

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI 'J' BENCH, MUMBAI.

Before Shri B.R. Baskaran (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 1771/Mum/2021 (A.Y. 2011-12)

Viraj Profiles Limited Ground and First Floor Viraj Towers, Near Western Express Highway Metro Station, Andheri East Mumbai-400 069. (Appellant)	Vs.	DCIT, Circle 3(2) Room No. 1923 19 <sup>th</sup> Floor Air India Building Nariman Point Mumbai-400 021. (Respondent)
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I.T.A. No. 2210/Mum/2021 (A.Y. 2011-12)

DCIT, Circle 3(2) Room No. 1923 19 <sup>th</sup> Floor Air India Building Nariman Point Mumbai-400 021. (Appellant)	Vs.	Viraj Profiles Limited Ground and First Floor Viraj Towers, Near Western Express Highway Metro Station, Andheri East Mumbai-400 069. (Respondent)
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PAN : AABCV1740N

Assessee by	Shri Pratik Jain
Department by	Shri Manoj Kumar
Date of Hearing	09.03.2023
Date of Pronouncement	26.04.2023

ORDER

PER BENCH:-

The cross appeals filed by parties relate to the assessment year 201112 and they are directed against the order passed by Ld CIT(A)-51, Mumbai.

2. The assessee is aggrieved by the decision of Ld CIT(A) in partially confirming the addition relating to bogus purchases and fully confirming the addition of professional fee paid to Ms Ramita Jam, daughter of CFO of assessee company. The revenue is aggrieved by the decision of Ld CIT(A) in granting partial relief to the assessee in respect of addition relating to bogus

purchases. The assessee has also raised a legal ground challenging the reopening of assessment of AY 2011-12.

3. The facts relating to the case are discussed in brief. The assessee is engaged in the business of manufacture and sale of stainless steel products. A search and seizure action was carried in the hands of the assessee and its associates on 13.7.2017. Consequent thereto, the assessments of the assessment years 2012-13 to 2017-18 were completed by the AO u/s 153A r.w.s 143(3) of the Act. The present assessment year, viz., AY 2011-12 falls beyond the period of six years mentioned in 153A(1) of the Act. However, the AO can reopen the assessment of any year beyond the period of six years u/s 153A of the Act by invoking the fourth proviso to sec. 153A(1) of the Act.

4. The assessee has raised a legal ground challenging the jurisdiction of the AO in reopening the assessment by invoking the fourth proviso to sec. 153A(1) of the Act. The said proviso reads as under:-

"Provided also that no notice for assessment or reassessment shall be issued by the Assessing Officer for the relevant assessment year or years unless----

(a) the Assessing officer has in his possession books of account or other documents or evidence which reveal that the income, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more in the relevant assessment year or in aggregate in the relevant assessment years;

(b) the income referred to in clause (a) or part thereof has escaped assessment for such year or years; and

(c) the search under section 132 is initiated or requisition under section 132A is made on or after the 1<sup>st</sup> day of April, 2017.

Explanation 1:- For the purposes of this sub-section, the expression

"relevant assessment year" shall mean an assessment year preceding the assessment year relevant to the previous year in which search is conducted or requisition is made which falls beyond six assessment years but not later than ten assessment years from the end of the assessment year relevant to the previous year in which search is conducted or requisition is made.

Explanation 2:- For the purposes of the fourth proviso, "asset" shall include immovable property being land or building or both, shares and securities, loans and advances, deposits in bank account."

We noticed earlier that the AO has reopened the assessment of AY 2011-12 by invoking the powers given to him under fourth Proviso to sec. 153A (extracted above).

4.1 It is the contention of the assessee that, in order to invoke the fourth proviso extracted above, the mandatory condition is that the income escaped for the relevant assessment years should be represented "*in the form of asset.*" The Explanation 2 defines the term "asset". As per the said definition the term "asset" includes immovable property being land or building or both, shares and securities, loans and advances, deposits in bank accounts. It is the contention of the assessee that the income escaped from assessment, if not represented in the form of asset, then the AO cannot reopen the assessments of any of the assessment year falling beyond the period of six assessment years under the fourth proviso to sec. 153A of the Act. It is submitted that, in AY 2011-12, the AO has not found any escaped income which represented "in the form of asset". The Ld A.R submitted that the addition made towards alleged bogus purchases and disallowance of salary to a family member, was not represented by any form of asset. Accordingly, it was contended that the AO was not justified in reopening the assessment of AY 2011-12 in terms of fourth proviso to sec. 153A(1) of the Act.

4.2 The Ld D.R, on the contrary, submitted that the AO has reopened the assessment of AY 2011-12 on noticing that the assessee has indulged in claiming bogus purchases and also there were payments to family members which are liable to be disallowed u/s 37 of the Act. He submitted that the AO has made identical additions in the subsequent years also, i.e., the years falling within six assessment years prior to the year of search. In view of the commonality involved in these additions, the Ld D.R contended that the AO

has rightly reopened the assessment of AY 2011-12 invoking the power given under fourth proviso to sec. 153A of the Act.

4.3 We have heard rival contentions on this legal issue and perused the record. We have extracted the fourth proviso to sec. 153A of the Act in the preceding paragraph. A careful perusal of the above said proviso would reveal that, in order to invoke the fourth proviso to sec.153A, it is required to be shown by the AO that

- (a) the books of account or other documents or evidence in his possession reveal that the income which has escaped assessment for the relevant assessment year is "in the form of asset"
- (b) the quantum of income so escaped amount to fifty lakhs or more in the relevant assessment year or in aggregate in the relevant assessment years.
- (c) the said income should have escaped assessment for such year or years.
- (d) the search is initiated on or after 1<sup>st</sup> day of April, 2017.
- (e) the relevant assessment year is the year preceding the year of search which falls beyond six preceding assessment years but not later than ten assessment years.

Hence, it is required to be shown by the AO that the escaped income was "in the form of asset" and further the value or aggregate value of assets has exceeded Rs.50.00 lakhs. The corollary is that, if the escaped income is not represented "in the form of asset", the fourth proviso to sec. 153A of the Act cannot be invoked in order to reopen the assessment of a year falling beyond six assessment years preceding the year of search.

4.4 In the instant case, we notice that the AO has not shown that the alleged income escaped for assessment is represented "in the form of an asset". What is assessed in this year u/s 153A of the Act is the addition towards alleged bogus purchases and disallowance of salary/professional fee u/s 37 of the Act. It is not shown that the income, if any, generated out of these two disallowances is represented in the form of asset. Hence, we are of

the view that the AO could not have invoked the fourth proviso to sec. 153A of the Act in order to reopen the assessment of AY 2011-12 and accordingly hold that the said reopening is not in accordance with the law and is liable to be quashed. Accordingly, we quash the orders passed by the tax authorities for AY 2011-12.

4.5 Since we have quashed the assessment order passed for AY 2011-12 itself, the grounds urged on merits both by the assessee as well as revenue would become academic in nature and hence they do not require specific adjudication.

5. In the result, the appeal filed by the assessee is allowed and the appeal of the revenue is dismissed.

Pronounced in the open court on 26.4.2023.

Sd/-  
(PAVAN KUMAR GADALE)  
Judicial Member

Sd/-  
(B.R. BASKARAN)  
Accountant Member

Mumbai, Dated : 26/04/2023

Copy of the Order forwarded to

1. The Appellant
2. The Respondent
3. The CIT(Judicial)
4. PCIT
5. DR, ITAT, Mumbai
6. Guard File.

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BY ORDER,  
  
(Assistant Registrar)  
ITAT, Mumbai