



ITA No.4907/Mum/2016
Silver Sand Beach Inn. Private Limited
Assessment Year-2008-09

आयकर अपीलीय अधिकरण “एफ” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH, MUMBAI

श्री शक्तिजीत दे, न्यायिक सदस्य एवं
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE SHRI SAKTIJIT DEY, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./I.T.A. No.4907/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2008-09)

Deputy Commissioner of Income Tax Central Circle-8(1) Room No.656, 6 th Floor Aaykar Bhavan, M.K.Road Mumbai-400 020	बनाम/ Vs.	Silver sand Beach Inn. Private Ltd. Room No.505, 5 th Floor NB-1, Mahavir Nagar Manpada Road, Dombivali (E) Thane
स्थायी लेखा सं./ PAN : AADCR-5784-L		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	None
Revenue by	:	S.Padmaja, Ld. DR

सुनवाई की तारीख/ Date of Hearing	:	25/07/2018
घोषणा की तारीख / Date of Pronouncement	:	08/08/2018

आदेश / ORDER

Per Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by revenue for Assessment Year [AY] 2008-09 contest the common order of Ld. Commissioner of Income-Tax (Appeals)-50 [CIT(A)], Mumbai, *Appeal No. CIT(A)-50/IT-123/2014-15 dated 31/03/2015 qua* deletion of certain addition of Rs.12.70 crores u/s



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68 as made by Ld. AO by relying upon the decision of Hon'ble Bombay High Court rendered in *CIT Vs. Continental Warehousing Corporation (Nhava Sheva) Ltd.* None has appeared for assessee and no valid adjournment application is on record. Left with no option, we proceed to dispose-off the same on the basis of material available on record and after hearing Ld. Departmental Representative, *Ms. S. Padmaja, Ld. CIT DR.*

2. The assessment for impugned AY was framed by *Ld. Deputy Commissioner of Income Tax, Central Circle-8(1), Mumbai [AO] u/s 143(3) read with Section 153C of the Income Tax Act, 1961* on 30/03/2015 wherein the assessee has been saddled with impugned additions of Rs.12.70 crores u/s 68. The assessee was subjected to proceedings u/s 153C pursuant to search & seizure operations u/s 132 on 09/01/2013 in the group cases belonging to *M/s Enpar*. The quantum assessment order at *para-3* record a finding that the *trial balances* belonging to assessee for the period April 2010 to March 2011, April 12 to 9.1.2013 & April 2011 to March 2012 were seized. In response to notice u/s 153C, the assessee offered the same return of income as filed u/s 139(1) at Rs.41,400/-.

3. From the perusal of financial statements, it was found that the assessee raised a sum of Rs.12.70 crores by way of issue of share capital from five parties, the details of which have already been extracted at *para-7* of the quantum assessment order. The Ld. AO, not satisfied with creditworthiness of the *share allottees*, added the aforesaid amount to the income of the assessee as *cash credit u/s 68*.



4. Aggrieved, the assessee contested the same with success before Ld. CIT(A) vide impugned order dated 31/03/2015 wherein the matter was concluded in the following manner:-

7. Decision on Ground No.3:

7.1 I have carefully considered the contention of the AO and submissions of the AR. I find that though the documents relied upon by the AO for initiating the proceedings u/c 153C for AY 2007-08 to AY 2012-13 pertain to period AY 2010-11, 2011-12 and 2013-14, no additions have been made in those assessment years. The only assessment year in which additions have been made is the AY 2008-09. Even in that assessment year, the additions made were not based on the documents as relied upon by the AO. This clearly shows that no incriminating documents relating to the appellant was seized for A.Y.2008-09. I also find that the assessment for A.Y. 2008-09 was completed u/s 143(3) r.w.s. 147 of the Act. before the date of initiation of the search.

7.2 In para 9.6 of the assessment order, the AO has relied on the order of the Hon'ble Bombay High-Court in the case of Murli Agro Products Ltd in ITA No. 36 of 2009. In para 13 of that order, the Hon'ble Bombay High Court observed as under:

"13. In the present case, there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings which would show that the relief under Section 80HHC was erroneous. In such a case, the AO. while passing the assessment order under Section 153A read with Section 143(3) could not have disturbed the assessment order finalized on 29.12.2000 relating to Section 80HHC deduction and consequently the C.I.T. could not have invoked jurisdiction under Section 263 of the Act."

7.3 Thus, the High Court observed that the A.O., while passing the assessment order under Section 153A r.w.s. 143(3) could not have disturbed the assessment order already finalized as there was nothing on record to suggest that any material had been unearthed during the search or during the 153A proceedings which would show that the relief under Section 80HHC was erroneous. From this the AO wrongly inferred that the Hon'ble Bombay High Court had held that had any material been unearthed during the 153A proceedings, the A.O. while passing the assessment order under Section 153A read with Section 143(3) could have disturbed the assessment order already finalized.

