

आयकर अपीलीयअधिकरण, विशाखापटणम पीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री दुव्वूरु आर एल रेड्डी, न्यायिक सदस्य एवं श्री एस बालाकृष्णन, लेखा सदस्य के समक्ष

BEFORE SHRI DUVVURU RL REDDY, HON'BLE JUDICIAL MEMBER &
SHRI S BALAKRISHNAN, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./ I.T.A. No.88/Viz/2020

(निर्धारण वर्ष / Assessment Year :2013-14)

ATR Warehousing Private Limited, Vs.
D.No. 11-8-34,
Daspalla Hills,
Visakhapatnam.

PAN: AADCA 2121 Q

(अपीलार्थी/ Appellant)

अपीलार्थी की ओर से/ Appellant by

प्रत्यार्थी की ओर से / Respondent by

सुनवाई की तारीख / Date of Hearing

घोषणा की तारीख/Date of
Pronouncement

DCIT,
Central Circle-2,
Visakhapatnam.

(प्रत्यर्थी/ Respondent)

Sri GVN Hari, Advocate

Sri MN Murthy Naik, CIT-DR

17/10/2022

21/12/2022

ORDER

PER BENCH :

This appeal filed by the assessee against the order of the Ld.
Commissioner of Income Tax (Appeals), Visakhapatnam [CIT (A)-3]
in Appeal No. 211/2017-18/CIT(A)-3/VSP/2019-20, dated

31/10/2019 arising out of the order passed U/s. 143(3) r.w.s 153A of the Income Tax Act, 1961 [the Act] for the AY 2013-14.

2. Brief facts of the case are that the assessee is a company in the name and style of M/s. ATR Ware Housing Pvt. Ltd., Visakhapatnam is deriving income from business and capital gains, filed its return of income for the AY 2013-14 on 31/10/2016 declaring a total income of Rs. 1,97,91,850/-. The main source of business income is license fee collected from the tenants for the ware housing godowns at various places viz., Visakhapatnam, Kakinada and Hyderabad. Sri AT Rayudu and Sri A. Avnash are the Directors of the assessee-company who hold 45% each of the shareholding in the company. The case was selected for scrutiny under CASS and a notice U/s. 143(2) was issued on 15/09/2014 but the assessment got abated as search and seizure operations u/s. 132 of the Act were conducted on 14/10/2015 and in the cases of AT Rayudu, Sri A. Avnash, Smt. A. Ammaji and Smt. Harshitha. In the course of said proceedings several documents and loose sheets were found and seized. Accordingly, notice U/s. 153A was issued to the appellant on 18/07/2016 and served on the assessee. In response

to the said notice the assessee stated that the return of income filed U/s. 139 on 31/10/2013 may be treated as the return filed in response to the notice U/s. 153A. Subsequently a notice U/s. 143(2) was issued on 19/06/2017. In response to the said notice, the assessee's representative appeared and furnished the copy of the computation of total income. Thereafter, a notice U/s. 142(1) and a questionnaire was issued to the assessee and its Authorized Representative to appear before the Ld. AO and the assessee was asked to submit some basic information i.e., audit reports, financial statements, TDS made details, bank account statements, copy of WT return filed etc., and the assessee's Representative furnished the information called for. Thereafter, another notice U/s. 142(1) was issued called for further details like books of account, bills & Vouchers, details of share holders, breakup of certain items in the P & L Account, balance sheet, confirmation letters in respect of unsecured loans, and applicability of section 14A, ledger extracts of expenditure above Rs. 5 lakhs, sundry creditors and a detailed note on the transactions with group concerns on the basis of material found and seized in the coursed of search and seizure operations conducted at the business premises of the applicant and residential

