

IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH 'A', KOLKATA
[BEFORE SHRI P.M. JAGTAP, VP (KZ) AND SHRI A.T. VARKEY, JM]

I.T.(SS)A. Nos. 97 & 98/Kol/2018

Assessment Year: 2010-11 & 2011-12

M/s. Sarva Priya Holdings Pvt. Ltd.....Appellant
104, 1st Floor, 27A, Waterloo Street,
Kolkata – 700 069.
[PAN : AADCS 7698 JJ]

DCIT Central Circle-4(3, KolkataRespondent
Kolkata.

Appearances by:

Shri Somnath Ghosh, FCA appearing on behalf of the Assessee.

Shri A.K. Nayak, CIT appearing on behalf of the Revenue.

Date of concluding the hearing : November 04, 2019

Date of pronouncing the order : November 29, 2019

ORDER

PER P.M. JAGTAP, VICE-PRESIDENT (KZ)

These two appeals filed by the assessee are directed against two separate orders passed by the Ld. CIT(Appeals) – 21, Kolkata both dated 27th July, 2018 for A.Y. 2010-11 & 2011-12 and since some of the issues raised therein are common, the same have been heard together and are being disposed of by a single consolidated order for the sake of convenience.

2. The assessee in the present case is a company which filed its return of income for the year under consideration originally on 01.10.2010 u/s 139 of the Act declaring a total income of Rs. 39,42,030/-. It belongs to Bhalotia Group. The said group is engaged in the business of manufacturing of sponge iron, infrastructure, jewellery and manufacturing and supply of medical furniture & equipment. A search u/s 132 was conducted in the cases belonging to Bhalotia Group including the case of the assessee on 01.12.2015. Pursuant to the search, a notice u/s 153A was issued by the AO in

response to which the return of income for the year under consideration was filed by the assessee on 16.02.2017 declaring the same total income of Rs. 39,42,030/- as was declared in the return originally filed u/s 139 of the Act. During the course of search, the bank account of the assessee was found showing receipt of share application money of Rs. 3,15,00,000/- during the year under consideration. In order to verify the genuineness of the said share application money, notices u/s 131 were issued by the AO to the concerned share applicants. The said notices, however, either remained unserved or uncomplied with. The assessee company, therefore, was called upon by the AO to offer its explanation in the matter. In reply, it was submitted by the assessee that the share applicants could not respond to the notices issued u/s 131 because of some inconvenience. It was also submitted by the assessee that all the transactions involving the receipt of share application money were routed through banking channels. In this regard, copies of bank statements of the share applicants were also furnished by the assessee for the verification of the AO. It was also submitted by the assessee that there was no incriminating material found during the course of search which could lead to believe that the transactions of share application money were not genuine.

3. The submissions made by the assessee were not found acceptable by the AO for the following reasons given in the assessment order:

i) Mere filing of documents that transactions were routed through banking channels would not suffice to prove the genuineness of the transactions. A transaction, prima facie, may appear/genuine. But one should have to understand the motive behind such transactions.

ii. *The assessee company had no business or income generation activity in the year under consideration as well as the preceding years.*

iii. *No answer has been given by the assessee to the question why the subscribers have paid money for the equities of a closely held company that had little income generation activity and that too at a premium of Rs. 90/- per share.*

iv) *The share subscribers have also failed to reply why they had invested in the equities of the assessee company at a high premium of Rs. 90 /- per share.*

v. *No prudent person would put his money at stake in the equities of a closely held company which had little business activity and from which he would get no return.*

vi) *In such cases, the agreement about real transactions takes place in secret and direct evidence about such direct transaction / agreement would not be available to the department in normal circumstances.*

vii) *The result of these transactions are designed in a way that unaccounted money or cash was brought in the books of the assessee company either in the form of equities or unsecured loan through multiple layers.*

viii) *Every single credit entry in tire bank accounts of the share subscribers is followed by a corresponding debit entry of equivalent amount on the very same day. The assessee has contended that this issue is irrelevant. But this issue is very much relevant. This issue coupled with the fact that all the shareholder companies had meagre income, clearly proves that these companies were merely used as fronts to route unaccounted money of the assessee in the garb of equities through multiple layers.*

ix. *Mere filing of copies of ITRs / bank statements / accounts of the subscribers would not absolve the assessee from the complicity of introducing unaccounted money in his books in the garb of equities.*

x. *The assessee was given reasonable and sufficient opportunities to produce all the shareholders, which he failed to do. The assessee had failed to explain the inconvenience in producing the share applicants for*

verification of genuineness of transactions and creditworthiness of the applicants

xi. It is true that when transactions are through cheques, it looks like real transactions- But one should look behind the transactions and find out motive behind transactions. Mere receipt of share application money through cheque does not render a transaction genuine.

xii. The assessee has not explained the reasons for non service of letters/summons to the shareholding companies which were despatched at their registered office. It shows that these companies only exist on paper and they have no business activity at all. It raises question mark over the genuineness of the transactions and creditworthiness of the shareholders.

xiii. The assessee was given a reasonable and fair opportunity to produce the shareholders, but he has failed to produce any of them citing inconvenience. The assessee has not explained what inconvenience it would have in producing the share applicants. The assessee has therefore, failed to prove the genuineness of the transaction and creditworthiness of the shareholders.

xiv) The share applicants/ share holders M/s. Stylish Tradelink Pvt. Ltd. and M/s. Sidhu Investment Pvt. Ltd. have been identified as shell companies by the Investigation Wing of the Department."

