employer of the assessee and not the assessee. This finding of the learned CIT – A is based on his findings for assessment year 2014 – 15. For this year also he has reiterated the above finding and allowed the appeal of the assessee. The categorical finding of the learned CIT – A is that the addition under section 68 as well as under section 69C of the act is required to be taxed in the hands of Mr Kishen Khadaria . We find that the learned assessing officer has not challenged the addition deleted in the hands of the assessee for assessment year 2014 – 15 holding that same should be taxed in the hands of the employer of the assessee. This position in case of assessee is accepted by the revenue for assessment year 2014 – 15. Therefore we do not find any reason for learned



AO to be aggrieved with the order of the learned CIT – A addition is sustained in hands of the assessee but the real owner of the transaction. It is apparent that assessee is working for Mr Kishan Khaderia , he is the real owner of any benefit in the transactions, therefore, we confirm finding of the learned CIT – A to tax the income in the hands of Kishan Khaderia and not the assessee. In the result ground number 1 and 2 of the appeal of learned AO are dismissed.

028. Accordingly, appeal of the learned AO for assessment year 2015 – 16 is dismissed.

Order pronounced in the open court on 01.05.2023.

Sd/-
(SANDEEP SINGH KARHAIL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 01.05.2023

Sudip Sarkar, Sr.PS & Dragon

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,

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