

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

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 3880/Mum/2023-A.Y.2010-11

M/s. Moraj Infratech Pvt. Ltd., Shop No. 28-29, Moraj Residency, Plot No.1, Sector 16, Sanpada, Navi Mumbai – 400 706.	Vs.	Deputy Commissioner of Income-tax, Central Circle-5(2), Room No.1908, Air India Building, Nariman Point, Mumbai-400 020.
APPELLANT		RESPONDENT

Assessee by : Shri Pradip Kapasi
Respondent by : Smt. Sanyogita Nagpal – (CIT-DR)
Date of hearing : 07/03/2024
Date of pronouncement : 25/04/2024

ORDER

PER GAGAN GOYAL, A.M:

This appeal by Assessee is directed against the order of Commissioner of Income-tax (Appeals)-53, Mumbai, dated 18.09.2023 for A.Y. 2010-11. The following are the grounds of appeal raised by the assessee: -

GROUND OF APPEAL AGAINST ORDER OF CIT (A) U/S. 250 DT. 18.09.2023. DIN OF ORDER OF CIT (A): ITBA/APL/S/250/2023-24/1056197055(1)

GROUND NO. 1: ADDITION MADE BY EXCEEDING THE SCOPE OF S.153A

(a) Ld AO erred in law and on facts in making additions of Rs. 30,00,000 in respect of issue for which no incriminating material was found and/or seized during the course

of search u/s 132 and thereby erred in exceeding the scope of provisions of s. 153A by encompassing the items and issues not covered by the provisions of s. 153A.

(b) Your appellant company strongly submits that no material of whatsoever nature was found and/or seized during the course of search u/s.132 of the Act in the hands of your appellant and that the additions or denials made in the order were in respect of the items and issues that were settled in the original assessment and therefore were not the subject matter of the special assessment u/s. 153A of the Act.

(c) Your appellant company prays that the additions or disallowances made in passing Assessment Order u/s.153A in excess of the scope and the powers thereunder be deleted/allowed and the order so passed be quashed.

GROUND NO. 2: ADDITION OF RS. 30, 00,000 U/S. 68 OF THE ACT ON ACCOUNT OF LOAN

a. Ld. CIT(A) erred in law and on facts in confirming the action of Id. AO in holding that an amount of Rs. 30,00,000 received by your appellant towards unsecured loan from M/s. Sampada Pharmaceuticals Ltd is bogus;

i. based on unsubstantiated allegations of third party namely Shri Vipul Vidur Bhatt, ignoring that he had voluntarily, in time retracted his statement,

ii. without any inquiry or finding and recording his satisfaction,

iii. Ignoring that your appellant had discharged the onus by substantiating the receipts by producing documents and evidences as per law and

iv. in making addition in gross violations of provisions of natural justice.

b. Your appellant submits that;

i. the said amounts aggregating to Rs. 30,00,000 were received via banking channel towards loan,

ii. were genuine in nature and were fully substantiated,

iii. The appellants had proved the identity of the lender and genuineness of the loan and

iv. The loan was repaid in succeeding years

v. the appellant had fully discharged its onus in support of the transaction by producing documents and evidences as per law.

c. Your appellant prays that the addition of Rs. 30, 00,000 made on account of alleged unexplained cash credit u/s. 68 towards receipt of loan be deleted.

GROUND NO. 3: SERIOUS VIOLATION OF NATURAL JUSTICE.

- a. The Id. CIT (A) erred in law and on facts in confirming the action of the Id. AO in*
- i passing an order of assessment in gross violation of the provisions of natural justice,*
- ii. confirming the action of the AO in ignoring all the evidences and proofs and documents produced for verification,*
- iii. proceeding to assess the total income in total disregard of such evidences and in not conducting adequate inquiry or bringing any material on record to support his action and in denying adequate opportunity of hearing, and*
- iv. not facilitating the cross examination of the witness.*
- b. Your appellant submits that the Id. CIT(A) and AO did not appreciate and instead ignored the evidences produced in assessment and the appellant further submits that all the details and explanations as requested were furnished including those required as per the law and adequate inquiries were not made and cross examination of the witness was denied.*
- c. Your appellants pleads that assessment made in violation of the provisions of natural justice be quashed.*

The Grounds of Appeal are Independent Grounds without prejudice to each other. Your appellant company prays for the leave to add, amend, alter, delete or modify any of the above grounds.