premise of the Directors etc and the assessee was asked to furnish the information by 30/08/2017. After considering the submissions of the assessee as well as the material available before the Ld. AO, the Ld. AO rejected the claim of unsecured loans borrowed by the assessee amounting to Rs. 16,08,00,000/- and consequently disallowed the claim of interest of Rs. 32,56,608/- relating to such unexplained cash credits. Ld.AO also made addition of Rs. 75,05,08,016/- being the excess amount collected for 1,93,655 shares and taxed as income from other sources U/s. 56(2)(viib) of the Act. Further, an amount of Rs. 8,66,489/- was added by the Ld. AO to the total income of the assessee by invoking the provisions of section 14A of the Act as the said amount was incurred towards earning dividend income. The Ld. AO made another addition of Rs. 1,33,58,461/- U/s. 40(a)(ia) of the Act which was incurred towards payment of interest on loans borrowed from APFSC and no tax at source was deducted U/s. 194A of the Act. An addition of Rs. 44,06,653/- was added by the Ld. AO invoking the provisions of section 2(22)(e) of the Act as deemed income and liable to tax as income from other sources. Ld. AO also made addition of Rs. 2,13,211/- u/s. 36(1)(iii) being expenditure incurred towards

interest on loans borrowed from banks on the ground that the said loans were not used for the purpose of business. The Ld. AO made another addition of Rs. 1,19,23,200/- by treating the shares for a sum less than fair market value U/s. 56(2)(vii) of the Act. On being aggrieved by the additions made by the Ld. AO, against the order of the Ld. AO, the assessee went on appeal before the Ld. CIT (A). On appeal, the Ld. CIT(A), after considering the submissions of the assessee as well as discussing the issues at length, partly allowed the appeal of the assessee. On being aggrieved by the decision of the Ld. CIT(A), the assessee is in appeal before the Tribunal by raising the following Grounds of Appeal:

"The order of the Ld. CIT(A)-3, Visakhapatnam is bad and unsustainable in the eyes of law as the same is passed without proper application of mind as it is also contrary to the spirit and provisions of the Income Tax Act, 1961.

- 1. That having regard to the facts and circumstances of the case, the present assessment pursuant to section 153A is not justified as the search conducted on the appellant was based on illegal search warrant.*
- 2. That having regard to the facts and circumstances of the case, the present assessment is not justified as no incriminating material was found in the course of search.*
- 3. That having regard to the facts and circumstances of the case, the Ld. AO has erred in passing the impugned assessment order which was passed pursuant to a notice issued u/s. 153A which itself was perverse in law.*
- 4. The Ld. CIT(A) has erred in law and on facts by treating the sum of Rs. 25,93,067/- as unexplained expenditure for the mere reason that the same was not recorded in the books of accounts.*
- 5. The Ld. CIT(A) has erred in law and on facts by holding that the appellant had received shares for a sum less than the FMV and accordingly, adding the differential amount of Rs. 1,19,23,200/- to the*

income returned as income from other sources u/s. 56(2)(viiia) of the Act."

3. At the outset, the Ld. Authorized Representative [Ld. AR] submitted that Grounds No. 1, 2 & 3 raised by the assessee are not pressed. Therefore, these grounds are dismissed as not pressed.

4. With respect to Ground No.4, Ld. AR argued that the Ld. CIT(A) has disallowed a sum of Rs. 25,93,067/- being the payment of interest in cash which has not been recorded in the books of accounts as unexplained expenditure in the hands of the assessee. The Ld. AR submitted that this enhancement of the assessment by the Ld. CIT (A) was made without providing any proper opportunity to the assessee and hence it is bad in law.

5. Per contra, the Ld. DR supported the order of the Ld. CIT(A).

6. We have heard both the sides and perused the material available before us as well as the orders of the Ld. Revenue Authorities. We find merit in the argument of the Ld. AR that when there is an enhancement to the assessment made by the Ld. AO, an opportunity of being heard to the assessee shall be provided to the assessee. However, in this case, we find that no

such opportunity was provided to the assessee. Therefore, following the principles of natural justice, we are of the considered view that the assessee shall be provided a reasonable opportunity with respect to enhancement of disallowance of interest of Rs. 25,93,067/-. Accordingly, in order to provide a reasonable opportunity, we remit the issue back to the Ld. CIT(A) for deciding the issue afresh after affording a reasonable opportunity of being heard to the assessee. Thus, Ground No.4 raised by the assessee is allowed for statistical purposes.

7. With respect to Ground No.5, the Ld. AR argued that the Ld. CIT(A) confirmed the addition made by the Ld. AO with respect to allotment of shares by M/s. Usha Tubes and Pipes Ltd [UTPL] to the assessee company by invoking the provisions of section 56(2)(vii) of the Act. The Ld. AR pleaded that the assessee being a holder of 3,10,000 equity shares in M/s. UTPL out of 3,11,000 equity shares it constitutes 99.68% of the equity shares. The Ld. AR therefore pleaded that the assessee being a holding company of M/s. UTPL and hence the shares were allotted at par value. The Ld. AR relied on the decision of the Chennai Bench of the Tribunal in the case of Vaani Estates (P.) Ltd. v. ITO (2018) reported in 70 ITR 643 and also on the decision of the Karnataka High

Court in the case of PCIT v. Dr. Ranjan Pai (2021) reported in 431 ITR 250. The Ld. AR further pleaded that the Ld. AO has not considered the relationship between the assessee company and M/s. UTPL which is a holding and subsidiary company relationship.

Per contra, the Ld. DR relied on the decision of the Ld. Revenue Authorities and supported their orders.

8. We have heard both the sides and perused the material available on record and the orders of the Ld. Revenue Authorities. As per section 56(2)(viiia) of the Act, if any company in which the public are not substantially interested receives in any previous year from any person or persons any property being shares of a company for a consideration which is less than aggregate fair market value of the property by an amount exceeding Rs. 50,000/- of the aggregating fair market value of such property as exceeding such consideration shall be chargeable to tax under the head income from other sources. The procedure for computation of fair market value is prescribed under Rule 11U and 11UA of the IT Rules, 1962. However, in the instant case it is established that the assessee is holding 99.68%

of the equity shares in the subsidiary company viz., M/s. UTPL. The assessee company being the holding company fully controls the management and affairs of M/s. UTPL. It is also noted that the entire assets and liabilities of the subsidiary company also belong to the assessee company as being a major shareholder and also the holding company. Considering the relationship between the assessee company and M/s. UTPL the allotment of the further equity shares in M/s. UTPL (subsidiary company) to the assessee company (holding company) does not alter neither the share holding pattern nor the ownership of the assets by the holding company. Further, section 56(2)(viiia) is being introduced as an anti-abuse measure pursuant to abolition of Gift Tax Act. In the instant case, the assessee has made payments towards share application money in the earlier years to the subsidiary company which was not disputed by the Ld. Revenue Authorities. It was also submitted that only the allotment was made during the impugned assessment year at face value based on the share application money already made by the assessee company being the holding company. It is noted that the share application money, share capital and reserves and surplus are ownership funds and belong to the share holders. Merely by converting the share application money by allotting shares at a subsequent date

cannot attract the provisions of section 56(2)(viiia) of the Act as there is no change in the shareholding pattern subsequent to the allotment of shares by the subsidiary company. Therefore, as per the above discussion, we are of the considered view that the provisions of section 56(2)(viiia) cannot be invoked in the instant case considering the peculiar circumstances and hence we delete the addition made by the Ld. Revenue Authorities.

9. In the result, appeal of the assessee is partly allowed.

Pronounced in the open Court on the 21st December, 2022.

Sd/-

(दुव्वूरु आर.एल रेड्डी)

(DUVVURU RL REDDY)

न्यायिकसदस्य/JUDICIAL MEMBER

Sd/-

(एस बालाकृष्णन)

(S.BALAKRISHNAN)

लेखा सदस्य/ACCOUNTANT MEMBER

Dated : 21.12.2022

OKK - SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee – ATR Warehousing Private Limited, D.No. 11-8-34, Daspalla Hills, Visakhapatnam, Andhra Pradesh – 530003.
2. राजस्व/The Revenue – DCIT, Central Circle-2, MVP Colony, Sector-8, Pratyakshakar Bhavan, Beside Post Office, Visakhapatnam, Andhra Pradesh – 530017.
3. The Principal Commissioner of Income Tax (Central), Visakhapatnam.
4. आयकर आयुक्त (अपील)/ The Commissioner of Income Tax (Appeals)-3, Visakhapatnam.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/ DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, Visakhapatnam