

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE SHRI R. K. PANDA, VICE PRESIDENT
AND
SHRI VINAY BHAMORE, JUDICIAL MEMBER

Sl. No.	ITA No./C.O. No.	Name of Appellant	Name of Respondent	Asst. Year
1	1185/PUN/2023	DCIT, Aurangabad.	Sandeep Bipinchandra Jhaveri, 21, Crest, Nutan Laxmi Society, NS Road No.9, JVPD Scheme, Mumbai- 400049. PAN : AATPJ3903A	2013-14
2	06/PUN/2024	Sandeep Bipinchandra Jhaveri, 21, Crest, Nutan Laxmi Society, NS Road No.9, JVPD Scheme, Mumbai- 400049. PAN : AATPJ3903A	DCIT, Aurangabad.	2013-14

Assessee by : Shri Deepak Shah
Revenue by : Shri Sourabh Nayak
Date of hearing : 26.06.2024
Date of pronouncement : 14.08.2024

आदेश / ORDER

PER VINAY BHAMORE, JM:

This appeal filed by the Revenue is directed against the order dated 24.08.2023 passed by Ld CIT(A)-12, Pune for the

assessment year 2013-14. The assessee is also in Cross Objection bearing C.O. No.06/PUN/2024 against the appeal of the Revenue.

2. The Revenue has raised the following grounds of appeal :-

“1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in law and in facts by quashing proceedings u/s. 153A in respect of abated assessment where the incriminating material was found during the same search action at the residential premises of Abhishekh S. Jhaveri.

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in law and facts by relying on the decision of Honorable Supreme Court in the case of Abhisar Buildwell (P.) Ltd. ignoring the fact that same is not applicable to the case of the assessee.

3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that in the assessee's case the A.O. was required to initiate u/s 153C whereas the assessee's case was also covered under search warrant and hence, the proceedings u/s 153A of the Act was rightly initiated by then A.O.

4. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.2,35,00,000/- (50% of Rs.4.7 crores) on account of cash paid on buyback of shares which was made by the A.O. on the basis of facts and based on certain loose papers and documents found and seized as per bundle No.2, page no.14 at the residential premises of Abhishekh S. Jhaveri.

6. The appellant craves leave to add, alter, modify, delete and amend any of the grounds, as per the circumstances of the case.”

3. The facts of the case, in brief, are that the assessee is an individual & during the year under consideration earned income from salary, commission, share trading income & income from bank interest etc. A search and seizure action u/s 132 of IT Act was conducted on 20-08-2014 at the business & residential

premises of different members/ associate concern of the Jhaveri Group at Mumbai/ Aurangabad & their directors. The search warrant was issued u/s 132 of the IT Act in the name of the assessee & search action was conducted at his residence. A notice u/s 153A of the IT Act was issued on 21.08.2015. In response to the above notice, the assessee furnished return of income on 30.10.2015 declaring total income at Rs.1,48,51,310/-. During the course of assessment proceedings, the Assessing Officer made addition of Rs.2,35,00,000/- on the basis of page no.17 & 18 of bundle no.2 found & seized during the course of search action at the residence of Abhishek S. Jhaveri, wherein as per certain noting it was inferred that an amount of Rs.4,70,00,000/- was paid to investors during buyback of shares of Jhaveri Flexo India Ltd. During the course of search action statement of Abhishek Jhaveri was also recorded under oath, wherein he admitted that the shares were purchased back from the investors & cash of Rs. 4.70 crore was paid to them, 50% by RSJ group & remaining 50% by SBJ group. But the assessee in his statement denied to have paid any cash to any one at all. The Assessing Officer disbelieving the

contention of the assessee, held that the assessee has paid cash Rs.2,35,00,000/- to the investors, during buyback of shares of Jhaveri Flexo India Ltd. & proceeded to pass the assessment order u/s 143(3) r.w.s. 153A on 29.12.2016, determining total income at Rs.3,84,74,242/- as against income of Rs.1,48,51,310/- declared by the assessee.

4. Being aggrieved with the above assessment order dated 29.12.2016, an appeal was filed before the Ld. CIT(A), who vide impugned order dated 26.09.2023 allowed the appeal of the assessee.