2. Brief facts of the case are that the assessee filed its original return of income on 27.09.2010, declaring total income at Rs. 52,98,350/-. The case of the assessee was selected for scrutiny u/s. 143(2) of the Act and assessed at returned income of Rs. 52,98,350/- vide order dated: 22.10.2012. A search and seizure operation was carried out at the premises of Gurnani Group on 04.02.2016. The assessee was also covered by the issue of a search warrant. A notice u/s. 153A of the Act was issued. In response to this notice filed a return of income at the same figure as mentioned (supra), i.e. Rs. 52,98,350/-vide dated: 13.01.2017. The assessment was concluded u/s. 143(3) r.w.s. 153A of the Act vide order dated: 31.03.2010 at a figure of Rs. 82,98,350/- by treating

an entry of loan amounting to Rs. 30,00,000/- as bogus unsecured loan u/s. 68 of the Act.

3. The assessee being aggrieved with the same preferred an appeal before the Ld. CIT(A)-53, Mumbai, who in turn confirmed the action of AO. The assessee being further aggrieved preferred this appeal before us. We have gone through the order of AO passed originally u/s. 143(3) of the Act, order of AO passed u/s. 143(3) r.w.s. 153A of the Act, order of Ld. CIT (A) passed u/s. 250 of the Act and submissions of the assessee along with grounds raised before us.

4. We have considered all the orders and documents placed before us and observed as under:

- I). There is no incriminating document found during the search relating to the addition of Rs. 30 Lacs made u/s. 68 of the Act vide panchnama Dated: 07.02.2016 (Pages 77-82 of PB);
- II). There is no reference to the assessee in the statement of Shri Vipul Vidhur Bhatt vide his statement dated: 09.02.2016, 10.02.2016, 12.02.2016 and 22.02.2016 (Pages 120-125 PB);
- III). The said addition of Rs. 30 Lacs is solely based on a statement and no corroborative evidence/incriminating document found against the assessee;
- IV). The statement on which department relied upon, i.e. Shri Vipul Bhatt is not a director or in anyway concerned with the lender entity, i.e. M/s. Sampada Chemicals Pvt. Ltd. and that is too the piece of information on which revenue relied upon ultimately does not exist anymore as Shri Vipul Vidhur Bhatt distracted from the same vide his affidavit Dated: 08.09.2017 (Pages 83-116 PB);

V). The assessee's case falls in the category of unabated assessment and the absence of any incriminating material seized during the search operation; no addition based on a third party's statement can't be made.

5. The facts of the case narrated above keeping in view the decision of Hon'ble Apex Court in the case of **PCIT, Central-3v.AbhisarBuildwell (P.) Ltd.[2023] 149 taxmann.com 399 (SC)**, wherein the apex court held as under:

"The question which is posed for consideration in the instant set of appeals is, as to whether in respect of completed assessments/unabated assessments, whether the jurisdiction of Assessing Officer to make assessment is confined to incriminating material found during the course of search under section 132 or requisition under section 132A or not, i.e., whether any addition can be made by the Assessing Officer in absence of any incriminating material found during the course of search under section 132 or requisition under section 132A or not. [Para 5]

At the outset, it is required to be noted that as such various High Courts have taken the view that no addition can be made in respect of completed/unabated assessments in the absence of any incriminating material. [Para 7]. No addition can be made in respect of the completed assessment in the absence of any incriminating material. [Para 8].

While considering the issue involved, one has to consider the object and purpose of the insertion of section 153A and when there shall be a block assessment under section 153A. [Para 9]. That prior to the insertion of section 153A in the statute, the relevant provision for block assessment was under section 158BA. The erstwhile scheme of block assessment under section 158BA envisaged assessment of 'undisclosed income' for two reasons, firstly that there were two parallel assessments envisaged under the erstwhile regime, i.e., (i) block assessment under section 158BA to assess the 'undisclosed income' and (ii) regular assessment in accordance with the

provisions of the Act to make assessment qua income other than undisclosed income. Secondly, the 'undisclosed income' was chargeable to tax at a special rate of 60 per cent under section 113 whereas income other than 'undisclosed income' was required to be assessed under regular assessment procedure and was taxable at normal rate. Therefore, section 153A came to be inserted and brought into the statute. Under section 153A regime, the intention of the legislation was to do away with the scheme of two parallel assessments and tax the 'undisclosed' income too at the normal rate of tax as against any special rate. Thus, after the introduction of section 153A and in case of search, there shall be block assessment for six years. Search assessments/block assessments under section 153A are triggered by conducting of a valid search under section 132. The very purpose of the search, which is a prerequisite/trigger for invoking the provisions of section 153A/153C is the detection of undisclosed income by undertaking extraordinary power of search and seizure, i.e., the income which cannot be detected in the ordinary course of regular assessment. Thus, the foundation for making search assessments under section 153A/153C can be said to be the existence of incriminating material showing undisclosed income detected as a result of a search. [Para 9.1]

