

IN THE INCOME TAX APPELLATE TRIBUNAL

“F” BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER

AND SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

आयकर अपील सं/I.T.A. No. 540/Mum/2021

(निर्धारणवर्ष/Assessment Year: 2012-13)

Deputy Commissioner of Income Tax, CC-7(4), Mumbai Room No. 658, Aaykar Bhavan, M.K. Road, Mumbai - 400020	बिधम/ Vs.	Shri Vipul Suresh Kumar Modi, Row House No. 8, Gokuldharm, Goregaon (E), Mumbai - 400063 PAN : AACPM1532H
(अपीलाधी / Appellant)	..	(प्रत्यधी) / Respondent)

Revenue by:	Ms. Vinita Shah (AR)
Assessee by:	Shri Achal Sharma (CIT DR)

सुनवाईकी तारीख / Date of Hearing : 02.02.2022

घोषणा की तारीख /Date of Pronouncement : 17.02.2022

आदेश/ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant/Department has challenged the order dated 10.02.2021 passed by the Commissioner of Income Tax (Appeals)-49, Mumbai [CIT (A)] under Section 250 of the Income Tax Act, 1961 [Act] in appeal[CIT(A)-49,Mumbai/10205/2019-20] for the Assessment Year 2012-13, whereby the Ld. CIT(A) had allowed the appeal filed by the Assessee against the Assessment Order dated 11.12.2019, passed under section 143(3) read with section 153A of the Act.
2. The Revenue has raised the following grounds of appeal:-

“1. On the facts and the circumstances of the case, Ld. CIT(A) erred in deleting the addition of Rs. 47,63,825/- made by the AO

account of unexplained investment made in the a penny stock company M/s Global Capital Market Limited.

2. "On the facts and the circumstances of the case, Ld. CIT(A) erred in not appreciating the fact that the sale consideration of Rs. 47,63,825/- derived from the sales of shares of company M/s Global Capital market Limited are bogus and the exemption claimed on such LTCG should not be allowed to the assessee.

3. "On the facts and the circumstances of the case, Ld. CIT(A) erred in deleting the addition made on account of commission paid to entry operator / exit provider @ 5% of total sale consideration of Rs. 2,38,191- /u/s 69C as unexplained expenditure."

4. On the facts and the circumstances of the case, Ld. CIT(A) erred in not appreciating the fact that neither under section 132 nor under section 153A, of Income Tax Act, 1961 phraseology „incriminating“ is used in the statute. Hence, Ld. CIT(A) erred in narrowing down the scope of assessment u/s 153A to the incriminating material found during the search."

3. The brief facts of the case relevant to the issue before us are that the Assessee, an individual resident, filed original return of income under Section 139 of the Act for the Assessment Year 2012-13 on 30.10.2012 declaring total income of INR 8,56,716/-, which was processed under section 143(1) of the Act. Subsequently, the search action was carried out in the case of Indo Count Industries Limited & group concerns on 01.02.2018. Notice under Section 153A of the Act, dated 19.02.2019 was issued to the Assessee and in response to the same, the Assessee filed return of income on 12.03.2019 declaring total income of INR 8,56,720/-. During the assessment proceedings, the Assessing Officer (AO) had noticed that the Assessee had sold 2,00,000/- shares of M/s. Global Capital Markets Ltd. (GCML), purchased at the cost of INR 13,28,294/-, for the sale consideration

of INR 47,63,825/-. According to the AO this was a penny-stock transaction undertaken by the Assessee in a pre-arranged manner in connivance with the operators to evade taxes. Accordingly, the AO concluded that sale consideration of INR 47,63,825/- was not in the nature of capital gain and represented unexplained income invested made by the Assessee. Thus, the AO made an addition of INR 47,63,825/- to the returned income and also made a further addition of INR 2,38,891/-, being 5% commission paid for obtaining accommodation entry, as unexplained expenditure under section 69C of the Act.

4. Being aggrieved, the Assessee filed appeal before the Commissioner of Income Tax (Appeals) [CIT (A)]. The primary contention of the Assessee before the CIT(A) was that the assessment year under consideration was not an abated assessment year and the AO has been erred in making additions without there being any incriminating documents/materials. The AO had merely analyzed the fluctuations in the price of shares of GCML and concluded that GCML was a penny-stock company without there being any incriminating material found during the course of search. The contentions of the Assessee found favour with the CIT(A) who granted relief to be Assessee by following, inter alia, the judgment of the Special Bench of the Tribunal in the case of All Cargo Global Logistics vs. DCIT (2012) : 18 ITR 106 (SB) and the judgment of Hon"ble Bombay High Court in the case of CIT vs.

Continental Warehousing Corporation : 374 ITR 645 (Bombay). The CIT(A) deleted the addition of INR 58,58,732/- made by the AO holding as under:

"6.3.33 In view of the aforesaid, detailed discussion and respectfully following judicial precedents, I am of the view that for the assessment year which do not abate proceedings U/s 153A of the Act does not empower the AO to adjudicate the issue which are not based on any incriminating material found during the course of search and, hence, in such cases, the AO does not have jurisdiction to made addition/disallowances which are not based on any incriminating material found during the course of

search. To conclude, in the case of completed/un-abated assessments, where no incriminating material is found during the course of the search, the assessment U/s 153A of the Act is to be made on originally assessed returned income and no addition or disallowance can be made de-hors the incriminating evidences recovered during the course of search.

6.3.34 In this case, since the addition of Rs. 47,63,825/- and Rs. 2,38,191/- were made on the basis of suo-motu observations and the analysis of facts by the Ld. AO, which are not based on incriminating material found during the course of search conducted u/s 153(2) of the Act, the additions are directed to be deleted. The Ground No. 1 is accordingly allowed.”

5. Being aggrieved by the relief granted by the CIT(A), the Revenue is in appeal before the Tribunal.
6. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position. The CIT(A) has returned factual finding that the additions made by the AO are not based on any incriminating material found during the course of search and the same remains uncontroverted. The Ld. Departmental Representative could not dispute the proposition that additions in the present case cases have not been made on the basis of any incriminating material found during search. The CIT(A) has granted relief by following the decision of the jurisdictional High Court in the case of Continental Warehousing Corporation (supra) wherein it has been held that no addition can be made in respect of unabated assessments which have become final in absence of any incriminating material found during search. This view has also been upheld by the Hon^{ble} Supreme Court in the case of CIT vs. Sinhgad Technical Education Society and Others vide judgment dated

29.08.2017 in Civil Appeal No. 11080 of 2017, reported in 397 ITR 344 (SC).
We do not find any merit in the present appeal.

7. In view of the above, the appeal by the Revenue is dismissed.

Order pronounced in the open court on 17/02/2022.

Sd/-
(Shamim Yahya)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दनांक Dated : 17/02/2022
Alindra, PS

आदेशकी प्रनिलनप अग्रेनर्/ Copy of the Order forwarded to :

1. अपीलाथी / The Appellant
2. प्रत्यथी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त/CIT
5. दवभागीय प्रदतदनदध, आयकर अपीलीय अदधकरण, मुंबई/DR,
ITAT, Mumbai
6. गार्डफाईल / Guard file.

आदेशधिसधर/BY ORDER,

सत्यादपत प्रदत //True Copy//

उप/सहधयक पंजीकधर/(Dy./Asstt. Registrar)
आयकर अपीलीय अनर्करण, मुंबई/ITAT, Mumbai