

WWW.LEGALERAONLINE.COM

IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND

SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA no.5165/Mum./2018
(Assessment Year : 2008-09)

ITA no.5166/Mum./2018
(Assessment Year : 2009-10)

ITA no.5167/Mum./2018
(Assessment Year : 2011-12)

Shri Dinesh Salecha
4th Floor, 4-D, Vijay Chambers
Opp. Dreamland Cinema
Tribhuvan Road, Mumbai 400 004
PAN - AAOPS2280C

..... Appellant

v/s

Dy. Commissioner of Income Tax
Central Circle-8(3), Mumbai

..... Respondent

Assessee by : Shri Shashi Tulsian

Revenue by : Dr. Deepkant Prasad

Date of Hearing - 29.10.2020

Date of Order - 01.01.2021

ORDER

PER SHAMIM YAHYA, A.M.

These are appeals by the assessee, against the common order dated 31st July 2018, passed by the learned CIT(A) for the concerned assessment years as above.

2. The grounds of appeal are common except for the amounts. For the sake of reference we are referring to grounds of appeal for assessment year 2008-09 which reads as under:-

"1. The learned Assessing officer and CIT (A) 50 erred in making addition under section 68 of Rs 25,00,000/- being loan from Simran Gems without appreciating the fact that the said loan was shown in the balance sheet of the assessee and that there was no incriminating material found in the course of search and therefore as per the principal laid down by Honourable Bombay High court in the case of Continental Warehousing Corporation (Nahava Seva)LTD. And All Cargo Global Logestic LTD. (2015) 374 ITR 645 and reaffirmed in the recent judgment CIT-20 vs Deepak Kumar Agarwal ITA NO, 1709 of 2014 dated 11th September 2017 no addition could be made for items for which there is not incriminating material.

2. The learned Assessing officer and the CIT(A)-50 erred in not providing the statement of Gyanchand B. Jain Proprietor of Simran Gems under section 132(4) though the same was sort both at the assessment and appeal stage in violation of grounds of natural justice.

3. The learned Assessing officer and CIT(A)-50 erred in not providing the assessee an opportunity to cross examine the party who had given evidence against the assessee in violation of grounds of natural Justice

4. On the facts and circumstances of the Appellant's case and in law the learned assessing officer and CIT(A) -50 erred in making addition u/s 68 of the Income Tax Act 1961 amounting to Rs 25,00,000/- on account of alleged unexplained cash credit on the basis of surmises and conjectures.

5. On the facts and circumstances of the appellant's case and in law the learned assessing officer and CIT(A) erred in making addition u/s 68 of the Income Tax Act 1961 amounting to Rs 60,000/- on account of Commission paid for arrangement of above mentioned cash credit without any evidence based on surmises and conjectures.

6. The learned Assessing Officer and CIT(A) erred in levying interest under section 234B of `959757 without considering the fact that the said interest was not leviabale as per the judgment of Datamatics Ltd v/s Assistant Commissioner of Income 2008 110 ITD 24 Mum, 2008 299 ITR 286 Mum, [2007] 111 TTJ Mum. 55."

3. Brief facts of the case are, the assessee is an individual and filed her return of income for the assessment year 2008-09 on 31st July 2008, declaring total income of ` 3,90,830. There was a search and seizure action carried out against the RSBL group under section 132 of the Act on 11th June 2013, and the assessee was also covered. The notice under section 153A of the Act was issued. The assessment under section 143(3) r/w section 154A of the Act was completed in the case of all the years on 28th March 2016, on an income of ` 29,50,830 (A.Y. 2008-09), ` 45,76,360 (A.Y. 2009-10) and ` 30,16,628 (A.Y. 2011-12). In the assessment, addition was made under section 68 for loans taken from the following parties:-

<i>Sr. no.</i>	<i>Assessment Year</i>	<i>Name of the Lender</i>	<i>Amount</i>
1.	2008-09	Simran Gems	` 25,00,000
2.	2009-10	Krishna Diam	` 20,00,000
3.	2009-10	Simran Gems	` 20,00,000
4.	2011-12	Khushi Gems Pvt. Ltd.	` 21,38,178

4. The assessing officer in his assessment order elaborately referred to the Departmental search and seizure and survey action at various places. He referred to the statements obtained under survey from various parties said to be entry operators. He elaborately referred to the general discussion of the modus operandi. he elaborately quoted

from the survey statements. He referred to Catena of case laws and finally concluded as under:-

"28. The various accommodation entry providers in their statement u/s. 13 1(IA) dated 10.10.2013 had admitted that no actual business activity was carried out and only accommodation entries were provided by the assessee. Statements of Directors / Proprietors of various concerns were recorded on different dates as discussed above and they had categorically admitted that no actual business transactions were carried out by them and they had provided only accommodation entries. At the time of search, no evidence of any actual business activity was found. All the persons responsible for control of above concerns could not reply to even basic questions which a person engaged in the business of diamond is suppose to know and also could not produce basic documents which a person engaged in the business of diamond has to keep. Statement given by Shri Rakesh Kothari before Enforcement Directorate is another evidence to prove that these persons had given only accommodation loan entries. Hence, retraction made by the accommodation entry providers is an afterthought and without any corroborative evidence and contrary to the evidences gathered as discussed above and hence the retraction filed by them is rejected hereby.

29. The above discussion establish beyond doubt that the assessee company had taken accommodation loan entry from various entry providers. Hence, the loans shown by the assessee in its books of account on account of loans taken from various accommodation entry providers arc added u/s.68 of the Income Tax Act, 1961 The assessee had taken following loans from accommodation entry providers:-

Sr. no.	A.Y.	Name of the Lender	Amount
1.	2008-09	Simran Gems	` 25,00,000
A.Y. 2008-09			` 25,00,000
2.	2009-10	Simran Gems	` 20,00,000
3.	2009-10	Krishna Diam	` 20,00,000
4.	2011-12	Khushi Gems Pvt. Ltd.	` 21,38,178
A.Y. 2011-12			` 21,38,178

Hence, addition of ` 25,00,000 is made to the total income of the assessee u/s 68 of the Income Tax Act, 1961. Penalty proceedings is initiated u/s 271(1)(c) of the Income Tax Act for furnishing inaccurate particulars of income.

The assessee has to pay commission to arrange for such accommodation entries. Rate of commission is taken @ 2.4% which the assessee paid for arranging accommodation entries. Hence, the amount of commission paid comes to ` 60,000 which is added back to the total income of the assessee. Penalty proceedings initiated u/s 271(1)(c) of the Act for furnishing inaccurate particulars of income.

30. From the various documents held as well as details filed by the assessee, total income of the assessee is computed as under:—

Income as per return of income	` 3,90,830
Add: u/s 68 as discussed above	` 25,00,000
Add: Commission paid on accommodation entries	` 60,000
Total assessed income	` 29,50,830

5. Against the order assessee appealed before the learned CIT(A). Assessee also filed additional ground challenging the jurisdiction of assessment under section 153A dehorse reference to any search material.

6. The additional ground noted by the learned CIT(A) read as under:—

"The learned Assessing officer erred in making addition under section 68 of Rs. 40,00,000 being loan from Simram Gems and Krishna Diam without appreciating the fact that the said loans were shown in the balance sheet of the assessee and that there was no incriminating material found in the course of search and therefore as per the principal laid down by Honourable Bombay

High court in the case of Continental Warehousing Corporation (NahavaSeva) LTD. And All Cargo Global Logistic LTD. (2015) 374 ITR 645 and reaffirmed in the recent judgment CIT-20 vs Dee pak Kumar Agarwal fIA NO, 1709 of 2014 dated 11 September 2017 no addition could be made for items for which there is not incriminating material."

7. In his appellate order learned CIT(A) once again elaborately referred to the modus operandi of the various persons said to be entry operators. He elaborately referred to the statements obtained upon survey of various parties. He also referred to as Catena of case laws. He upheld the addition under section 68 by observing that the financials of the lenders were not sufficient. However he did not address the assessee's challenge to jurisdiction of assessment under section 153A was without reference to search material nor he dealt with the Hon'ble Bombay High Court decision referred by the assessee in this regard.

8. Against the above order assessee is in appeal before us. We have heard both the parties and perused the records. Learned counsel of the assessee at the outset reiterated his challenge that the addition and the consequent assessment under section 153A are not sustainable as the addition is without reference to any material foundering search. He submitted that all these assessments are unabated in as much as earlier assessment was completed under section 143(1) and there was no further time remaining to complete the assessment under section 143(3). In this regard he referred to

several decisions from Hon'ble Bombay High Court which were also referred before the CIT(A). Learned counsel of the assessee reiterated that the addition has been made solely on the basis of statements obtained upon survey from various parties which have also been retracted. That assessee has provided all the necessary documentary evidences. That the parties whose statement have been relied upon duly retracted. That no opportunity was given to the assessee to cross-examine the parties on the statement of which the addition has been made.

9. Per contra, learned departmental representative relied upon the orders of the authorities below. He submitted that the addition has been made on the basis of various statements upon survey and search obtained from various parties. He elaborately relied upon the orders of the learned CIT(A). Learned departmental representative referred to the assessing officer's order for the following reference: –

"16. Hence, the assessee was issued show cause dated 19.02.2016 which is reproduced as under:–

2. During the course of the search action at the premises at 257 .Bapty Road, Kamthipura in the group case of MIs Riddhi Siddhi Bullions Ltd./Rakesh Kothari certain diaries were found and seized which were marked as annexures A-6 to All. These diaries were written by Shri Rakesh Kothari and contain cash transactions with various parties. It is found that your name appear in the diaries. Copies of the relevant pages where your name appears are enclosed herewith for your ready reference. You are required to furnish your explanation with relevant evidences as to how these cash transactions are entered in your books of

accounts.

2. It is noticed from the details filed that you have shown to have taken unsecured loans from the following parties during the assessment years mentioned below:-

<i>Sr. no.</i>	<i>Assessment Year</i>	<i>Name of the Lender</i>	<i>Amount</i>
1.	2008-09	Simran Gems	Rs.25,00,000
2.	2008-09	Krishna Diam	
2.	2009-10	Simran Gems	Rs.20,00,000
3.	2009-10	Krishna Diam	Rs.20,00,000
4.	2011-12	Khushi Gems Pvt. Ltd.	Rs.21,38,178
6.	2012-13	Kushi Gems Pvt. Ltd.	Rs.21,18,060

10. Referring to the above learned departmental representative submitted that the addition is duly based upon material obtained from search.

11. In the rejoinder learned counsel of the assessee submitted that this reference to search material relates to some other assessee. Moreover he submitted that this observation of the assessing officer itself refers to cash transactions. He submitted that this is not at all the material on which the addition is made. He submitted that the addition is on the basis of loans which are recorded in the regular books of accounts of the assessee. Hence he submitted that addition on the basis of regular books of accounts without reference to any

search material is not sustainable under section 153A on the touchstone of various decisions referred above.

12. Upon careful consideration we find that addition in the present case has been made under section 153A on the basis of statements of various parties obtained under survey and search. The addition of unsecured loan has been made on the basis of entries in the regular books of accounts duly reflected in the assessee's financial accounts. There is no reference to material found in search with reference to the addition made. It is also undisputed that these assessments are unabated. The law for assessment under section 153A in case of unabated assessment has been duly laid down by the Hon'ble Bombay High Court in the case of continental warehousing as under:—

"On a plain reading of section 153A, it becomes clear that on initiation of the proceedings under section 153A, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under section 132 or making requisition under I section 132/4 stand abated and not the assessments / reassessments already finalised for those assessment years covered under section 153A. By a Circular No. 8 of 2003, dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment / reassessment shall not abate. It is only because, the finalised assessments / reassessments do not abate, the appeal revision or rectification pending against finalised assessment / reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under section 153A, the assessments / reassessments finalised for the assessment years covered under section 153A stand abated cannot be accepted. Similarly on annulment of assessment made under section 153A(1) what stands revived is the pending assessment

/ reassessment proceedings which stood abated as per section 153A(1)."

"Once it is held that the assessment has attained finality, then the Assessing Officer while passing the independent assessment order under section 153A read with section 143(3) could not have disturbed the assessment / reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under section 153A establish that the reliefs granted under the finalised assessment / reassessment were contrary to the facts unearthed during the course of 153A proceedings. If there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings, the Assessing Officer while passing order under section 153A read with section 143(3) cannot disturb the assessment order."

13. A reading of the above makes it clear that it was expounded that in case of assessments which have attained finality no addition under section 153A can be done without seized incrementing material. We are aware that in these cases earlier assessments were not done u/s 143(3). In our considered opinion, the Hon'ble Jurisdictional High Court has never mentioned that it is only assessment which has been completed under section 143(3) that addition under section 153A cannot be done without reference to incriminating seized material. Hon'ble Jurisdictional High Court has clearly mentioned that it is those assessments which are unabated, that is not pending, to which the above said ratio will apply. Assessments which are not pending are not only those which have been completed under section 143(3) but also those for which the time for issuing notice under section 143(2) have already elapsed.

In other words the reference is to those assessments in whose case assessment under section 143(3) cannot now be done. It is not at all the case of the revenue that in the appeals which have been claimed as unabated here there was time for assessment under section 143(3). In this view of the matter, in our considered opinion, the submission of the learned counsel of the assessee succeeds that addition in the case of unabated assessment without reference to incriminating seized material for assessment u/s.153A is not sustainable on the touchstone of above said Hon'ble Jurisdictional High Court decision.

14. It may not be out of place here to mention that it is specifically provided in section 153A *"that assessment or reassessment if any relating to any relevant assessment year or years referred to in this subsection pending on the date of initiation of search under section 132 or making of requisition under section 132 a as the case may be shall abate"*. This makes it further abundantly clear that only those assessments which are pending abate. Hence sanguine provisions of the act read with Hon'ble Jurisdictional High Court decision as above make it abundantly clear that the assessments which do not abate and assessment and addition under section 153A without reference to incriminating seized material is not sustainable.

15. The jurisprudence regarding jurisdictional defect in assessment under section 153A /153C without reference to incriminating seized material has also been expounded by Hon'ble Supreme Court in the case of CIT v/s Singhad technical education Society in Civil Appeal No.11080 of 2017 and others. In this regard the Hon'ble Supreme Court in paragraph 18 of the said order observed that:-

"In this behalf it was noted by the ITAT that as per provisions of section 153C of the act,, incriminating material which was seized had to pertain to assessment years in question and it is an undisputed fact that the documents which were seized did not establish any correlation, document -wise, with these for assessment years since this requirement under section 153C of the act is essential for assessment under the provision it becomes a jurisdictional defect. We find this reasoning to be logical and valid having regard to the provisions of section 153C of the Act."

16. In the background of aforesaid discussion and precedents, the addition made in these assessment orders passed by the assessing officer under section 153A without reference to any incriminating material found search is not sustainable. Hence we set aside the orders of authorities below and direct that the additions made are not sustainable due to the jurisdictional defect. Since we have already held that addition of loan itself is not sustainable the addition of commission is also directed to be deleted as the same is also without reference to any material foundering search.

17. As we have already directed that these additions are not sustainable due to jurisdictional defect in as much as they are without

reference to any incriminating material found upon search, the adjudication on the merits of the addition is only of academic interest. Hence we are not engaging into the same.

18. Our above adjudication applies mutatis mutandis to all the appeals under adjudication here.

19. In the result appeals by the assessee stand partly allowed.

Order pronounced through notice board under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1963, on 01.01.2021

Sd/-
RAM LAL NEGI
JUDICIAL MEMBER

Sd/-
SHAMIM YAHYA
ACCOUNTANT MEMBER

MUMBAI, DATED: 01.01.2021

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

By Order

Assistant Registrar
ITAT, Mumbai