For the reasons given above, the AO treated the share application money of Rs. 3,15,00,000/- received by the assessee company during the year under consideration as unexplained cash credits and addition to that extent was made by him to the total income of the assessee u/s 68.

4. During the course of assessment proceedings, the AO found that the assessee company during the year under consideration had claimed dividend income of Rs. 17,90,211/- as exempt from tax, but disallowance u/s 14A on account of expenses incurred in relation to the said exempt income was offered by the assessee company only to

the extent of Rs. 1,41,111/-. He worked out such expenses by applying Rule 8D at Rs. 2,15,941/- and made a further disallowance of Rs. 74,830/-. Accordingly, the total income of the assessee for the year under consideration was worked out by the AO at Rs. 3,55,16,860/- as against the total income of Rs. 39,42,031/- as offered by the assessee in the return of income originally filed u/s 139 on 01.10.2010.

5. The assessment for A.Y. 2011-12 was also completed by the AO u/s 153A / 143(3) of the Act vide an order dated 31.12.2017, pursuant to the search operation, wherein the addition of Rs. 2,12,571/- was made by the AO on account of disallowance u/s 14A by applying Rule 8D.

6. Against the orders passed by the AO u/s 153A / 143(3) for both the years under consideration, appeals were preferred by the assessee before the Ld. CIT(A) and since the submissions made on behalf of the assessee company during the course of appellate proceedings before him in support of its case were not found acceptable by the Ld. CIT(A), he proceeded to confirm the additions made by the AO to the total income of the assessee and dismissed the appeals of the assessee for both the years under consideration. Aggrieved by the orders of the Ld. CIT(A), the assessee has preferred these appeals before the Tribunal.

7. The additions made by the AO u/s 153A of the Act for both the years under consideration in case of the unabated assessments are challenged by the assessee mainly on the ground that the same having been made without any incriminating material found during the

course of search are not sustainable. In this regard, the learned counsel for the assessee submitted that the returns of income for both the years under consideration were regularly filed by the assessee u/s 139 on 01.10.2010 and 22.09.2011 and since no notice u/s 143(2) was issued by the AO within the prescribed time limit, the assessments for both the years consideration had become final before the date of search i.e 01.12.2015. He contended that the scope of unabated assessments for the years under consideration u/s 153A of the Act thus was confined to assessment of undisclosed income of the assessee as detected on the basis of incriminating material found during the course of search and since there was no incriminating material found during the course of search which could form the basis of the addition of Rs. 3.15 crores made by the AO by treating the share application money as unexplained cash credit u/s 68 for A.Y. 2010-11 as well as the disallowance made u/s 14A read with Rule 8D for A.Y. 2010-11 & 2011-12, the same are not sustainable. In support of this contention, he relied inter alia on the decision of the Hon'ble Delhi Court in the case of PCIT vs Kurele Paper Mills Pvt. Ltd. 380 ITR 521 as well as the decision of Hon'ble Kolkata High Court in the case of PCIT vs Salasar Stock Broking Ltd. (ITAT Bo. 264 of 2016 dated 25.08.2016.

8. The learned DR, on the other hand, contended that the bank account found during the course of search revealed receipt of share application money by the assessee during the course of previous year relevant to A.Y. 2010-11 and since the addition by treating the share application money as unexplained cash credit u/s 68 was made by the AO on the basis of the said bank account found during the course of

search, the same is within the scope of assessment made u/s 153A. He contended that the assessee could not establish the identity and capacity of the concerned share applicants and also failed to establish the genuineness of the relevant transactions inspite of sufficient opportunity afforded by the Assessing Officer in this regard. He contended that the primary onus that lay on the assessee, thus was not discharged and the addition made by the Assessing Officer by treating the share application money as unexplained cash credit u/s 68 was rightly confirmed by the Ld. CIT(A). He also relied on the decision of Hon'ble Kerela High Court in the case of E.N. Gopakumar vs CIT 390 ITR 131 as well as in the case of St. Francis Clay Decor Tiles 385 ITR 624 to contend that the addition to the total income of the assessee can be made in the assessments u/s 153A even without their being any incriminating material found during the course of search.