5. Being aggrieved with the above first appeal order, Revenue is in appeal before this Tribunal.

6. LD DR submitted before us that LD CIT(A), Pune erred in allowing the appeal of the assessee. LD DR argued at length & furnished two paperbooks in support of his contention & requested to set-aside the order passed by LD CIT(A) & further requested to sustain the additions made by the AO.

7. LD AR submitted before us that the order passed by LD CIT(A), Pune is correct & requested to confirm the same &

consequently requested to dismiss the appeal of the Revenue. In addition LD AR also furnished paperbook containing copy of written submissions furnished earlier.

8. We have heard LD counsels from both the sides & perused the material available on record. We find that a search u/s 132 of the IT Act was conducted on 20-08-2014 at the residential premises of the assessee at Bombay. The AO made impugned addition of Rs.2,35,00,000/- (50% of Rs.4.70 Crores) on the basis of documents seized from Abhishek S. Jhaveri & also on the basis of his statement, which is deleted by LD CIT(A) by giving specific finding for granting relief which are subject matter of present appeal filed by the Revenue.

9. As regards to the ground no.1 & 2, we find that the LD CIT(A) has quashed the assessment passed u/s 153A of the IT Act as per the discussion given in para 6.3.2 of page no.9 & 10 of the impugned order, the relevant discussion is reproduced as under :-

“6.3.2 I firstly deal with the legal ground relating to framing assessment u/s 153A in absence of seized material found from the appellant. It is the contention of the appellant that in absence of any material found from the appellant during search, the concluded assessment cannot be disturbed. If the material is found from someone else during search at his place, appropriate course of action would be to initiate action as prescribed u/s 153C after following due

procedure as mandated in said section namely, to record satisfaction in the case of searched person from whom such material is found as well as in the case of the person to whom it belongs/pertains and is required to be considered as his undisclosed income. Thus, the above grounds of appeal are against framing of assessment under section 153A on the issues which are neither the subject matter of search proceedings nor on the basis of any material found during search at the premises of the appellant. It is undisputed that the materials /documents found from the residential premises of Mr. Abhishek S. Jhaveri and not the appellant. The AO wanted to proceed against the appellant on the basis of evidence found from the premises of Mr. Abhishek S. Jhaveri and should have proceeded u/s 153C by recording requisite satisfaction. However, no such satisfaction is recorded either in the case of Mr. Abhishek S. Jhaveri or in the case of the appellant. Thus, the fact remains that no evidence is found from the premises of the appellant, no addition could be made in respect of concluded assessment. As per the provisions of S. 153A, as on the date of search, the original assessment was completed and not pending. Therefore, the original assessment had not abated. Though u/s 153A, the assessment for 6 years prior to the date of search can be completed, although in respect of unabated assessments, the same can be done only on the basis of evidence or incriminating material found during the course of search and not otherwise.

In the present case, as held above, the addition of Rs. 2.35 crores is not based on any evidence found as a result of search at the premises of the appellant and therefore, any action u/s 153A in the case of the appellant does not survive. This view has been taken in the case of Continental Warehousing Corporation Ltd. (supra) which has been fortified by the recent decision of the Hon'ble Supreme Court in the case of Abhisar Buildwell (P.) Ltd. (149 taxmann.com 399 (SC)) Wherein the court held as under:

“11. As per the provisions of Section 153A, in case of a search under section 132 or requisition under section 132A, the AO 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 re-assessment, 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 AO would assume the jurisdiction to assess or reassess the 'total income' for the entire six years period/block assessment period. The intention does not seem to be to re- open the completed/unabated assessments, unless any incriminating material is found with respect to concerned assessment year falling within last six years preceding the search. Therefore, on true interpretation of Section 153A of the Act, 1961, 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 AO 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.”

In view of the above discussion and the binding nature of the order of the Hon'ble Supreme Court and the jurisdictional High court, I hold that since original assessment has not abated on the date of search and no material is found from the premises of the appellant, the AO has exceeded his jurisdiction while framing assessment u/s 153A in making additions based on the material found from the premises of other person and that too without following due process of law as prescribed u/s 153C of the act. I hold that assessment now framed is beyond jurisdiction of the AO and is accordingly required to be set aside. This ground is accordingly allowed and the action of the AO in initiating proceedings u/s 153A in respect of abated assessment where no incriminating material is found from the appellant is quashed and set aside.”

10. As regards above finding of LD CIT(A) regarding quashing of assessment passed u/s 153A of the IT Act & applicability of

Hon'ble Supreme Court judgement in the case of Abhisar Buildwell (149 Taxmann.com 399) we find that no material of incriminating nature was found during search. The addition made is de hors the material found. Therefore even if search is conducted in the case of the assessee as also in the case of Abhishek Jhaveri as per the warrant of authorization cited by LD DR, the addition cannot be made de hors the seized material. Since no material is found during search regarding unaccounted amount is paid for buy back of shares, the same is not sustainable. Thus the finding given by LD CIT(A) in para 6.3.2 does not call for any interference & hence the ground no.1 & 2 of appeal raised by Revenue are dismissed.

11. As regards to the ground no.3, we find that the LD CIT(A) has dealt with this ground as per the discussion given in para 6.3.3 of page no.11 of the impugned order, the relevant discussion is reproduced as under :-

“6.3.3 The next contention pertains to non-issuance of notice u/s 153C when material pertaining to the appellant was found at the premises of a third party and not the appellant. It is not in dispute that the evidence on the basis of which addition was made, was found at the premises of Mr. Abhishek Jhaveri and not the appellant. If that be the case, the AO should have issued notice to the appellant u/s 153C of the act. Section 153C requires that when the assessing officer is

satisfied that any money bullion etc. seized or requisitioned or any books of accounts or document seized or requisitioned pertains to a person other than the person in whose case the search is conducted, then such material should be handed over to the assessing officer having jurisdiction over such other person and that assessing officer shall proceed against each such other person if that assessing officer is satisfied that the books of accounts or documents or assets seized have a bearing on the determination of the total income of such other person. Thus, it requires a two way satisfaction, one by the AO of the person searched from whom such material is found and another by the AO of such other person to whom such material pertains to. Even if the AO of both such persons is the same, still such formality has to be observed and only thereafter he can proceed against such other person on the basis of such material found. Where the AO of the searched person and the other person is the same, such a satisfaction note qua the other person has to be recorded by the AO of the searched person prior to the initiation of the proceedings against the other person. This is a sine qua non for triggering the proceedings against the other person under Section 153C of the Act. This is so held in the case of Ganpati Fincap Services Pvt Ltd. (395 ITR 692 Del HC) and other decisions by the Hon'ble ITAT relied upon by the appellant. In the present case, not only the AO of Shri Abhishek Jhaveri should have been satisfied that the document seized pertains to the appellant which should have been handed over to the AO of the appellant, but the AO of the appellant should have also been satisfied that the said document seized has a bearing on the determination of the total income of the appellant. In my opinion, the AO has completely ignored the due procedure laid down u/s 153C and framed the assessment. However, as the assessment is already quashed and set aside while deciding the above ground no. 1, this ground becomes academic; hence, the same is dismissed.”

12. From the above we find that, in principle LD CIT(A) has agreed to the proposition that the AO has completely ignored the due procedure laid down u/s 153C of the IT Act & framed the assessment u/s 153A of the IT Act, but as the assessment has been quashed & set-aside on other legal ground, no finding has been

given in this regard by LD CIT(A). Therefore, in our considered opinion, Revenue should have no grievance in this regard, & hence the ground no.3 raised by the Revenue is also dismissed.

13. As regards to the ground no.4, we find that the Ld. CIT(A) has deleted the addition of Rs.2,35,00,000/- as per the discussion given in para 7.1 & 7.2 of page no.11 & 12 of the impugned order, the relevant discussion is reproduced as under :-

“7.1 Vide these grounds of appeal, the appellant has contended that Ld A.O. erred in law and of the facts of the case in making addition of Rs. 2,35,00,000/- being unexplained payment of Rs. 2,35,00,000/- even though there is no proof of payment in respect of alleged buyback of shares of Jhaveri Flexo India Ltd and in absence of any evidence as to whom such payment is made. It is further stated that the Ld A.O. erred in law and of the facts of the case in making addition in A.Y. 2013-14 in absence of any evidence that the alleged sum of Rs. 2,35, 00,000/- was paid during F.Y. 2012-13 particularly when the buyback of the shares of Jhaveri Flexo India Limited took place during the period December 2011. As the assessment is already quashed and set aside in the first ground, this ground does not require separate adjudication however even on merits, the addition made by the AO is on a wrong footing. The challenge is to addition made of Rs. 2.35 crores being amount stated to have been paid to N.M. for buyback of shares of JFL. The appellant in this regard has relied upon the evidences filed before the AO in the form of written statement, copy of exit offer to shareholders of JFL for delisting of shares, list of persons from whom shares were bought back to demonstrate that there is no person like N.M. in the entire list of persons who have offered shares in the buyback offer. It is also submitted that buyback offer is through SEBI registered merchant banker who only makes payments to all the shareholders surrendering the shares in buyback. The appellant along with Mars Fincom Pvt Ltd were the parties to the buyback. The offer opened on 27-12-2011 and closed on 29-12-2011. The scheme is at page 13-45 of the paper book. They firstly paid certain sum to the merchant banker who keeps the same in an escrow

account and on receipt of shares in buyback pays amount to them directly. It is therefore, contended that the appellant is not at all involved in the buyback of shares from the various shareholders spread along length and breath of the country.

7.2 I have examined the exit offer and the list of shareholders who have surrendered shares in the said offer. The scheme of buy-back was during Dec. 2011 which is relevant to A.Y 2012-13. This fact was also brought to notice of the AO by the appellant during the assessment proceedings. The AO ignored such fact. Hence it cannot be conclusively held that the appellant paid any sum over and above as stated in the buyback scheme to any person during the year under appeal. It is a settled law that the income of a particular year is assessable in that year alone and not in any other year. This is the mandate of sec 4 of the IT Act also. Based on the above discussion, the addition of Rs.2.35 crores is not sustainable which is required to be deleted.”

14. As regards merits of addition of unexplained payment for buy back of shares of Jhaveri Flaxo Ltd, the addition is purely on the basis of statement of Mr. Abhishek Jhaveri with whom the assessee has no connection. The addition is because, Mr. Abhishek Jhaveri admitted having paid Rs.4.70 crores towards buy back of shares from NM during the year, attention is invited to buy back offer made by the assessee alongwith two others for buy back of shares of Jhaveri Flaxo Ltd. at pages 13 of the paper book filed by the assessee. The buyback offer opened on 27.12.2011 and closed on 29.12.2011 which falls in F.Y. 2011.12 relevant to A.Y. 2012.13 and not for the year under appeal. Attention is also

invited to page 51 which is demat statement wherein pursuant to buy back of shares, 3200000 shares were received on 10.02.2012 which is also in F.Y. 2011.12 relevant to A.Y. 2012.13 and not for the year under appeal. These facts are not disputed by any authority or Ld. DR. LD CIT(A) in para 7.2 of the impugned order noted that these facts even though brought to notice of the AO, has ignored the same. Since particular income can be taxed only in relevant year & no other, the same is rightly deleted by LD CIT(A). We therefore are of considered opinion that there is no infirmity in the order passed by LD CIT(A) & the same is confirmed by us, consequently the 4th ground of appeal raised by revenue in this regard is dismissed.

15. In the result, the appeal filed by the Revenue stands dismissed.

C.O. No.06/PUN/2024 :

16. Since the appeal filed by the Revenue has been dismissed by us in the foregoing paragraphs, the cross objection filed by the assessee becomes infructuous and, therefore, the same is dismissed.

17. In the result, the Cross Objection filed by the assessee stands dismissed.

18. To sum up, the appeal filed by the Revenue as well as the Cross Objection filed by the assessee stands dismissed, as above.

Order pronounced in the open Court on 14th August, 2024.

Sd/-
(R. K. PANDA)
VICE PRESIDENT

Sd/-
(VINAY BHAMORE)
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 14th August, 2024.

Sujeet

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-12, Pune.
4. The Pr. CIT/CIT concerned.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "B" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.