On a plain reading of section 153A, it is evident that once a search or requisition is made, a mandate is cast upon the Assessing Officer to issue a notice under section 153 to the person, requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. [Para 10]. As per the provisions of section 153A, in case of a search under section 132 or requisition under section 132A, the Assessing Officer gets the jurisdiction to assess or reassess the 'total income' in respect of each assessment year falling within six assessment years. However, it is required to be noted that as per the second proviso to section 153A, the assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search

under section 132 or making of requisition under section 132A, as the case may be, shall abate. As per sub-section (2) of section 153A, if any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner. Therefore, the intention of the legislation seems to be that in case of search, only the pending assessment/reassessment proceedings shall abate and the Assessing Officer would assume the jurisdiction to assess or reassess the 'total income' for the entire six-year period/block assessment period. The intention does not seem to be to reopen the completed/unabated assessments unless any incriminating material is found with respect to the concerned assessment year falling within the last six years preceding the search. Therefore, on true interpretation of section 153A, in case of a search under section 132 or requisition under section 132A and during the search any incriminating material is found, even in case of unabated/completed assessment, the Assessing Officer would have the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material collected during the search and other material which would include income declared in the returns, if any, furnished by the assessee as well as the undisclosed income. However, in case during the search no incriminating material is found, in case of completed/unabated assessment, the only remedy available to the revenue would be to initiate the reassessment proceedings under section 147/48, subject to fulfilment of the conditions mentioned in section 147/148, as in such a situation, the revenue cannot be left with no remedy. Therefore, even in case of block assessment under section 153A and in case of unabated/completed assessment and in case no incriminating material is found during the search, the power of the revenue to have the reassessment under section 147/148 has to be saved, otherwise the revenue would be left without remedy. [Para 11].

If the submission on behalf of the revenue that in case of search even where no incriminating material is found during the course of a search, even in case of unabated/completed assessment, the Assessing Officer can assess or reassess the income/total income taking into consideration the other material is accepted, in that case, there will be two assessment orders, which shall not be permissible under the law. At the cost of repetition, it is observed that the assessment under section 153A is linked with the search and requisition under sections 132 and 132A. The object of section 153A is to bring under tax the undisclosed income which is found during the course of search or pursuant to search or requisition. Therefore, only in a case where the undisclosed income is found on the basis of incriminating material, the Assessing Officer would assume the jurisdiction to assess or reassess the total income for the entire six-year block assessment period even in case of completed/unabated assessment. As per the second proviso to section 153A, only pending assessment/reassessment shall stand abated and the Assessing Officer would assume the jurisdiction with respect to such abated assessments. It does not provide that all completed/unabated assessments shall abate. If the submission on behalf of the revenue is accepted, in that case, the second proviso to section 153A and sub-section (2) of section 153A would be redundant and/or rewriting the said provisions, which is not permissible under the law. [Para 12]. For the reasons stated hereinabove, no addition can be made in respect of the completed assessments in the absence of any incriminating material. [Para 13].

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

(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 Assessing Officer 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 Assessing Officer including the income declared in the returns; and

(iv) In case no incriminating material is unearthed during the search, the Assessing Officer cannot assess or reassess taking into consideration the other material in

respect of completed assessments/unabated assessments. This means thereby, with respect to completed/unabated assessments, no addition can be made by the Assessing Officer in the absence of any incriminating material found during the course of a search under section 132 or requisition under section 132A. However, the completed/unabated assessments can be reopened by the Assessing Officer in the exercise of powers under section 147/148, subject to fulfilment of the conditions as envisaged/mentioned under section 147/148 and those powers are saved.

6. Given the above facts and law laid down by the Hon'ble Apex Court in the case of PCIT, Central-3 vs. Abhisar Buidwell Pvt. Ltd. (supra), **Ground No. 1 raised by the assessee is allowed and the assessment order declared to be null and void as the same has been passed in violation of provisions of section 153A of the Act, which is further fortified by the Hon'ble Apex Court (supra).**

7. Given the above finding against ground no. 1 raised by the assessee, we find there is no need to deliberate on ground nos. 2 & 3 as both became academic and infructuous respectively.

8. In the result, an appeal of the assessee is allowed and AO is directed to delete the addition as the same has been done in violation of the scope provided in section 153A of the Act.

Order pronounced in the open court on 25th day of April 2024.

Sd/-

(AMIT SHUKLA)

JUDICIAL MEMBER

Mumbai, दिनांक/Dated: 25/04/2024

Dhananjay, Sr. PS

Sd/-

(GAGAN GOYAL)

ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
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BY ORDER,

(Asstt.Registrar)
ITAT, Mumbai