9. In the rejoinder, the learned counsel for the assessee submitted that the bank account found during the course of search was duly disclosed in the books of account of the assessee and even the share application money reflected in the said account was duly shown by the assessee in the balance sheet filed along with the regular return of income. He contended that the said bank account therefore did not constitute any incriminating material and in the absence of any other incriminating material found during the course of search, the additions made by the AO and confirmed by the Ld. CIT(A) by treating the share application money as unexplained cash credit u/s 68 as well as by way of disallowance u/s 14A read with Rule 8D are not sustainable.

10. We have considered the rival submissions and also perused the relevant material available on record. The main contention raised by the learned counsel for the assessee is that when the assessments originally completed for both the years under consideration had become final before the date of search, there was no abatement of the said assessments and the scope of assessments u/s 153A of the Act made in pursuance of the search was limited to assessing the undisclosed income of the assessee as found / detected on the basis of incriminating material found during the course of search. This contention raised by the learned counsel for the assessee is duly supported by the decision of Delhi High Court in the case of Kurele Paper Mills Pvt. Ltd. (supra) wherein no incriminating evidence related to share capital issue was found during the course of search and keeping in view the same, the addition made by the Assessing Officer by treating the share capital as unexplained cash credit u/s 68 was held to be unsustainable by the Hon'ble Delhi High Court. Even the decision of the Hon'ble Kolkata High Court in the case of Salasar Stock Broking Ltd. (supra) supports the contention of the learned counsel for the assessee, wherein it was held by this Lordships that incriminating material is prerequisite before power could have been exercised u/s 153A of the Act and the Assessing Officer had no jurisdiction u/s 153A to reopen the concluded cases when the search and seizure did not disclose any incriminating material.

11. In support of the Revenue's case, the ld. DR has relied on the decision of Hon'ble Kerala High Court in the case of CIT vs St. Francis Clay Decor Tiles (supra) to contend that addition in the assessment

u/s 153A of the Act completed in pursuance of search conducted u/s 132 can be made even without any incriminating material found during the course of search. A perusal of the judgment delivered by the Hon'ble Kerala High Court in the said case however shows that the limited issue was decided by their lordships to the effect that once search is initiated u/s 132 of the Act, the Assessing Officer is empowered to issue notice to such person requiring him to furnish the returns of income in respect of each assessment year, following within six assessment years as referred to in clause (b) and then the assessee has to furnish all the details with respect to each assessment year even if no documents are unearthed or any statement made by the assessee during the course of search u/s 132. Another decision of Hon'ble Kerala High Court in the case of E.N. Gopakumar vs CIT relied upon by the Id. DR no doubt is in favour of the revenue on this issue wherein it was held that the assessment proceeding generated by the issuance of a notice u/s 153A can be concluded against the interest of the assessee including making additions even without any incriminating material being available against the assessee in the search u/s 132. However, issue of the scope of section 153A in case of unabated assessment as involved in the present case was not specifically considered by the Hon'ble Kerala High Court in the said case. Moreover, the judicial pronouncements including the decision of Hon'ble Jurisdictional High Court cited by the Id. Counsel for the assessee are in favour of the assessee on this issue and we are bound to follow the same.

12. It is observed that the addition of Rs. 3.15 by treating the share application money as unexplained cash credit u/s 68 was made in the

present case by the AO in the assessment completed u/s 153A of the Act for A.Y. 2010-11 on the basis of bank account found during the course of search and since the said bank account as well as transactions reflected therein were duly disclosed by the assessee company in its return of income originally filed for A.Y. 2010-11, we find ourselves in agreement with the contention of the Id. Counsel for the assessee that the same cannot be treated as incriminating material found during the course of search. The addition of Rs. 3.15 crores made by the Assessing Officer u/s 68 and confirmed by the Id. CIT(A) thus was not based on any incriminating material found during the course of search and the same, in our opinion, is not sustainable being outside the scope of section 153A of the Act. Similarly, the disallowance made by the AO and confirmed by the Id. CIT(A) u/s 14A read with Rule 8D in both the years under consideration is also not sustainable as the same is not based on any incriminating material found during the course of search. We, therefore, delete the said additions made in both the years under consideration and allow these appeals of the assessee.

13. In the result, the appeals of the assessee are allowed.

Order Pronounced in the Open Court on 29th November, 2019.

Sd/-

(A.T. Varkey)
JUDICIAL MEMBER

Sd/-

(P.M. Jagtap)
VICE PRESIDENT

Dated: 29/11/2019

Biswajit, Sr. PS

Copy of order forwarded to:

1. M/s. Sarva Priya Holdings Pvt. Ltd., 104, 1st Floor, 27A, Waterloo Street, Kolkata – 700 069.
2. DCIT, Central Circle-4(3), Kolkata.
3. The CIT(A)
4. The CIT
5. DR

True Copy,

By order,

Assistant Registrar/H.O.O.
ITAT, Kolkata