7.4 The AO also relied on the order of the Hon'ble Karnataka High Court in the case of Canara Housing Development Co. (274 CTR 122) (Karnataka) wherein the Hon'ble Court held that the Assessing Officer can determine the total income of the assessee taking into consideration the materials which was the subject-matter of earlier return and the undisclosed income unearthed during search and also any other income which comes to his notice in course of proceedings u/s 153A.



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7.5 The Hon'ble jurisdictional Bombay High Court in case of Commissioner of Income-tax-II, Thane vs Continental Warehousing Corporation (Nhava Sheva) Ltd, Bharati Vidyapeeth Medical Foundation, it has been held that no additions can be made for unabated assessments which have achieved finality and for which no incriminating material has been found.

7.6 Thus, I find that the decision of the Hon'ble Karnataka High Court is contrary to the decision of the jurisdictional High Court (Bombay High Court). However, the decision of the jurisdictional court is binding on me. Therefore, respectfully following the decision of the Hon'ble jurisdictional Bombay High Court in case of Commissioner of Income-tax-11, Thane vs Continental Warehousing Corporation (Nhava Sheva) Ltd, I hold that the AO was not justified in making the addition. Accordingly, I direct the AO to delete the addition of Rs 12,70,00,000/-.

7.7 There is no need to decide the sustainability of the addition on merit because that would be a futile exercise.

7.8 **In the result, the ground of appeal is allowed.**

Aggrieved, the revenue is in further appeal before us.

5. The Ld. CIT DR, Ms. S. Padmaja submitted that the assessee miserably failed to prove the creditworthiness of the *share allottees* and therefore, the additions were justified.

6. We have carefully heard the submissions and perused the material as available on record. Upon careful consideration, from the findings of Ld. AO at *para-3*, it is evident that the *trial balances* belonging to the assessee for other AYs were found during search operations. Nothing on record suggest that there was any incriminating material *qua* impugned Assessment Year. This fact remains uncontroverted. The original assessment had already completed u/s 143(3) *read with Section 147* before the date of initiation of search. Having noted so, we find that the facts of the case get squarely covered by our Jurisdictional Bombay High Court rendered in *CIT Vs. Continental Warehousing Corporation [2015 374 ITR 645]*. Similar view has been taken by Hon'ble Delhi High Court in *CIT Vs. Kabul Chawla [380 ITR 573]*. Further, upon perusal of *SLP*



No. 18560 of 2015 dated 12/10/2015 admitted by Hon'ble Supreme Court against the decision of Hon'ble Bombay High Court rendered in *CIT Vs. Continental Warehousing Corporation [supra]*, we find that Hon'ble apex court has only admitted SLP against the ruling of the Hon'ble Bombay High Court's finding that no addition can be made in respect of assessments which have become final if no incriminating material is found during search or during 153A proceedings. However, it is seen that the Hon'ble Apex Court has not stayed or suspended the operation of the decision of the Hon'ble Bombay High Court in any manner and therefore, at the moment, the decision of jurisdictional High Court is binding on us and we are bound to follow it.

7. For the sake of completeness, we find that Hon'ble Delhi High Court in the case of *Kabul Chawla (supra)* and others dated 28/08/2015 has summarized the legal position on the issue as under :-

"Summary of the legal position:

37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under :

- i. Once a search takes place under Section 132 of the Act, notice under Section 153A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six A.Ys immediately preceding the previous year relevant to the A Y in which the search takes place.*
- ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.*
- iii. The A.O. will exercise normal assessment powers in respect of the six years previous to the relevant A.Y. in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs. "in which both the disclosed and the undisclosed income would be brought to tax".*
- iv. Although Section 153A does not say that additions should be strictly made on*



the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material.

- v. *In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.*
- vi. *Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each A Y on the basis of the findings of the search and any other material existing or brought on the record of the A.O.*
- vii. *Completed assessments can be interfered with by the AO while making the assessment under Section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the Course of search which were not produced or not already disclosed or made known in the course of original assessment.*

Conclusion

38. The present appeals concern AYs, 2002-03, 2005-06 and 2006-07. On the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.

39. The question framed by the Court is answered in favour of the Assessee and against the Revenue."

Respectfully following the binding judicial precedent, we upheld the conclusions drawn by Ld. CIT(A) and dismiss revenue's appeal.

8. Resultantly, the revenue's appeal stand dismissed.

Order pronounced in the open court on 08th August, 2018

Sd/-
(Saktijit Dey)
न्यायिक सदस्य / **Judicial Member**

Sd/-
(Manoj Kumar Aggarwal)
लेखा सदस्य / **Accountant Member**



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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai**