www.taxguru.in

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

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT &
Ms. MADHUMITA ROY, JUDICIAL MEMBER

I.T.(SS)A. No.08/Ahd/2017
(Assessment Year : 2009-10)

Asst. Commissioner of Income Tax, Central Circle – 2(3), Ahmedabad.	Vs.	The M/s. Samor Properties Pvt. Ltd., 24K, Rangsagar Flats, P. T. College Road, Paldi, Ahmedabad.

[PAN No. AAMMCS 5349 D]

(**Appellant**) .. (**Respondent**)

Appellant by : Shri R.C. Danday, CIT-D.R.
Respondent by : Shri S. N. Soparkar & Parin Shah, A.R

Date of Hearing 30.04.2019
Date of Pronouncement 08.05.2019

O R D E R

PER Ms. MADHUMITA ROY - JM:

The instant appeal filed by the revenue is directed against the order dated 31.10.2016 passed by the Commissioner of Income Tax (Appeals)-12, Ahmedabad under section 143(3) r.w.s 153A(1)(b) of the Income Tax Act, 1961 (in short 'the Act') arising out of the order dated 30.03.2014 passed by the Deputy Commissioner of Income Tax, Central Circle – 2(3), Ahmedabad for the Assessment Year 2009-10.

2. The facts leading to this case is this that in the case of Jayesh Steel Group, search operation u/s 132 of the Act was conducted on 13.10.2011. The assessee's case was also covered in the said search action. Subsequently, notice

www.taxguru.in

u/s 153A was served upon the assessee upon which return of income on 27.12.2013 for A.Y. 2009-10 was filed declaring total income at Rs.28,240/- and book profit under Section 115JB of the Act at Rs.28,240/-.

Notice dated 17.09.2013 u/s 143(2) was served upon the assessee followed by a further notice u/s 143(2) dated 02.12.2013 and 142(1) along with a questionnaire. The AO during the assessment proceeding observed that the share capital of the assessee has increased by Rs.1,79,25,000/- (Rs.20,00,000/- for A.Y. 2010-11). The details/evidences were called upon from the appellant with regard to the same and after considering the same the Learned AO concluded that the "share capital introduced by the assessee company in this year is its unexplained cash credit and the same is added u/s 68". The AO also additionally brought to tax the commission @ 0.5% of the amount so introduced, thus resulting into total additions as under:

A.Y.	Total Amount Made
2009-10	Rs.1,39,94,625/-
2010-11	Rs.12,06,000/-

The contention of the appellant was this that both the assessments of 2009-10 and 2010-11 under appeal had attained finality on the date of search which took place on 13.10.2013, and therefore, did not "abate" within the meaning of second proviso to section 153A, and further that the addition are not based on any incriminating documents found or seized during the course of the search, and therefore, in view of this, the impugned additions made de hors seized documents are not sustainable in the eye of law. The judgment on this count pronounced in the matter of Kabul Chawla reported in 61 Taxmann.com 412 (Del) and Saumya Construction in ITA No.24/2016 passed by the Jurisdictional High Court dated 14.03.2016 was also relied upon by the

www.taxguru.in

appellant. Ultimately, the Learned CIT(A) deleted such addition with the following observation relying upon the judgment passed in the matter of Saumya Construction (supra):

> *"6.1 The search was carried out on 13/10/2011. The time limit for issuance of notice u/s 143(2) for these two assessment years under appeal, therefore, had indisputably expired as per column 4, much before the date of search. The Ld, AR is therefore right, which of course has also not been disputed by the AO, that the assessment for the year under reference had **attained finality as on the date of the search** and indeed **did not abate** within the meaning of second proviso to section 153A. The Ld. AR is also right in putting reliance on Kabul Chawla (supra) and on Jurisdictinal High Court decision in Saumya Construction (supra) for the proposition that no addition unfounded on and de hors the incriminating seized documents could have been made by the AO while refraining u/s 153A/153C those assessments which had remained unabated within the meaning of second proviso to section 153A. The AO's reliance on Shivanath Red Harnarain (India) Ltd., 117ITD 74 (Del) in his report dated 21/10/2016, is, in my considered opinion, totally misplaced in view of the same remaining no longer a good law as emphatically ruled by both Delhi HC in Kabul Chawala and Gujarat HC in Saumya Construction (supra). The AR is thus right that the AO erred in "interfering with" assessments which remained unabated as on the date of search. As such, when the examination of seized material by the AO did not lead him to any incriminating document/entry for the year under reference, he was indeed duty-bound to "reiterate" the total income which had attained finality before the date-of search, and he indeed exceeded his jurisdiction in firstly taking up the roving enquiries unfounded on incriminating seized documents, and secondly, in making the impugned additions. This view in Kabul Chawla (supra) has been reiterated by Ahmedabad Bench of Tribunal in Saumy a Construction (supra), which in turn, and eventually, has also now been approved and reiterated by the Hon. Gujarat High Court. In Saumya Construction, Ahmedabad Tribunal disapproved the AO's action of making addition of Rs. 11,05,51,000/- u/s 68 as unexplained investment in "unabated" assessment being refrained u/s 153A on the ground that the AO's action of making addition u/s 68 was not based on any incriminating seized documents. Tribunal, while relying on Sanjay Agarwal 47 taxmann.com 210 (Del), observed that the AO while reframing "unabated" assessment u/s 153A, is not authorized to "get influenced" by items of income other than those based on material "unearthed during the course of search". This, view of the Hon. Tribunal is further approved authoritatively by Hon. High Court by observing that in "unabated" assessments being refrained u/s 153A, in the absence of incriminating seized material enabling the AO for the year under" reference*

www.taxguru.in

"to" enquire/make addition, the AO is duty-bound merely to "reiterate" the concluded assessment which had attained finality before the date of search. I would only quote from these decisions of Hon. Tribunal and Hon. High Court in the case of Saumya Construction:

Saumya Construction Pvt. Ltd. IT(SS)A. No. 3/Ahd/2O14 Dated:- 21-8-2016

".......6. We have noted that, as learned counsel fairly accepts, the grievance of the assessee is not against framing of the assessment u/s 153A but is confined to making of any additions or disallowances other than on the basis of incriminating material found during search operations. In effect thus, additions cannot be made other than on the basis of incriminating material found during search operations. That plea stands approved by a coordinate bench of the tribunal, in the case of Sanjay Aggarwal Vs. DCIT [(2014) 47 taxmann.com 210 (Del)],by observing as follows:

> ***13. The above extracted observations of the Hon. High Court, which are though obiter dicta, make the point clear that where an assessment order has already been passed for a year (s) within the relevant six assessment years, then also the AO is duty bound to reopen those proceedings and reassess the total Income but by taking note of the undisclosed income if any 'unearthed during the search". The expression 'unearthed during the search' is quite significant to denote that in respect of completed or non-pending assessments, the Assessing Officer is albeit duty bound to assess or reassess the total income but there is a cap on the scope of additions in such assessment, being the items of income 'unearthed during the search'.***
>
> ***In other words, the determination of 'total income; in respect of the assessment years for which the assessments are already completed on the date of search, shall not be influenced by the items of income other than those based on the material unearthed during the course of search................. .***

7. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench. Respectfully following the same, and having noted that the additions of Rs.11,05,51,000/- is not based on any incriminating material found during search operations on the assessed, we delete the said addition....."

Saumya Construction ITA No.24/2016 dated 14/3/2O16 (Gujarat HC)

www.taxguru.in

"....18. In this case, it is not the case of the appellant that any incriminating material in respect of the assessment year under consideration was found during the course of search. At the relevant time when the notice came to be issued under section 153A of the Act, the assessee filed its return of income. Much later, at the fag end of the period within which the order under section 153A of the Act was to be made, in other words, when the limit for framing the assessment as provided wider section 153 was about to expire, the notice has been issued in the present case seeking to make the proposed addition of Rs.11,05,51,000/-on the basis of the material which was not found during the course of search, but on the basis of a statement of another person. In the opinion of this court, in a case like the present one, where an assessment has been framed earlier' and no assessment or reassessment was pending on the date of initiation of search under section 132 or making of requisition under section-132A, while computing the total income of the assessee under, section 153A of the Act, additions or disallowances can be made only on the basis of the incriminating material found during the search or requisition. In the present case, it is an admitted position that no incriminating material was found during the course of search, however, it is on the basis of some material collected by the Assessing Officer much subsequent to the search, that the impugned additions came to be made.

19. On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of all the six assessment years. In the opinion of this court, the said contention does not merit acceptance, inasmuch as, the assessment in respect of each of the six assessment years is a separate and distinct assessment Under section 153AoftheAct, an assessment has to be made in relation to the search or requisition, namely, in relation to material disclosed during the search or requisition. ***If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of Jai Steel (India), Jodhpur v. Assistant Commissioner of Income Tax (supra). Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court in the case of Commissioner of Income-tax-1 v. Jayaben Ratilal Sorathia (supra) wherein it has been held that while it cannot be disputed that considering section 1S3A of the Act, the Assessing Officer can reopen and/or assess the return with***

www.taxguru.in

respect to six preceding years; however, there must be some Incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year.

20. For the foregoing reasons, it is not possible to state that the impugned order passed by the Tribunal suffers from any legal infirmity so as to give rise to a question of law, much less, a substantial question of law, warranting interference. The appeal, therefore, fails: and is, accordingly, dismissed."

7. In view of the above, arid in view of by now settled legal position as enunciated by Jurisdictional HC, the AO, in re-assessments of any of unabated and finally concluded assessments framed u/s 153A/153C, is not. authorized to 'interfere" ***except on the basis of and except having been prompted by incriminating seized documents relatable to that assessment year.*** *It is clear that the additions as explained share capital made by the AO* ***are not based on any seized*** *documents. As such, as per even the AO in the assessment order, the additions; based on "post-search" enquiry on and verification of information which was already available in the pre-search return of income filed by the appellant which had attaint finality as on the date of search. It is also clear that the assessment under reference had attained finality and therefore remained unabated as on the date of search. These facts are not disputed by the AO in his report dated 21/10/2016. Thus and therefore, the Ld. AR is absolutely right in contending that the additions, de hors any incriminating seized documents, made by the Ld. AO in these unabated assessments reframed by him u/s 153A, are without requisite authority in law and are therefore not sustainable in law. In view of this, and respectfully following the Jurisdictional High Court mandate, I have no hesitation in deleting the additions a under:*

A.Y.	*Additions deleted*
2009-10	*Rs.1,39,94,625/-*
2010-11	*Rs.12,06,000/-*

8. The appellant would get relief of equivalent amount. Legal ground no.(ii) is thus allowed for both the years under appeal."

3. At the time of hearing, Learned Senior Counsel appearing for the assessee submitted before us that the issue has already been decided in the matter of Asst. Commissioner of Income Tax-vs-The Jayesh Steel Pvt. Ltd. in

www.taxguru.in

favour of the assessee wherein it was decided that since the additions in question are not based on any incriminating material found during the search operation, as is the undisputed factual position in this case, the very foundation of the additions ceases to be sustainable in law; a copy of the said judgment has also been submitted before us. The Learned DR on the contrary has not been able to controvert the contention made by the Learned Sr. Counsel appearing for the assessee.

4. We have heard the rival contentions made by the respective parties, perused the relevant materials available on record. We have also carefully considered the order passed by the Hon'ble Tribunal in the case of ACIT-vs-The Jayesh Steel Pvt. Ltd. in IT(SS)A No.49 & 50/Ahd/2017 for A.Y. 2008-09 & 2010-11 in which the search proceeding was conducted on 13.10.2011 and the assessee is also covered in the said search action. The relevant portion of the said judgment in deciding the issue is as follows:

> *7. This issue is no longer res integra. Upholding the stand of this Tribunal that during the post search assessment proceedings under section 153 A in respect of completed assessments "additions cannot be made other than on the basis of incriminating material found during search operations", Hon'ble jurisdictional High Court, in the case of PCIT Vs Saumya Constructions Pvt Ltd [(2016) 387 ITR 529 (Guj)] has observed as follows:*
>
> > *..........it is not the case of the appellant that any incriminating material in respect of the assessment year under consideration was found during the course of search. At the relevant time when the notice came to be issued under section 153A of the Act, the assessee filed its return of income. Much later, at the fag end of the period within which the order under section 153A of the Act was to be made, in other words, when the limit for framing the assessment as provided under section 153 was about to expire, the notice has been issued in the present case seeking to make the proposed addition of Rs.11,05,51,000/- on the basis of the material which was not found during the course of search, but on the basis of a statement of another person. In the opinion of this court, in a case like the present one,*

www.taxguru.in

> *where an assessment has been framed earlier and no assessment or reassessment was pending on the date of initiation of search under section 132 or making of requisition under section 132A, while computing the total income of the assessee under section 153A of the Act, additions or disallowances can be made only on the basis of the incriminating material found during the search or requisition.*

8. Once it is no in dispute that the additions in questions are not based on any incriminating material found during the search operation, as is the undisputed factual position in this case, the very foundation of the additions ceases to be sustainable in law. That is precisely what the learned CIT(A) has held.

9. In view of the above discussions, as also bearing in mind entirety of the case, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

Respectfully following the said judgment which dealt with the main search proceeding relating to assessee's case, we find no infirmity in the order impugned passed by the first appellate authority so far as to warrant interference. The question is accordingly answered in the affirmative, i.e. in favour of the assessee and against the revenue. Consequently, the appeals failed and accordingly dismissed.

5. In the result, revenue's appeal is dismissed.

This Order pronounced in Open Court on	**08/05/2019**

Sd/-	Sd
(PRAMOD KUMAR)	(Ms. MADHUMITA ROY)
VICE PRESIDENT	**JUDICIAL MEMBER**

Ahmedabad; Dated 08/05/2019

Priti Yadav, Sr.PS

www.taxguru.in

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-12, Ahmedabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad