

**IN THE INCOME TAX APPELLATE TRIBUNAL
"H" BENCH, MUMBAI**

**BEFORE SHRI PRASHANT MAHARISHI, AM &
SHRI N. K. CHOUDHRY, JM**

I.T.A. No. 2817/Mum/2022
Assessment Year: 2014-15)

**DCIT, CC-7(3),
Room No. 655, Aayakar
Bhavan, M.K. Road,
Mumbai-400020.**

Vs.

Abhishek Kumar Agarwal
201, UGAM, NS Road No.9,
JVPD Scheme Juhu,
Ville Parle-(W),
Mumbai-400097.
PAN No. **ADOPA4901B**

Appellant) : **Respondent)**

Appellant/Department by : Ms. Madhumalti Chosh, Ld. CIT-
DR

Assessee/Respondent by : Sh. Rushabh Mehta, Ld. CA

Date of Hearing : 15.06.2023

**Date of
Pronouncement** : 28.06.2023

O R D E R

Per N. K. Choudhry, JM:

The Revenue Department/Appellant herein has preferred this appeal against the order dated 24.08.2022 impugned herein passed by Ld. Commissioner of Income Tax (Appeals)-49, Mumbai {in short 'Ld. Commissioner'} u/s 250 of the Income Tax Act 1961 (in short 'the Act').

2. In this case, on the basis of search and seizure operation carried out by the Investigation Wing of the Department, in the residential premises of Sh. Abhishek Kumar Agarwal on dated 09.10.2014, reasons for issuing notice under section 153 of the Act were recorded and consequently notice dated 26.09.2016 under section 153-C of the Act was issued to the assessee. In response to which the assessee filed its return of income on dated 09.10.2016 by declaring total income of Rs. 11,53,390/-.

3. On perusing the details filed by the assessee, the AO observed that the assessee has earned Long Term Capital Gain (LTCG) of Rs. 6,72,72,028/- on sale of 250000 shares of Global Infratech & Finance Ltd. which were stated to have been purchased in December 2011 by way of preferential allotment of 750000 shares of face value Rs. 10/- per share at a premium of Rs. 5/- per share for a consideration of Rs. 11,25,000/-. The said shares were subsequently split into 750000 shares of face value of Rs. 1 each. The 750000 shares were sold over the period August, 2013 to December, 2013 for a total consideration of Rs. 6,83,97,028/- (Rs. 6,83,83,093/- + charges added back of Rs. 13,935/-) resulting in long term capital gains of Rs.6,72,72,028/-. The said capital gains has been claimed exempt u/s 10(38) of the Income Tax Act, 1961.

4. The AO ultimately made the addition of Rs. 6,83,83,093/- on account of undisclosed income earned by selling of such shares.

5. The Ld. Commissioner on appeal, deleted the said addition mainly by holding that the addition made by the AO by denying the claim of exemption in respect of LTCG on sale of shares, is not based on any incriminating material found during the course of search.

6. Being aggrieved, the Revenue Department has preferred this appeal.

7. Having heard both the parties and perused the material placed on record, we observe that admittedly the addition in hand, which has been made by the AO and affirmed by the Ld. Commissioner, dehors the incriminating material found during the course of search u/s 132 or section 132A of the Act and the assessment of the assessee is unabated, and therefore the addition in hand made by the AO is unsustainable, in view of the dictum laid down by the Hon'ble Apex Court in the case of case of Pr. CIT v. Abhisar Buildwell (P.) Ltd. [2023] 149 taxmann.com 399 wherein it has been held as under:

13. *For the reasons stated hereinabove, we are in complete agreement with the view taken by the Delhi High Court in the case of Kabul Chawla (supra) and the Gujarat High Court in the case of Saumya Construction (supra) and the decisions of the other High Courts taking the view that **no addition can***

be made in respect of the completed assessments in absence of any incriminating material.

14. *In view of the above and for the reasons stated above, it is concluded as under:*

i) that in case of search under Section 132 or requisition under Section 132A, the AO assumes the jurisdiction for block assessment under section 153A;

ii) all pending assessments/reassessments shall stand abated;

iii) in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns; and

*iv) in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. **Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132A of the Act, 1961.***

And therefore in our considered view, impugned addition has rightly been deleted by the Id. Commissioner and thus the impugned order do not require any inference, as the same does not suffers any perversity, impropriatory and/or illegality.

6. In the result, appeal filed by the Revenue/Department stands dismissed.

Orders pronounced in the open court on 28-06-2023.

Sd/-
(PRASHANT MAHARISHI)
Accountant Member

Sd/-
(N. K. CHOUDHRY)
Judicial Member

SK, Sr.PS.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai